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EDWIN G. SEVERIN, PLAINTIFF IN ERROR, V. THE STATE OF NEBRASKA, DEFENDANT IN ERROR.

20 N. W. 2d 377

FILED NOVEMBER 2, 1945. No. 31964.

1. **Criminal Law.** This court will not interfere with a verdict of guilty in a criminal case which is based upon conflicting evidence unless it is so lacking in probative force that we can say as a matter of law that it is insufficient to support a finding of guilt beyond a reasonable doubt.
2. ———. Where the intent with which an act is done is a necessary element of the crime charged, evidence of wrongful intent must be produced from which a jury may find that such intent was conceived or existed in the county where the crime is alleged to have been committed.
3. ———. The intent with which an act is committed is purely a mental process and difficult to establish by direct proof. It is generally a conclusion that must be drawn after a consideration of the actions of the defendant, viewed in the light of the attendant circumstances.
4. ———. Whether the wrongful intent charged was formulated in the county where the crime is alleged to have occurred is usually a question for the jury to determine after considering the actions of the defendant and the surrounding circumstances.
5. **Embezzlement.** It is not material ordinarily what the source of the particular funds was which were alleged to have been wrongfully embezzled other than that they came into defendant's possession by virtue of the relationship named in the information on or about the time charged.

ERROR to the district court for Pierce County: FAY H. POLLOCK, JUDGE. *Affirmed.*

Hugh J. Boyle, for plaintiff in error.

Walter R. Johnson, Attorney General, Carl H. Peterson, and *H. Emerson Kokjer*, for defendant in error.

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

CARTER, J.

The plaintiff in error was convicted of the crime of embezzlement under section 28-538, R. S. 1943, and sentenced to serve one year in the state penitentiary. For convenience

the plaintiff in error will be referred to herein as the defendant.

The record shows that the defendant was a real-estate dealer living in Omaha. In July 1942, he came to the farm home of Clarence Brokaw near Foster in Pierce County to interest him in the purchase of a ranch. In the furtherance of this purpose he took Brokaw and his wife to Bassett and showed them a ranch owned by A. H. Rutan. A few days later on July 13, 1942, Brokaw gave defendant his check for $100 as earnest money on the ranch deal. A contract was drawn up which was never executed. On August 5, 1942, defendant again called on Brokaw, informed him that the contract which had previously been drawn up was unsatisfactory to the seller and prepared another for signature, which was signed by Brokaw only. A second check for $100 was given to the defendant with the understanding that it was to be paid on the purchase price. On October 15, 1942, defendant again called on Brokaw, signed the contract of sale of the Rutan ranch made out with defendant as seller and Brokaw as purchaser, with the explanation, as recited by Brokaw, that "he had to buy it in his own name in order to get his commission out of it, and then turn it to me." Brokaw delivered a third check to defendant for $800, the balance of the cash then required to be paid. The record further shows that defendant entered into a contract of purchase with Rutan whereby he contracted to purchase the ranch for a sum less by $1,300 than the amount for which he had contracted to sell it to Brokaw. Defendant paid $500 to Rutan under his contract with him, but failed to pay the other $500, due under the contract, with the result that the first $500 was forfeited and the ranch sold to another. Defendant commenced a suit to compel Rutan to specifically perform his contract which was settled by defendant receiving back the $500 cash payment made by him when he contracted with Rutan for the purchase of the land.

The evidence shows that Brokaw had never met Rutan during the course of the transaction and that Rutan did not know that any one except the defendant was interested in

the purchase of the ranch. An officer of the bank at Bassett, the place where the papers were to be held in escrow and the transaction finally closed, testified that he was never informed that Brokaw was interested in the transaction, he believing from the conversations of defendant that defendant was the only one interested in making the purchase.

It is the theory of the state that defendant undertook to purchase the ranch as the agent of Brokaw, came into the possession of $1,000, which was to be used in making the purchase and then appropriated $500 of it to his own use with intent to defraud Brokaw.

The defendant says that he contracted to sell the ranch to Brokaw and that he informed Brokaw that he had to negotiate for its purchase before he could sell it to him. He says he entered into the contract with Rutan for its purchase, paid down $500 in cash, and agreed to pay in the additional $500 when Rutan and his wife executed a warranty deed to be placed in escrow at the bank. Defendant says that the deed was never executed and for that reason the additional $500 was not paid over. He further testifies that he became ill, was hospitalized and operated upon and confined to his home during a convalescent period, with the result that he became in default of payment of the second $500 required by the contract to have been paid on November 15, 1942. In December 1942, Rutan sold the ranch to a third party. Defendant never paid the money back to Brokaw. The theory of the defense is that the only relationship existing between the defendant and Brokaw was that of seller and purchaser and that defendant was at no time the agent of Brokaw.

There is evidence in the record from which a jury could properly find that defendant was the agent of Brokaw. If, as the defendant testifies, defendant was purchasing the ranch from Rutan for himself, there would have been no occasion for him to contact Brokaw when Rutan allegedly refused to execute the first contract as drawn. The record is clear that he demanded and received checks for $100, $100, and $800 to be paid on the purchase price of the ranch

in buying it from Rutan. Defendant says that the first contract was torn up because it was unsatisfactory to the seller of the ranch, a statement which the seller denies. Defendant stated that he was taking it in his own name to protect his commission, when the record shows that he was not the agent of Rutan and that he then had no interest in the property to protect. We think the evidence is sufficient for a jury to find that defendant accepted the $1,000 from Brokaw as the agent of Brokaw in negotiating for the purchase of the ranch for Brokaw. It is evident that he discovered that the ranch could be purchased for less than Brokaw was willing to pay for it and the scheme recited was resorted to as a means of gaining an additional profit. The difficulty arose when defendant, after receiving $1,000 from Brokaw, appropriated $500 to his own use and did not have that amount when it became due under the contract he had made with Rutan. Whether defendant received the money as agent of Brokaw or as the seller of the property is clearly a question for the jury. The jury found that he received it as the agent of Brokaw and converted it to his own use. The evidence is amply sufficient to sustain the jury's verdict in this respect. The case is very similar on the facts to that of *Matters v. State,* 120 Neb. 404, 232 N. W. 781.

The applicable rule is: "This court, in a criminal action, will not interfere with a verdict of guilty, based upon conflicting evidence, unless it is so lacking in probative force that we can say, as a matter of law, that it is insufficient to support a finding of guilt beyond a reasonable doubt." *Williams v. State,* 115 Neb. 277, 212 N. W. 606; *Buckley v. State,* 131 Neb. 752, 269 N. W. 892.

It is urged that the evidence is insufficient to sustain a finding that the crime was committed in Pierce County where the case was tried. This court has held, in effect, that in a prosecution for embezzlement the venue is properly laid in the county where the purpose is formed to convert the property or money to the use of the person charged, accompanied, of course, by acts taken in the furtherance of the purpose. *Higbee v. State,* 74 Neb. 331, 104 N. W. 748;

Forney v. State, 123 Neb. 179, 242 N. W. 441. It is necessary, of course, that there be evidence that defendant intended to embezzle the money in Pierce County. The intent with which an act is committed is purely a mental process and difficult to establish by direct proof. It is generally a conclusion that must be drawn after a consideration of the actions of the defendant, viewed in the light of all the surrounding circumstances. *Buckley v. State, supra.* The information fixed the venue in Pierce County. The transaction between defendant and Brokaw took place largely in Pierce County. The three checks totaling $1,000 were signed and delivered to defendant in Pierce County. The relation of principal and agent which the jury found to exist was entered into in Pierce County. That the intent to embezzle was conceived in Pierce County, where the possession of the $1,000 in checks was obtained and representations and actions made and done in furtherance of the crime, is a deduction which a jury could properly draw from the evidence adduced. See *Jurgensen v. State*, 135 Neb. 537, 283 N. W. 228. While it is true that there is conflicting evidence in the record from which a jury might come to a contrary conclusion, yet we think there was ample evidence to sustain the conclusion reached that the intent to embezzle was formulated in Pierce County.

Error is claimed in the giving of instruction number ten by the trial court. The portion of the instruction complained of provides as follows: "The State contends that the defendant as the agent and clerk of Clarence Brokaw received a total of approximately $1,000. and that the defendant intended to and did embezzle and feloniously convert to his own use the sum of $500 thereof. Proof of either the reception or embezzlement of the money as alleged in the information, if any, must be of acts committed on approximately the dates alleged. It is not necessary for the State to prove that a clerk or agent received the whole of the amount alleged to have been embezzled, in one transaction, nor on any particular day. You are entitled to consider the aggregate sum of moneys received by such clerk or agent

and embezzled by him, if such you find, but not more than the sum alleged." The objection advanced is that the particular $500 embezzled is not specified by this instruction. We do not think there is merit to the objection. It is true that $1,000 came into the possession of defendant through the medium of three checks totaling $1,000, each of which was given at a different time. The evidence shows that $500 was used in the real-estate transaction, though possibly not in the exact manner that Brokaw, the principal, intended. In any event, the defendant had $500 in addition thereto which he converted to his own use. It does not seem important whether the $500 retained and converted came into the defendant's hands through the medium of any particular check or checks. The information charges that on or about October 15, 1942, the defendant, in Pierce County, as the agent of Brokaw, received $500 belonging to Brokaw which he subsequently fraudulently, unlawfully and feloniously converted to his own use without Brokaw's consent. We fail to see that it is at all material, as the trial court charged, what the source of the particular funds was which were alleged to have been converted on or about March 1, 1943, other than that they came into the defendant's possession as the agent of Brokaw on or about the time charged. After the proceeds of the checks aggregating $1,000 were commingled, it would be utterly impossible to determine which $500 was properly accounted for and which feloniously converted. We think that the criticized instruction was free from prejudicial error.

Having found no prejudicial error in the record, the judgment of the trial court is affirmed.

AFFIRMED.

THE COUNTY OF DAWSON, APPELLEE, V. SOUTH SIDE IRRIGATION COMPANY, APPELLANT.

20 N. W. 2d 387

FILED NOVEMBER 2, 1945. No. 31913.

1. **Statutes.** The provisions of article III, section 14, of the Constitution should be liberally construed so as to uphold a provision in a legislative act which, though not specifically expressed in the title, is germane to the subject matter and comprehended within the object and purposes of the act.
2. **Eminent Domain.** Where the evidence discloses an interference with the proper drainage of a highway, condemnation proceedings as contemplated by section 46-251, R. S. 1943, may properly be dismissed by the trial court.

APPEAL from the district court for Dawson County: I. J. NISLEY, JUDGE. *Affirmed.*

R. E. Bannister, for appellant.

Bernard B. Smith, W. A. Stewart, Jr., and *John M. Neff*, for appellee.

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

MESSMORE, J.

The South Side Irrigation Company, a common carrier of irrigation water, instituted condemnation proceedings in the county court against Dawson County to appropriate a limited easement in real estate upon and along 14 feet of one side of a 66-foot road for a distance of about one-half mile, for the purpose of running irrigation water thereon for short periods of time, not exceeding 30 days in any one year, and without overflowing or damaging the road, drainage or other property and there being no other ditch or lateral along said road. In compliance with section 46-607, Comp. St. 1929, now section 46-251, R. S. 1943, appraisers were appointed, damages assessed for the appropriation and paid into court. The county appealed to the district court and in its petition therein alleged that the condemnation statute, section 46-251, R. S. 1943, is unconstitu-

tional. The trial court found that said section of the statute had been held unconstitutional by this court in the case of *State v. Central Nebraska Public Power & Irrigation District,* 143 Neb. 153, 8 N. W. 2d 841. The part of the statute involved in the instant case was not under consideration in that case, and the trial court was in error in so holding. Motion for new trial was overruled. The irrigation company appeals.

For convenience the South Side Irrigation Company will hereinafter be referred to as appellant, and the county as appellee.

The appellee contends that section 46-251, R. S. 1943, is unconstitutional for the reason that it is violative of article III, section 14, of the state Constitution which provides in part: "No bill shall contain more than one subject, and the same shall be clearly expressed in the title. And no law shall be amended unless the new act contain the section or sections as amended and the section or sections so amended shall be repealed."

In 1895, House Roll 443 was enacted. It is found in Laws 1895, ch. 69, p. 244, and the section here involved is section 40, p. 259. The title to the act was in part as follows: "AN ACT prescribing regulations for the appropriation, distribution and use of water in the construction and maintaining of canals, ditches * * * for the purpose of irrigation, * * * and water power; for the diversion and confining, retention, storage and distribution of water, * * * ; the condemnation of lands for the right of way of work for such purposes, * * * ." Section 40 of the act provides: "All persons, companies, corporations, or associations being desirous of constructing any of the works provided for in the preceding sections, shall have the right to occupy state lands, and to obtain right of way over and through any highway in any county in this state for such purposes without any compensation therefor." Section 40 appears in Cobbey's Annotated Statutes, 1909 as section 6819. The language is identical with that found in the Laws of 1895, *supra.*

In 1911, the Legislature amended section 6819 of Cobbey's Annotated Statutes, 1909. Laws 1911, ch. 153, p. 497. The title to the act read in part: "AN ACT to amend" (then several sections of the statute are set out among which is section 6819 of Cobbey's Annotated Statutes of Nebraska for 1909) "relative to irrigation, and to repeal said original sections as now existing." And, in Laws 1911, p. 513, "That section 6819 of Cobbey's Annotated Statutes of Nebraska for 1909 * * * be amended to read as follows": (the amendment for the purpose of this case in addition to the language contained in the section heretofore set out, follows) " * * * All such persons, companies, corporations or associations may obtain the right of way for a like purpose along, parallel to and upon one side of any sixty-six foot highway by condemnation proceedings as hereinafter provided, the same to in no way interfere with the proper drainage of such highway, * * * . Provided, * * * , that not more than sixteen feet in width shall be taken from the side of any highway * * * ." The language is substantially the same as appearing in section 46-251, R. S. 1943, except that the 1911 enactment as amended was included in the Civil Administrative Code of 1919 and some changes in the wording made at that time. The language appearing in the Laws 1919, ch. 190, title 7, article 5, division 3, section 7, p. 848 is identical with the language as it now appears in section 46-251, R. S. 1943.

In Laws 1919, article 3, section 1, p. 860, there is a saving clause attached to such statute that provides in substance that in the event any part of the act is declared unconstitutional or unauthorized by law, or in conflict with any other part of the act, that such part declared unconstitutional shall not affect any other section or part of the act, but will affect only the part so declared to be unconstitutional, and that each section, part or subdivision thereof and each article and title so far as an inducement for the passage of the act is concerned, is independent of every other section or part, etc. It is clear from the saving and

inducement clause that the legislature intended each part of every section of the law to stand by itself and to be effective unless specifically found unconstitutional.

The appellee's contention is that the amendment to the original statute was not covered by the title of the act and was not germane to the subject matter of the original sections proposed to be changed, and is violative of article III, section 14, of the Constitution of Nebraska.

This court in *Miller v. Hurford,* 11 Neb. 377, 9 N. W. 477, said: "When the title of an act is to amend a particular section of a statute, the proposed amendment must be germane to the subject matter of the section sought to be amended or it will be void." In speaking of the constitutional provision heretofore set out, the court said: "Our constitutional provision that 'no bill shall contain more than one subject, which shall be clearly expressed in its title,' is but making inviolable the rule governing legislative bodies, that 'no proposition or subject different from that under consideration shall be admitted under color of amendment' * * * ."

In *State v. Tibbets,* 52 Neb. 228, 71 N. W. 990, the following is quoted with approval from *Miller v. Hurford, supra*: "That an amended section must be germane to the section amended does not mean that it must be confined to the same limits; that it cannot be enlarged and extended beyond the limits of the original section. It only means that it must be confined to the same subject-matter, or have the same object in view, and this subject-matter or object may be general in its nature. So long as the legislature fairly confines itself to the object of the original section it is sufficient.

"The purpose of the constitutional provision under consideration, * * * is to give notice, through the title of the bill, to the members of the legislature and the public, of the subject-matter of the projected law,—in other words, that the title should clearly indicate the legislation embraced in the bill. * * * The title to a bill may be general, and it is not essential that it specify every clause in the proposed statute. It is sufficient that they are referable and cognate to the subject expressed. When the subject is expressed in general

terms, everything which is necessary to make a complete enactment in regard to it, or which results as a complement of the thought contained in the general expression, is embraced in and authorized by it. If the subject-matter is within the scope of the title the constitutional requirement is met."

In *Spier v. Thomas*, 131 Neb. 579, 269 N. W. 61, this court said: " 'The provisions of * * * the Constitution should be liberally construed so as to uphold a provision in a legislative act which, though not specifically expressed in the title, is germane to the subject matter, and comprehended within the objects and purposes, of the act.' *Pandolfo v. State*, 120 Neb. 616, 234 N. W. 483. It is not necessary for the title to analyze the bill in detail. In *State v. Price*, 127 Neb. 132, 254 N. W. 889, it is said: 'If by a fair and reasonable construction the title calls attention to the subject-matter of the bill, it may be said that the object is expressed in the title. * * * Neither is it necessary that the title inform its readers of the specific contents of the bill. If it indicates the subject of the proposed legislation, it meets all essential requirements. It needs not that it be a complete abstract and epitome of the contents of the bill.' " See, also, *State v. Lehmkuhl*, 127 Neb. 812, 257 N. W. 229; *Lennox v. Housing Authority of City of Omaha*, 137 Neb. 582, 290 N. W. 451.

We conclude that the amendment to the original statute is covered by the title of the act and is germane to the subject matter of the original sections proposed to be changed, and is not violative of article III, section 14, of the Constitution.

The appellee contends that the proposed condemnation interferes with the proper drainage of the highway in question and as such is prohibited by provisions of section 46-251, R. S. 1943. The appellee's petition alleges that the statute provides no right-of-way for irrigation purposes shall be obtained over and upon the highway right-of-way where the same interferes with the proper drainage of the highway; that highway drainage into the ditch, in addition to the irrigation water, will cause the same to overflow to

the damage of the county's roadbed and to the damage of adjoining farms, and when used for irrigation purposes would cause the ditch, its banks and the shoulders of the highway to become saturated and soft, and make the highway dangerous and unsafe for public travel and unworkable for road machinery for long periods of time after the flow of water ceased. The appellant's answer is a general denial.

By agreement the case was tried on the pleadings in the county and district court. On this phase of the case, by a supplemental journal entry the court decreed that all of the 66-foot right-of-way is being used for road purposes; that the evidence shows that the road is elevated and the dirt for the elevation was removed from the south side of the road, and in the event further grading and elevation is necessary the dirt for said purposes will have to be taken from the north road ditch; that should condemnation proceedings be affirmed the defendant would require a right and easement in the north road ditch for irrigation purposes, and that the same would be inconsistent with the use of the ditch for road purposes and the county would have no right to interfere with the same, and that the condemnation should be denied. The appellant contends there is no sufficient evidence to sustain the judgment of the trial court. The following constitutes the evidence pertinent to a determination of this contention.

The parties stipulated, in substance, as follows: That the easement sought is a strip of land not exceeding 16 feet in width along and upon one side of a public highway 66 feet wide, and that there is no lateral or irrigation ditch on the other side of the highway; that the appellee has a drainage ditch for surface water along both sides of the highway, the one on the south being much larger and deeper than the one on the north where appellant's easement is sought; the purpose of the easement is to carry a small amount of water for irrigation to lower lands for short periods of time, not exceeding 30 days in any one year; that during the pendency of this action the appellant has used such portion of the highway in accordance with the easement and during this

period the appellee has suffered no damage on account thereof, and the easement has not interfered with the proper drainage of the highway or materially interfered with the usual use of the highway for such purposes; the approximate half-mile length of the easement has a total fall in level of seven feet and results in a reasonably fast-running stream in the bottom of the ditch when the easement is in use.

The record further discloses, by the testimony of a county commissioner familiar with the highway, that it is a 66-foot road running east and west, its surface is 24 to 35 feet in width and the balance is used for ditches. The drainage ditch on the north side of the highway is not a large ditch. Its average depth is from two to three feet below the traveled portion of the highway. The water flows through it from west to east along the highway and the flow at one point is nearly equal to the level of the adjoining land to the north, and at the highest point approximately within a foot of the surface of the highway. In the event the road would have to be elevated in the future, the dirt would have to come from the north ditch. Two or three years prior to trial of this action the drainage water flowing through the north ditch overflowed onto the fields north of the ditch and the county was threatened with litigation. Since that time no damage has accrued to the highway or adjoining land by the use of the ditch by appellant. He further testified that there was not a continual drop in the north ditch from the west to the east; that when he viewed the overflow of the water from the ditch, the water left the ditch west of the east corner, otherwise the flow would have been east and not north onto the farm land. To dispose of surface water from rainfall it is necessary to maintain both the north and south ditches. The damage arises when there is too much water in the north ditch and when that occurs the water overflows to the north onto the farm lands, and if a dike should be constructed along that section of the farm land, the water would back up and soften the surface of the highway; that due to the appellant's use of the ditch, heavy road

machinery could not be used, due to the wet condition of the highway. While the evidence discloses that maintainers have been used, it is probable that heavier road machinery would be required and this may be at a time when such machinery is within the supervisor district and the ditch is being used by the appellant. On cross-examination he was asked as to whether the overflow to the north, of which he spoke, was the result of certain floodwaters rather than any use of the ditch as a lateral for carrying irrigation water. His reply in effect was that it was not entirely; but at this particular floodtime the gates were open creating a flood condition in the ditch. The water then came down the highway from both the north and south ditches that lead to the crossroads where it enters into the side ditch and the north ditch, the two combining to produce the flood condition. His attention was directed to a part of the petition in condemnation to the effect that no changes are to be made in the construction or maintenance of the ditches, except a temporary cover at the cement culvert at the east end of the property and that the north ditch would only be used for 30 days each year and so run as to not cause overflow onto the traveled portion of the highway or abutting land, and, assuming the language to be true, would any damage result? His reply, in effect was, not unless it would come with a combination of floodwaters and irrigation.

The ditch on the south side of the highway is larger and deeper and constructed for the purpose of carrying off floodwater coming from the south hills.

The manager of the irrigation company testified that the use of the north ditch for irrigation purposes constituted the most feasible method in serving one water-user and to irrigate 25 acres of his land. He described the north ditch in substance as follows: That for the full half-mile and within a couple of hundred feet of the east end there is quite a slope and for that reason the stream is never large, and is relatively small until it reaches the last 200 feet where the ground is level, and then the bottom of the road ditch is about level from there on to where it is taken out in the

lateral, and then the stream becomes a little larger until it piles up at the east end. At the east end there would be a foot or a foot and a half of water. Along the other parts of the ditch the depth would be about six inches and at no point is the ditch more than two or three feet wide. While the ditch is in operation it is necessary to cover the drainpipe at the east end thereof, so the water would not go on down the road. If the drainpipe was not covered the water would flow east and north. The cover is removed when the ditch is not used for irrigation purposes. He further testified that there was no way in which the proposed operation of the ditch for irrigation purposes could interfere with the natural drainage of the highway because it was merely an addition to the water that would come from the hills, and the water coming from the hills runs into the south ditch, and that the appellant does not use the north ditch when it is necessary for such ditch to carry off drainage water.

There is a controversy in the evidence with reference to the location of a bridge that crosses the highway and connects the south road ditch to the north road ditch. The witness was asked the following question: "The flood waters from the hills can cross at this bridge and they do and can run into the north ditch as well as the south ditch and flow in an easterly direction? A. That is right."

In the event the county took dirt out of the north ditch it would not interfere with appellant's use thereof, as it would make no difference how deep the ditch would be.

The county commissioner, in rebuttal testified that there was a bridge at the southwest corner of the Kugler quarter-section connecting the south road ditch with the north road ditch. The Kugler quarter-section is a part of the land that was overflowed, about which the commissioner testified. He further testified, in assuming irrigation is proceeding and the ditches are full of water and a sudden rain develops, an inch or two, fllling the ditch to overcapacity, then you have a flood condition.

From the evidence it appears that if the appellant acquired the right and easement contemplated, the same

would be inconsistent with the use of the road for drainage purposes, and within the meaning of the statute would constitute an interference with the proper drainage of the highway. We conclude the trial court did not err in dismissing the condemnation proceedings.

Other contentions of appellee are without merit and not necessary to a determination of this appeal.

The judgment of the trial court is affirmed.

AFFIRMED.

WENKE, J., participating on briefs.

PAUL C. MULLINS, APPELLANT, V. STATE OF NEBRASKA, APPELLEE.

20 N. W. 2d 385

FILED NOVEMBER 2, 1945. No. 31983.

1. **Criminal Law: CHATTEL MORTGAGES.** In a prosecution under section 69-109, R. S. 1943, for the unlawful sale of mortgaged property without the written consent of the mortgagee, oral consent of such mortgagee to the sale of the mortgaged chattels, coupled with the payment of the value of the property, is a defense.
2. ———: ———. When the evidence shows the defense set forth in syllabus number one to be complete and undisputed, a verdict of guilty and sentence of the court must be set aside, vacated and dismissed, and the defendant discharged.

ERROR to the district court for Pawnee County: VIRGIL FALLOON, JUDGE. *Reversed and remanded with directions to dismiss.*

Hubka & Hubka, for plaintiff in error.

Walter R. Johnson, Attorney General, and *C. S. Beck,* for defendant in error.

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

MESSMORE, J.

This record presents a proceeding in error from the district court for Pawnee County, prosecuted by Paul C. Mullins who will be hereinafter referred to as the defendant.

An information was filed under section 69-109, R. S. 1943, on February 22, 1945. The information charges that the defendant on April 21, 1944, in the county of Pawnee and state of Nebraska, mortgaged to the State Bank of DuBois, Nebraska personal property, 30 Hereford heifers, and on or about October 10, 1944, during the existence of the lien of said mortgage, the defendant unlawfully and feloniously and without having first procured the consent in writing of the State Bank of DuBois, sold 23 head of the cattle. The case was tried to a jury with the result that the defendant was convicted of the charge filed against him, and sentenced. A motion for new trial was filed and overruled.

The principle assignment of error is that the verdict is not sustained by sufficient evidence.

The record discloses that on April 21, 1944, the defendant borrowed from the State Bank of DuBois, Nebraska, the sum of $2,400, executing a note securing the same by a chattel mortgage on 30 head of Hereford cattle. On October 10, 1944, the defendant sold the cattle to one Buman, receiving therefor a check on the State Bank of DuBois for $1,802.90, signed by Buman. The defendant took the check to the bank and inquired of an employee thereof whether or not he would be permitted to use part of the money to accompany Buman to Texas, the purpose being to purchase some Jersey cattle. The employee informed him that that was a matter for the president of the bank to determine. The money was placed on deposit to the credit of the defendant where it remained for approximately 30 days. On or about November 9, 1944, Buman sold the cattle, together with one two-year old bull, back to the defendant. The defendant paid $500 and Buman carried back $1,500 secured by a note and chattel mortgage on the cattle, the full amount not being paid but with which we are concerned only insofar as the transaction affects the State Bank of DuBois and its mortgage on the chattels.

The president of the bank testified he was acquainted with the defendant and had been for some time, and the bank had made loans to the defendant; the note and mortgage given by the defendant, which the bank held, was for the purchase of cattle. He knew that the defendant had sold some of the cattle in the fall of 1944. He did not give written consent as president of the bank to the defendant to sell the cattle covered by the mortgage. Prior to February 19, 1945, the president of the bank and the defendant concluded that the bank should take possession of the 23 head of cattle which the bank did, and after obtaining possession of the cattle, shipped them to St. Joseph, Missouri where they were sold, the bank receiving the proceeds of the sale of cattle, which appeared to be the full value of the mortgaged chattels, and endorsing the amount so received on the note. The bank is not the complainant in this case.

The foregoing constitutes the material evidence as disclosed by the record upon which the defendant was convicted and sentenced.

In the case of *State v. Butcher*, 104 Neb. 380, 177 N. W. 184, this court said: "The doing of the inhibited act constitutes the crime. The statute was enacted to prevent the fraudulent transfer of mortgaged chattel property.

"An examination of the history of this statute to its present form clearly indicates the purpose of the legislature to be the protection of the mortgagee in his security, and to permit him to have the full value of the chattel property applied to the mortgage debt. * * * Instances can well be perceived in which a mortgagor, acting in good faith and selling the mortgaged property without written consent, might find himself within the inhibited letter of the law, and yet his act in disposing of the property may not have resulted in any injury or damage to the mortgagee. Thus, if on oral consent the mortgagor sold the property at its fair value and immediately turned the proceeds of the sale to the mortgagee, it would seem that the mortgagee was not deprived of any right, the purpose of the mortgage being to secure the mortgage debt to the extent of the value of the

property, and the law, so far as its purpose was concerned, would be completely vindicated. The state would have no purpose in a prosecution to sustain a mere technical violation of the law, the result of which has harmed no one in his property, or the good morals of the citizens of the state. Under this statute the state makes out a *prima facie* case when it has established beyond a reasonable doubt the execution and delivery of a valid chattel mortgage, and the sale of the chattel mortgaged property during its life without the written consent of the mortgagee. But, if it is shown by the mortgagor that the full value of the mortgaged chattel has been turned over to the mortgagee in payment in whole or in part of the mortgage debt, the defense thus established would be complete."

In *Fiehn v. State,* 124 Neb. 16, 245 N. W. 6, the court quoted with approval the following from *State v. Butcher, supra*:

"In a prosecution under said section, the accused may show as a defense that the full value of the mortgaged chattel has been turned over to the mortgagee in payment in whole or in part of the mortgage debt, or that the mortgage debt has been paid."

"In a prosecution for the unlawful sale of mortgaged property without the written consent of the mortgagee, oral consent of such mortgagee to the sale of the mortgaged chattels, coupled with payment of the value of the property, is a defense." *Knapp v. State,* 139 Neb. 810, 299 N. W. 223, citing *State v. Butcher, supra, Fiehn v. State, supra.*

In view of the defense pronounced in the foregoing heretofore cited authorities, the defense in the case at bar is complete and absolute. The evidence is not in dispute that the mortgagee received the full value of the mortgaged chattels and the proceeds therefrom and applied the same on the mortgage indebtedness. It is further clear from the evidence that the mortgagee bank was acquainted with all of the transactions with reference to the sale and disposition of the chattels upon which it held a mortgage. Therefore, the judgment of the district court is reversed with di-

rections to the district court to vacate the verdict and sentence, to dismiss the cause and to discharge the defendant.

REVERSED WITH DIRECTIONS TO DISMISS.

MELVIN V. HALLGREN, APPELLEE, V. FAY E. WILLIAMS ET AL., APPELLANTS.

20 N. W. 2d 499

FILED NOVEMBER 9, 1945. No. 32004.

Judgments. A judgment of a court upon a subject within its general jurisdiction, but which is not brought before it by any statement or claim of the parties, and is foreign to the issues submitted for its determination, is a nullity.

APPEAL from the district court for Morrill County: J. LEONARD TEWELL, JUDGE. *Reversed and remanded with directions.*

Mothersead & Wright and *Paul Rhodes*, for appellants.

F. J. Reed, for appellee.

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

SIMMONS, C. J.

This action originated as one to have a judgment declared void and to enjoin its collection. A restraining order was issued. An intervener claimed some of the property upon which levy was made. Trial was had resulting in a judgment favorable to the intervener and defendants. Thereafter at a subsequent term the trial court entered an order modifying its decree. Defendants appeal. We reverse the judgment of the trial court.

Plaintiff is a judgment debtor. Defendant Williams, as assignee, is the judgment creditor. Defendant Webb is the sheriff of Morrill County. Defendant Williams had an execution issued on the judgment and the defendant sheriff levied upon personal property in which, according to plaintiff's petition, he had "an undivided interest."

Plaintiff brought this action in equity, praying that the judgment and assignment be declared void and unenforceable; that the defendants be enjoined from taking any action looking to its collection; and that a restraining order issue pending the action. A bond was given and the restraining order issued. Thereafter Theron R. Hallgren, as special administrator of the estate of Lillian J. Hallgren, deceased, intervened claiming ownership and right to possession of a substantial part of the property upon which the levy was made.

Issues were joined and on January 3, 1944, during the regular October 1943 term of court, trial was had. On January 4, 1944, the trial court made findings and decreed that the judgment was valid and not subject to attack, dismissed plaintiff's petition, and dissolved the restraining order. The court further held that certain items of the personal property should be surrendered to the intervener and enjoined the sale of those items under the execution.

On July 29, 1944, plaintiff filed a petition in this action, in which he alleged, so far as material here, that the trial court found, adjudged and announced that plaintiff was entitled to have the sheriff enjoined and restrained from selling so much of said property as was decreed to belong to the estate; and that by reason of "oversights, mistakes, and omissions in journalizing said judgment same was made to read that the entire matter of restraining order brought by this plaintiff was dissolved, whereas it should have provided in conformity with the findings of the Court that it be dissolved only in so far as it involved a few items of personal property which was found and adjudged to belong to this plaintiff and this plaintiff is entitled to have said judgment modified in the aforesaid particulars." Plaintiff further alleged that an action for damages had been brought against him and his bondsmen upon the bond given when the restraining order issued, and that he was entitled to have the judgment modified, sustaining the restraining order and granting a permanent injunction insofar as the estate property was concerned. He prayed for a new trial and an

injunction against the judgment, and that if that be not granted, that the judgment be modified and the temporary restraining order be sustained insofar as it affected the property of the estate of Lillian J. Hallgren.

To this petition the defendants demurred for the reason that it did not state facts sufficient to constitute a cause of action against them.

Thereafter, on March 27, 1945, one of the days of the regular February 1945 term of said court, the matter was heard upon the petition and the demurrer. The court found that the petition did not state facts entitling the plaintiff to a new trial upon the issue of vacating the judgment, and did not state facts entitling the plaintiff to a modification of the decree of January 4, 1944, dismissing the plaintiff's temporary restraining order.

The court further found that the form of its journal entry made on January 4, 1944, should be modified in its findings so far as it pertained to the matter of plaintiff's temporary restraining order. The court then reentered its journal entry in exact language, but with this addition: "The Court finds from the record and the evidence that the plaintiff was entitled to the restraining order issued by the County Court by order dated February 26, 1943, and was entitled to restrain the sale of said property under the execution for the reason that the property of the estate of Lillian J. Hallgren had been advertised for sale together with a small amount of property of the plaintiff herein and for the reason that a permanent injunction was granted by order of this court in favor of the intervenor, Theron R. Hallgren, as administrator, the restraining order granted this plaintiff had no further function to perform herein and was and is for that reason dismissed. The court finds that the temporary restraining order of the plaintiff was properly granted and was not wrongfully obtained."

We are furnished with a bill of exceptions showing that on March 27, 1945, evidence was taken on a motion to retax costs and as to the plaintiff's diligence in seeking a missing witness. We find no evidence as to the matter of a modification of the journal entry.

From the modification of the decree the defendants appeal, presenting as error the action of the court on March 27, 1945, in modifying the decree of January 4, 1944, at a subsequent term and in its findings there made, contending that the court was without power and authority to enter this additional finding.

It would seem that when the court made its finding that the petition did not state facts entitling the plaintiff to relief on either of the two grounds advanced, it in effect sustained the demurrer; that that disposed of the matter; and that there was nothing then at issue to require further judicial action.

But the court, having found that the petition did not state facts entitling plaintiff to a modification of the decree dismissing the temporary restraining order, proceeded to modify the decree by adding the finding above quoted.

Section 25-2001, R. S. 1943, provides that a district court shall have power in certain circumstances to vacate or modify its own judgments or orders after the term at which such judgments or orders were made. It is obvious that plaintiff sought to bring his case within clause (3) of that section, to wit: " * * * for mistake, neglect, or omission of the clerk, or irregularity in obtaining a judgment or order" for plaintiff alleged that by reason of "oversights, mistakes, and omissions" the decree was not in accord with the findings of the court.

But whether plaintiff appeals for relief to the statute or to independent equity jurisdiction, the result is the same. There is no evidence here that either clerk or court made any oversight, mistake, or omission in journalizing the judgment. The court makes no finding of such facts. The allegation that the court found at the first trial that the plaintiff was entitled to have the sheriff enjoined and restrained from selling so much of said property as belonged to the estate is negatived by the finding made by the court in both the decree of January 4, 1944, and the decree of March 27, 1945, that "the prayer of the intervenor to enjoin the sale of the personal property should be granted" as to

the property to which he was entitled; and in the entry of March 27, 1945, the court said that it granted a permanent injunction "in favor of the intervenor."

Plaintiff in his first petition alleged a levy upon property in which he had an individual interest. He prayed for injunctive relief as to his property. He asked for no relief as to property which he did not own. Neither is there any evidence that the trial court found or intended to decree in the order of January 4, 1944, that the restraining order should be dissolved only insofar as it involved the few items of personal property belonging to the plaintiff. On the contrary, the court found in both decrees that "the plaintiff's petition should be dismissed and the temporary restraining order should be dissolved." So it appears that the court found against the plaintiff on the fact basis of his petition to modify.

The court then in its decree of March 27, 1945, found that plaintiff was entitled to the restraining order for two reasons. The first reason given was that a part of the property being advertised for sale belonged to the estate. Plaintiff made no such contention when the restraining order was issued and at no time did plaintiff by his pleadings seek to protect the property of the estate. The second reason given was that a permanent injunction being granted to the intervener, the restraining order had no further function to perform and was for that reason dismissed. The restraining order was issued to protect the property of the plaintiff from sale pending a determination of the validity of the judgment. The trial court found in both orders that the plaintiff's petition was dismissed and the restraining order dissolved, and that for the obvious reason that plaintiff had no cause of action entitling him to injunctive relief. It seems that the reasons given by the court are negatived by its findings contained in both decrees.

This court has held: " 'A judgment of a court upon a subject within its general jurisdiction, but which is not brought before it by any statement or claim of the parties, and is foreign to the issues submitted for its determination, is a

nullity.' *Lincoln Nat. Bank v. Virgin,* 36 Neb. 735, 55 N. W. 218." *Petersen v. Dethlefs,* 139 Neb. 572, 298 N. W. 155. As was said there, so it must be said here, so much of the judgment as is invalid should be vacated and not permitted to encumber the record.

The judgment is reversed and the cause remanded with instructions to vacate that part of the decree which purports to modify the decree of January 4, 1944.

REVERSED WITH DIRECTIONS.

CARTER, J., not participating.

EMERSON-BRANTINGHAM IMPLEMENT COMPANY ET AL., APPELLANTS, V. MELVIN V. HALLGREN, APPELLEE.
20 N. W. 2d 501

FILED NOVEMBER 9, 1945. No. 32003.

1. Courts. The immunities of the custodia legis doctrine should not be extended to protect a debtor from the just claims of a creditor simply on the theory of safeguarding officers of the court.
2. Executions: EXECUTORS AND ADMINISTRATORS. It is the duty of the district court, in a proceeding in aid of execution, when it is disclosed by the administrator of an estate that a judgment debtor has an interest in a distributive share of such estate, to impress a lien upon such share.

APPEAL from the district court for Morrill County: J. LEONARD TEWELL, JUDGE. *Reversed and remanded.*

Mothersead & Wright and *Paul Rhodes,* for appellant.
F. J. Reed, for appellee.

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

PAINE, J.

This is an appeal from an order of the district court which denied a motion of the assignee of the plaintiff that the unpaid portion of a judgment against the defendant, Melvin V. Hallgren, be declared a lien upon the distributive

share, being a one-fourth interest of the said defendant in the estate of his wife, Lillian J. Hallgren.

The plaintiff assigns as error that the refusal of the district court to impress this judgment as a lien on the defendant's share of the said estate, which was not exempt, violates the law in reference thereto.

The transcript discloses that Emerson-Brantingham Implement Company secured a verdict against the defendant in the district court on October 11, 1932, in the sum of $1,277.04, and judgment thereon in said amount, with costs.

On September 29, 1937, an execution was issued on said judgment, and on the same day was returned unsatisfied. Another execution was issued July 3, 1942, and three days later returned unsatisfied. On October 29, 1943, the judgment was assigned to F. E. Williams by the plaintiff corporation, by its vice-president and secretary, and a certificate as to their authority filed.

On January 4, 1944, affidavit in interpleader having been filed by Great Western Sugar Company, and garnishee having paid into court $937.97, distribution of said amount was ordered by the district court, and the sum of $324.03 was ordered applied on the judgment in suit. A few days later affidavits were filed, the first praying that defendant be ordered to appear in court for examination, which was duly ordered, and the other affidavit setting out that Theron R. Hallgren, as special administrator of the estate of Lillian J. Hallgren, has in his possession personal property, to wit: Livestock, household goods, and farm machinery, in which defendant has an interest, and that same are not exempt by law from being applied in payment on his debts. The court directed that such special administrator appear in court and show cause why said property should not be applied on said judgment.

On November 13, 1943, an alias execution was issued by the clerk of the district court. Thereafter a temporary restraining order was served on the sheriff, preventing further action thereon. Thereafter, on January 25, 1944, a second alias execution was issued, and return duly made

thereon, setting forth that he had levied upon certain property. Trial was had and evidence taken, and the district court denied the motion of the assignee of the plaintiff to impress the unpaid portion of the judgment against defendant as a lien upon the share of defendant in the estate of Lillian J. Hallgren, which was not exempt by law, "it appearing that the said Melvin V. Hallgren had a one-fourth interest in said estate and that the administrator had on hand property and funds undistributed." Supersedeas bond being filed in the sum of $100, the assignee of plaintiff appealed from said order.

It appears that it was contended that no proper notice was given the judgment debtor, and that he should have been brought before the court and given an opportunity to protect his rights by showing whether certain of the property levied upon was exempt.

The testimony of the administrator, Theron R. Hallgren, was that the family of his mother, Lillian J. Hallgren, consisted of himself and his three sisters, who lived in the state of Washington, and that his father, the defendant, was at that time living out on the farm, and had been for two or three months, but had not farmed it for over a year, and has no interest in the farming operations. He knew of no claims filed against his father's share in the estate, and has not closed the estate because the heirs did not care. He testified that his mother also had another daughter by her first marriage, who lives near Holdrege.

The counsel stipulated as to all sums paid in to the clerk by the garnishee, and also all receipts from other sources, and all payments made by the clerk and sheriff on order of the court, and that the clerk now has on hand $556.28, subject to certain small cost items.

The law as it relates to the case at bar is found in the following sections of our statutes:

It is generally provided that any interest a judgment debtor may have in any money or choses in action due, or to become due, to him is subject to the payment of the judgment against him. Sec. 25-1564, R. S. 1943. Section

25-1569, R. S. 1943, sets out that the notice in such proceedings is to be given in the manner which the court deems proper.

It is shown by the transcript that the trial court issued an order to the defendant to appear before it, to answer all questions concerning his property, at a definite day and time, and there is attached the return of the sheriff, showing that he served this order upon the defendant by delivering to him personally a true and certified copy of the same.

It is also true that at a later date the administrator of Lillian J. Hallgren's estate was required to attend, and was examined before the court itself, as provided in sections 25-1570 and 25-1571, R. S. 1943, and disclosed that he held property belonging to the judgment debtor, the defendant being in court, and his attorney cross-examined the administrator, as shown in the decree.

It may be contended that the distributive share of the judgment debtor, which is in process of administration in the county court, is immune from process under the doctrine of custodia legis, as was the general rule under the common law. See 4 Am. Jur., Attachment and Garnishment, s. 412, p. 812. But our court has for over 50 years shown that there are many exceptions to this rule. In *Oppenheimer v. Marr*, 31 Neb. 811, 48 N. W. 818, it was held that money in the hands of the sheriff might be garnisheed.

In the recent case of *Orchard & Wilhelm Co. v. North*, 135 Neb. 39, 280 N. W. 272, this matter is discussed at some length, and it is said that, if an officer of a court has been ordered to pay over money in his custody, nothing remains except to pay it over.

This court has said: "A creditors' suit may be maintained to impress a lien upon the distributive share of a judgment debtor in a decedent's estate, which is in process of administration in the county court, and to require the administrator or executor to account for it, after order of distribution by the county court, to the clerk of the district court or to a receiver appointed for that purpose." *Fremont Farmers Union Cooperative Ass'n v. Markussen*, 136 Neb. 567, 286

N. W. 784, 123 A. L. R. 1287. The syllabus just quoted is used as the topic for an extensive annotation in 123 A. L. R., beginning at page 1293, in which cases supporting this statement of the law are cited from a majority of the states of the Union.

Again, in this same case, it is said: "The immunity of the custodia legis doctrine should not be extended beyond the actual demonstrated necessities of a particular situation, since otherwise courts will be making of themselves a sanctuary for property of a dishonest or elusive debtor, on the pretext of safeguarding their officers and agencies from theoretical inconveniences and conjectural confusions. The first concern of a court must always be its availability to a suitor and the fullness of its ability to serve, rather than the convenience of its own officers."

It appears to this court that it is not only proper but it is the duty of the district court, in a proceeding in aid of execution, such as the case at bar, where it is disclosed by the evidence of an administrator of an estate that a judgment debtor has an interest in a distributive share in such estate, to impress a lien upon such share.

In our opinion, the trial court erred in denying the motion of the assignee of the plaintiff to impress a lien for the unpaid portion of the judgment upon the share of the defendant in the estate of his wife, insofar as the same was not exempt to him by law.

REVERSED.

CARTER, J., not participating.

ORIN V. ROBINSON, APPELLANT, V. THE CENTRAL NEBRASKA PUBLIC POWER & IRRIGATION DISTRICT, APPELLEE.
20 N. W. 2d 509

FILED NOVEMBER 9, 1945. No. 31968.

1. **Waters.** The liability of public power and irrigation districts for "all overflow" imposed by section 70-671, R. S. 1943, is

absolute only for such waters as flow over and from or escape out of their reservoirs or canals and damage another.

2. **Constitutional Law**: EMINENT DOMAIN. The words "or damaged" in section 21, art. I, of the Constitution, include all actual damages resulting from the exercise of the right of eminent domain which diminish the market value of private property. Their insertion was intended to give a right of recovery which did not previously exist and not limit or restrict any remedy previously existing or subsequently provided by statute.

3. ———: ———. The same constitutional provision that requires one who lawfully takes or damages property for public use to pay just compensation therefor, protects him when he is without fault from liability to pay more than once.

4. ———: ———. If the landlord's right of action for proper construction and operation is satisfied by payment of just compensation a subsequent grantee or a subsequent tenant would have no more rights than the landlord since he would take subject to such damages.

5. **Eminent Domain.** Actions or proceedings to recover just compensation for property taken or damaged for public use by proper construction and operation are permanent as distinguished from transient in character and ordinarily recoverable in but one action.

6. **Actions.** The question in classifying causes of action as permanent or transient in such cases is not whether damages were suffered because that is a fact alike common to both.

7. ———. Where the structure causing the injury is permanent in character the injury cannot be classified as transient unless the structure was erected or maintained without lawful right, or has been put to an unlawful or improper use, or unless it was negligently constructed or operated and the injury complained of resulted, not from the fact of the existence of the structure but from the manner of its construction or operation.

8. **Waters.** A public power and irrigation district having lawfully obtained its right-of-way has the same right as any other land proprietor as to surface water.

9. ———. The rule in this jurisdiction is that a proprietor may defend himself against the encroachments of surface water by embankment or dike or otherwise and will not be liable in damages which may result from the deflection and repulsion defended against, provided that the proprietor in making defense on his own land himself exercised ordinary care and provided he so uses his own property as not to unnecessarily and negligently injure another.

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

Shuman & Overcash, for appellant.

Beatty & Clarke, R. O. Canady, and *P. E. Boslaugh,* for appellee.

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

CHAPPELL, J.

This action was instituted by plaintiff to recover damages from defendant district for destruction of his growing crop because of its alleged obstruction of diffused surface waters by a spoil bank on its right-of-way for an irrigation canal. At the conclusion of plaintiff's evidence the trial court sustained defendant's motion to dismiss and entered judgment for defendant. Upon the overruling of plaintiff's motion for new trial, he appealed to this court, assigning as error that the order and judgment is contrary to the evidence and applicable law. We find that plaintiff's assignments cannot be sustained.

Plaintiff argues that because of section 21, art. I, Constitution of Nebraska, section 70-671, R. S. 1943, section 28-1016, R. S. 1943, and the evidence adduced by him in support of the allegations of his petition to the effect that defendant district negligently constructed and operated its canal, the trial court should have overruled defendant's motion to dismiss.

The ownership of the land involved by one Kate M. Herrod, plaintiff's crop tenancy thereof and damages to plaintiff's crops thereon by surface waters are conceded. The evidence is that plaintiff knew about and was acquainted with the farm and its contour for more than 25 years. He examined it and looked it all over just before he leased it. The land was good, almost level, farm land which sloped slightly to the northeast. There was no natural drainway, draw, channel, or watercourse of any kind upon it. It is conceded that we have involved here only wholly diffused

surface waters falling upon or flowing over the land from lands to the south of plaintiff.

Two or three years before plaintiff ever became a tenant or had any interest in the property the defendant district, having previously paid compensation therefor and lawfully acquired a right-of-way from the owner by deed, constructed and operated an irrigation canal diagonally northwest to southeast across the land with a spoil bank on the southwest side of the canal. A little northwest of the center of the spoil bank defendant constructed and maintained one three-foot syphon or underdrain. There is no complaint by plaintiff that this underdrain was obstructed by debris or otherwise. Plaintiff testifies that the bottom of the syphon was two and one-half or three feet above the level of the farm land. However, a picture appearing in plaintiff's evidence lends doubt to that contention. A heavy, extraordinary rain fell on or about June 12 and 13, 1943. The surface waters therefrom falling upon plaintiff's land and coming from and across land to the south of him flowed with force down over most of that portion of plaintiff's land southwest of the spoil bank in a wide sheet covering most of it. The surface waters flowed against the spoil bank, drained gradually into the underdrain for four days and thereafter a part of it stood on plaintiff's field for some time destroying a large part of his growing crop. There is evidence that the land was never theretofore flooded, by ordinary rainfall or otherwise, either before or since construction of the canal. There is no direct evidence that the canal was negligently constructed or operated, or that it could have been constructed in any other manner for the purposes and uses of defendant in lawfully carrying on its public works.

Plaintiff concedes in his brief that the deed from the owner to defendant district contained the provision: "The above named consideration includes all damages sustained by grantors as a result of the canal of The Central Nebraska Public Power and Irrigation District located on the aforementioned real estate."

We will first discuss the two statutes under which plaintiff claims a right to recover. Referring to public power and irrigation districts, section 70-671, R. S. 1943, provides: "Any such district shall be liable for *all* breaks, *overflow* and seepage damage. Damages from seepage shall be recoverable when and if it accrues." (Italics ours.)

Plaintiff contends that since this court in *Asche v. Loup River Public Power District*, 138 Neb. 890, 296 N. W. 439, held that damages from seepage were absolute then by analogy damages from overflow would also be absolute. For purposes of argument in this case that proposition may be admitted. However, the rule has no application here because plaintiff assumes a strained definition of "overflow" which was never intended by the act. The word "all" modifies the word "overflow." We are convinced that the Legislature never thereby intended to make the liability of such districts absolute for all interference with or obstruction of purely diffused surface waters. The word "overflow," as used in the statute, must reflect its ordinary, everyday application and use. The act intended to specifically make the damage liability of such districts for "all overflow" absolute for only waters flowing over and from or escaping out of their reservoirs and canals.

We intended to and did so construe and apply the act in *Webb v. Platte Valley Public Power & Irrigation District*, *ante*, p. 61, 18 N. W. 2d 563, a case wherein the canal was full, overflowing and thereby forcing floodwaters back upon the plaintiff's land destroying his crops. The situation in this case is entirely different. To hold that diffused surface waters which never entered defendant's canal were "overflow" and impose an absolute liability upon defendant would in effect, without statutory authority, abrogate the well-known law of this state relating to diffused surface waters, the evolution of which is exhaustively reviewed and reaffirmed in the recent case of *Snyder v. Platte Valley Public Power and Irrigation District*, 144 Neb. 308, 13 N. W. 2d 160. We have also examined section 28-1016, R. S. 1943, and find that it has no application to the situation presented in this case.

We turn then to the question whether defendant's liability is absolute by virtue of section 21, art. I, of the Constitution, which provides: "The property of no person shall be taken or damaged for public use without just compensation therefor." This court has construed and applied this section in many cases since its adoption. A perusal of them indicates clearly that the section has no application to situations like that presented by plaintiff. Generally speaking they are cases where property has been taken or damaged for public use without just compensation ever having been paid therefor. As late as *Snyder v. Platte Valley Public Power and Irrigation District, supra,* we permitted recovery by virtue of the section as well as for negligence and quoted with approval from the opinion in *City of Omaha v. Kramer,* 25 Neb. 489, 41 N. W. 295. In the latter opinion it was said: "In other words, the words, 'or damaged,' in Sec. 21, Art. I. of the constitution, *include all actual damages resulting from the exercise of the right of eminent domain which diminish the market value of private property.*" (Italics ours.) *Gledhill v. State,* 123 Neb. 726, 243 N. W. 909, relied upon by plaintiff to permit him to recover regardless of negligence is clearly distinguishable from the case at bar and we do not deem it necessary to discuss it at length in this opinion.

In *Snyder v. Platte Valley Public Power and Irrigation District,* 140 Neb. 897, 2 N. W. 2d 327, we reaffirmed the rules that: "The purchase of lands for a right of way in lieu of condemnation carries with it all of the incidents of eminent domain or condemnation in so far as damages by reason of construction are concerned." And, "In condemnation proceedings, it is presumed that the owner of damaged lands received or had opportunity to receive compensation for the injury to such lands." Also, "For all injuries which may arise on account of the proper construction or future operation of an improvement, an adjoining proprietor must be compensated in the original condemnation proceedings." See, also, 30 C. J. S., Eminent Domain, s. 400, p. 117. In other words, actions or proceedings to recover just compen-

sation for property taken or damaged for public use by proper construction and operation are permanent as distinguished from transient in character and recoverable in but one action.

However, actions for damages in such cases are ordinarily classified as permanent or transient according to the facts of each particular case and the right to recover respectively accrues to those who own the land or hold a damageable interest therein at the time the cause of the injury is created. By applying the principle that the owner can recover in but one action for proper construction and operation it follows that his tenant could recover therefor in but one action and that for damages to his crops then on the land and damaged thereby and his lease-hold estate then existent.

If a right of action in such cases does not pass from the owner to a subsequent grantee unless provision to that effect appears in the deed or by separate assignment (as stated in 20 C. J., Eminent Domain, s. 292, p. 858, approved in *Croft v. Scotts Bluff Co.*, 121 Neb. 343, 237 N. W. 149) then logically even if the landlord had a right of action it would not ordinarily pass to his tenant. Naturally if the landlord's right of action for proper construction and operation were satisfied, as in the case at bar, then a subsequent grantee (*Fremont, E. & M. V. R. Co. v. Harlin*, 50 Neb. 698, 70 N. W. 263) or a subsequent tenant would have no more rights than the landlord in any event since he would take it subject to such damages. See *Illinois Central R. R. Co. v. Ferrell*, 108 Ill. App. 659. This must be true because the same justice that requires one who lawfully takes or damages property for public use to pay just compensation therefor, protects him when he is without fault, from liability to pay more than once.

On the other hand if there is negligent construction or future operation and damages result therefrom all authority gives an owner or tenant a cause of action therefor whether he was such at the time of the exercise of the right of eminent domain, or otherwise. It was held in *Omaha &*

Republican Valley Railroad Co. v. Standen, 22 Neb. 343, 35 N. W. 183, an action to recover damages for the negligent construction of a bridge across the Platte River which unlawfully obstructed the flow, that: "The insertion of the words 'or damaged' in section 21, Art. I., of the constitution of 1875, was intended to give a right of recovery which did not previously exist, *and was not intended to limit or restrict any remedy previously existing.*" (Italics ours.) To this we should now add the words "or subsequently provided by statute."

The plaintiff in the present case did not become a tenant or suffer damages to his crops until long after defendant's right-of-way was acquired by deed, payment made therefor, and construction and operation of the canal. He did not have a damageable interest at the time of the exercise of the right of eminent domain. The canal was not constructed or maintained without lawful right or put to an unlawful or improper use. Therefore, if he has any remedy it must be for negligent construction or operation and as such is transient in character.

The question in classifying causes of action as permanent or transient in such cases, is not whether damages were suffered because that is a fact alike common to both. The applicable rule is that where the structure causing the injury is permanent in character the injury cannot ever be classed as transient unless the structure was erected or maintained without lawful right, or has been put to an unlawful or improper use, or unless it was negligently constructed or operated and the injury complained of resulted, not from the fact of the existence of the structure but from the manner of its construction or operation. See *Illinois Central R. Co. v. Lockard*, 112 Ill. App. 423. See, also, *Fremont, E. & M. V. R. Co. v. Harlin, supra; Chicago, R. I. & P. R. Co. v. Andreesen*, 62 Neb. 456, 87 N. W. 167; *Chicago, R. I. & P. R. Co. v. Ely*, 77 Neb. 809, 110 N. W. 539; *Iske v. Missouri P. R. Co.*, 94 Neb. 9, 142 N. W. 671; *Bunting v. Oak Creek Drainage District*, 99 Neb. 843, 157 N. W. 1028; *Boschulte v. Elkhorn River Drainage District*, 102 Neb. 451, 167 N. W.

730; *Hopper v. Elkhorn Valley Drainage District,* 108 Neb. 550, 188 N. W. 239, for discussion of such principles.

It will be observed that plaintiff claims in his petition that defendant negligently constructed and operated its canal, thereby obstructing the natural flow of wholly diffused surface waters across his lands and destroying his crops. Of course, it is apparent at once that whether there was negligent construction or operation depends upon whether the evidence adduced by plaintiff establishes a violation of some duty imposed by law upon defendant.

It was held in *Snyder v. Platte Valley Public Power and Irrigation District,* 144 Neb. 308, 13 N. W. 2d 160, that: "A public power and irrigation district organized under chapter 86, Laws 1933, commonly referred to as Senate File No. 310, by its right of way has the same right as a railroad company has by its right of way and the same right as a farm owner has to his farm, or any other land proprietor, as to surface water." And, "The following, which is the common-law rule with exceptions, is a statement of the rule with regard to defense against surface water obtaining in this jurisdiction: Surface water is a common enemy and the proprietor may by embankment or dike or otherwise defend himself against its encroachments and will not be liable in damages which may result from the deflection and repulsion defended against, provided that the proprietor in making defense on his own land himself exercised ordinary care, and provided he so uses his own property as not to unnecessarily and negligently injure another." The latter rule reflects the duty imposed upon defendant in the case at bar and the trial court would not be required to submit the question of defendant's liability to a jury for determination unless the plaintiff established the violation thereof by competent evidence.

We turn then to the question of whether plaintiff's evidence was sufficient to take the case to the jury. In the consideration of that question we must bear in mind the well-known rule that a motion for directed verdict or dismissal 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 such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the facts in evidence. *Moncrief v. Interstate Transit Lines*, 129 Neb. 168, 261 N. W. 163. See, also, *Grantham v. Watson Bros. Transportation Co.*, 142 Neb. 362, 6 N. W. 2d 372.

From an examination of the record, we are of the opinion that there is no competent evidence requiring the submission of plaintiff's case to a jury for its determination. The mere fact that defendant lawfully constructed an irrigation canal which thereafter interfered with or obstructed wholly diffused surface waters resulting from an extraordinary rainfall which did not flow in any natural watercourse, channel, draw, or drainway but in a sheet across plaintiff's almost level farm from which he suffered damages will not sustain a finding that defendant did not exercise ordinary care and so used its property as to unnecessarily and negligently injure plaintiff. To require defendant to provide unnatural and artificial outlets for all such wholly diffused surface waters would make it impossible for public power and irrigation districts to function, as contemplated by law, and put into full force and effect the civil law which is not recognized as operative in this state. In the case at bar we have evidence of what was done and damages resulting from the obstruction of wholly diffused surface waters from an extraordinary rainfall but when that is admitted no legal liability results.

Plaintiff has not cited any authority involving wholly diffused surface waters which would sustain a contrary view except from jurisdictions where the civil law prevails. The Nebraska cases cited are clearly distinguishable. In *Lincoln & B. H. R. Co. v. Sutherland*, 44 Neb. 526, 62 N. W. 859, the railroad built its roadbed and railway with a solid embankment across a natural draw. In *Fremont, E. & M. V. R. Co. v. Harlin, supra*, the railroad caused waste surface waters to be collected or concentrated in ditches and then

precipitated the same upon and over plaintiff's lands. In *Morse v. Chicago, B. & Q. R. Co.*, 81 Neb. 745, 116 N. W. 859, the railroad embankment intercepted the natural course of flow in a draw and carried it some distance in a ditch, then through a culvert and cast it upon plaintiff's land. In *Snyder v. Platte Valley Public Power and Irrigation District, supra,* the district not only changed the direction of a fixed natural watercourse but also concentrated the flow of surface waters into a narrow artificial channel across an overdrain or flume located on the land of another and cast it with great force upon plaintiff's land. In all of such cases the question of negligence was for the jury because the evidence sufficiently and clearly demonstrated the violation of some duty imposed by law self-evident of improper construction or operation and damages resulting therefrom, but in this respect they are not comparable with the case at bar.

We are of the opinion that the trial court rightly sustained defendant's motion to dismiss and the judgment is affirmed.

AFFIRMED.

Wenke, J., participating on briefs.

WENKE, J., concurring.

I concur with the opinion of the majority and especially with the ninth syllabus which correctly states the law applicable to all surface water. But because our opinions are not too clear on this subject matter as to wholly diffused surface water, which is the fact situation here, I think a further statement is desirable.

This state early adopted the common law rule as to surface water, which rule is stated in *Morrissey v. Chicago, B. & Q. R. Co.*, 38 Neb. 406, 56 N. W. 946, as follows: "Under the common law rule, surface water is regarded as a common enemy, and every landed proprietor has a right to take any measures necessary to the protection of his own property from its ravages, even if in doing so he throws it back upon a coterminous proprietor, to his damage, which the law regards as a case of *damnum absque injuria,* and afford-

ing no cause of action."

In connection with this rule of the common law our decisions adopted what is often referred to as exceptions thereto whereby the proprietor, in making a defense on his own land, must exercise ordinary care and so use his own property as not to unnecessarily or negligently injure another. With the possible exception of the case of *Conn v. Chicago, B. & Q. R. Co.*, 88 Neb. 732, 130 N. W. 563, all the cases I can find that discuss these exceptions deal with surface water that had collected in natural drains, draws, or ditches or that had been collected and then dumped or discharged upon another's land.

In the case of *Conn v. Chicago, B. & Q. R. Co., supra,* the court discussed the principle here involved in connection with diffused surface water in the following language: "Subsequently, in a long line of decisions, unnecessary to cite, this court say that a proprietor may improve his premises in any proper manner, although he may thereby interfere with diffused surface water, without becoming liable to his neighbor, provided he does not unnecessarily or negligently injure him." From reading the opinion it is not certain that the case involved wholly diffused surface water.

However, in view of language contained in some of our decisions, such as in *Town v. Missouri P. Ry. Co.*, 50 Neb. 768, 70 N. W. 402, and the discussion contained in *Muhleisen v. Krueger*, 120 Neb. 380, 232 N. W. 735, there may be doubt as to whether the duty to not unnecessarily or negligently injure another applies to a proprietor in defending himself against wholly diffused surface water. The language referred to in *Town v. Missouri P. Ry. Co., supra,* is as follows: "On the other hand, there may be a flow of diffused waters over the surface of lands, which passes across the country in such condition, and nowhere gathers in large or restricted volume, or in any stream confined within banks or in a channel. This last may be said to be true surface drainage, as to which the general rule of law is applicable in its full force."

I do not think the rule, that a proprietor in making a de-

fense to surface water on his own land must himself exercise ordinary care and so use his own property as not to unnecessarily or negligently injure another, is any exception to the common law rule as to surface water hereinbefore set forth. It is a common law rule equally applicable to all surface water, including diffused surface water, which limits the application thereof. As this court stated in *Lincoln & B. H. R. Co. v. Sutherland,* 44 Neb. 526, 62 N. W. 859.

"The doctrine of this court is the rule of the common law, that surface water is a common enemy, and that an owner may defend his premises against it by dike or embankment, and if damages result to adjoining proprietors by reason of such defense, he is not liable therefor.

"But this rule is a general one and subject to another common law rule, that a proprietor must so use his own property as not to unnecessarily and negligently injure his neighbor." See, also, *City of Beatrice v. Leary,* 45 Neb. 149, 63 N. W. 370, and *Chicago, R. I. & P. R. Co. v. Shaw,* 63 Neb. 380, 88 N. W. 508.

NORTH AMERICAN ACCEPTANCE CORPORATION, A CORPORATION, APPELLANT, V. MERLE C. MEEKS, OTHERWISE KNOWN AS MYRLL C. MEEKS ET AL., APPELLEES.

20 N. W. 2d 504

FILED NOVEMBER 9, 1945. No. 31966.

1. Sales: CONFLICT OF LAWS. Whether a sale of a chattel conditioned on the retention of title by the vendor is legally effective to keep title in the vendor depends upon the law of the place where the chattel was at the time of the sale. So the requirements of acknowledgment and registration applicable are those of the state of situs of the chattel.
2. ———: ———. If, after a valid conditional sale in another state, the chattel is taken into this state, the vendor's title to the chattel will be recognized in this state.
3. Sales. Under the law of Illinois a conditional sale contract need not be recorded.
4. ———. The law of Illinois, under the Uniform Sales Act, recognizes the validity of a conditional sale with reservations of

title in the seller and where there is no basis for an estoppel no title can be passed by the buyer of the goods under such a contract although he has possession of the goods and the purchaser from him has no notice of the reservation.

5. ———. The Uniform Sales Act of Illinois provides as follows: "(1) Subject to the provisions of this act, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell."
6. **Estoppel.** The determination of the question of estoppel under this statute depends upon the facts and circumstances attending the sale.
7. **Replevin.** In an action of replevin, in the absence of evidence showing special damages, the measure of damages is interest upon the adjudicated value of the property from the time of its seizure until it is returned or paid for.

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

Leonard A. Hammes, for appellant.

Fred N. Hellner, for appellees.

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

WENKE, J.

Plaintiff, North American Acceptance Corporation, an Illinois corporation, commenced this replevin action in the district court for Douglas County upon a conditional sale contract to gain possession of a 1942 Packard Clipper sedan. Myrll C. Meeks, the Meeks Service Garage, and Merle W. Ice were made parties defendant but service was not obtained upon Merle W. Ice and the action proceeded against the other defendants. Upon the issues raised, a jury being waived, a trial was had to the court. The court found in favor of the defendant, Myrll C. Meeks, doing business as Meeks Motor Exchange, and that said defendant was entitled to the possession of the 1942 Packard sedan. From this judgment the plaintiff has appealed.

The appellant, North American Acceptance Corporation,

a corporation, will be herein referred to as plaintiff and the appellee, Myrll C. Meeks, as Meeks. In the action the appellee, Myrll C. Meeks, is referred to as Merle C. Meeks but they are the same party, the correct name being Myrll C. Meeks. Likewise, the defendant referred to as Meeks Service Garage is the Meeks Motor Exchange and is the name under which Meeks is doing business.

The record discloses that P. V. Beard was in February 1944, engaged in the garage business and a dealer in cars in Peoria, Illinois. He was carrying on this business under the name of South Side Auto Company. On February 9, 1944, he purchased from the Merry Motor Company of St. Louis, Missouri, the car here involved and took from the Merry Motor Company an assignment in blank of the Missouri certificate of title to said car which had been issued to Wm. L. Frick on December 10, 1941, and by him assigned to the Merry Motor Company on October 2, 1943.

Shortly thereafter, on or about February 11, 1944, Beard sold the car to Merle W. Ice and delivered possession thereof to him. Ice, who lived in Peoria, operated a filling station and was engaged in the selling of used cars. Beard sold the car for $1,900 of which amount Ice immediately paid $750. Ice, who was a member of the Chicago Motor Club through whom the plaintiff operated, then had the conditional sale contract prepared together with an assignment thereof with a draft thereto attached. Ice signed the conditional sale contract and then brought it, together with the assignment thereof and draft thereto attached, to Beard. Beard signed the conditional sale contract, the assignment thereof and endorsed the draft, all in the name of the South Side Auto Company. He deposited these papers in the bank and received credit for the balance of the purchase price in the sum of $1,150. The amount of the conditional sale contract was $1,300.91, for which amount Ice executed and delivered to the plaintiff his installment note payable in 14 installments of $87 and a final installment of $82.91. This conditional sale contract was never filed or recorded in Illinois.

Thereafter, on February 22, 1944, Beard placed Ice's name and address on the assignment of the Missouri certificate of title as assignee and immediately above the assignor's signature wrote in ink that the North American Acceptance Corporation of Chicago had a conditional sale contract lien of $1,300 on the car. After taking a receipt from Ice, showing delivery of said title subject to this lien, Beard delivered the Missouri certificate of title to Ice.

After the certificate of title had been delivered to Ice the plaintiff attempted to get possession thereof by writing to him and also through the Chicago Motor Club, of which Ice was a member, but was unsuccessful in its efforts.

On March 21, 1944, Ice presented the Missouri certificate of title to the Secretary of State of Illinois together with his sworn statement that the same was free and clear of liens. At this time the assignment to Ice of the Missouri certificate of title no longer contained Beard's notation as to the conditional sale contract lien of $1,300 to the North American Acceptance Corporation. The evidence shows that it had been removed by some process but just who did it is not positively shown although presumably it was done by Ice.

The Secretary of State of Illinois thereupon, on March 21, 1944, issued to Ice an Illinois certificate of title showing the car was subject to no liens or encumbrances.

On April 5, 1944, Ice personally contacted Fred King, an automobile dealer in Omaha, Nebraska, and attempted to sell him the car. King had known Ice for about two years prior thereto and knew he was operating a filling station and handling used cars in Peoria. Ice had with him three other people whom he introduced as his wife, brother-in-law and sister-in-law. King did not buy the car but called Meeks on the phone and told him about Ice and the car he had for sale. Meeks has been a dealer in used cars in Omaha for 32 years and is now doing business as the Meeks Motor Exchange. Meeks has known King for many years. Ice then brought the car to Meeks' place of business, telling Meeks the car was clear and showing him his Illinois cer-

tificate of title thereto. Ice further identified himself by his gas ration book and tire certificate. After some negotiations Meeks purchased the car for $1,650. They, Meeks and Ice, then drove out to the Douglas County Bank in Benson, where Meeks did his banking business, and contacted Herbert H. Meile, vice-president of the bank, and negotiated a loan in the amount of the purchase price. At this time the parties checked the serial and motor number on the Illinois certificate of title with those on the car itself and found them to be correct. Meeks then acknowledged Ice's signature of his assignment on the Illinois certificate of title, which assignment was to the Meeks Motor Exchange. Meeks then delivered to Ice two drafts for a total of $1,650, the full amount of the purchase price, which drafts Ice cashed. Meeks thereafter on April 7, 1944, obtained a Nebraska certificate of title to this car in the name of Meeks Motor Exchange. The Illinois certificate of title at the time it was issued showed the car was not subject to any lien or encumbrance and at the time of the negotiations between Ice and Meeks, when Meeks bought the car, Ice told him the car was clear. In the assignment made to the Meeks Motor Exchange when the sale was consummated the parties failed to make any declaration after the statement "Amount of Lien." Ice brought the car into Nebraska without the plaintiff's knowledge or consent.

Thereafter Meeks stayed in possession of the car until the plaintiff commenced this action on April 21, 1944. On May 1, 1944, the parties stipulated that Meeks could deposit $1,300.91 with the clerk of the court and regain possession of the car but it was to in no way affect the rights of the parties and that the deposit was in lieu of possession. The final judgment of the court ordered the clerk to refund this deposit to Meeks.

The conditional sale contract assigned to plaintiff contained the usual provisions in such contracts: That the title should remain in the seller or his assigns until all the conditions thereof had been satisfied; that the car should not be permanently removed from the state without the consent of

the seller; that the seller would not attempt to sell it; and that the seller or his assigns may enforce one or more remedies in the contract provided, either successively or concurrently, and that doing so shall not operate to prevent the seller or his assigns from pursuing any other remedy which he may have.

Ice paid the first two installments due on the contract on March 11 and April 11, 1944. Thereafter, on April 28, 1944, the plaintiff obtained a judgment against Ice in the municipal court of Chicago for the balance of the note plus interest, costs, and attorney fees. This judgment remains unsatisfied.

The conditional sale contract here involved was entered into in Illinois by two residents of that state and was to be fully performed there. It is an Illinois contract. The provisions thereof are not contrary to the public policy of this state and it is therefore enforcible in our courts pursuant to the law of Illinois.

As stated in 2 Beale, The Conflict of Laws, s. 272.2, p. 1001: "Whether a sale of a chattel conditioned on the retention of title by the vendor is legally effective to keep title in the vendor depends upon the law of the place where the chattel was at the time of the sale. So the requirements of acknowledgment and registration applicable are those of the state of situs of the chattel." See, also, Restatement, Conflict of Laws, s. 272, p. 359, and comment "a" under s. 265, p. 351. And, as stated in Restatement, Conflict of Laws, s. 273, p. 360: "If, after a valid conditional sale, the chattel is taken into another state, the vendor's title to the chattel will be recognized in the second state." See 2 Beale, The Conflict of Laws, s. 273.1, p. 1003.

Under the law of Illinois a conditional sale contract need not be recorded. See Ford Motor Co. v. National Bond and Investment Co., 294 Ill. App. 585, 14 N. E. 2d 306.

The law of Illinois is stated in Sherer-Gillett Co. v. Long, 318 Ill. 432, 149 N. E. 225, as follows: "Under the Uniform Sales act, which recognizes the validity of a conditional sale with reservation of title in the seller, where there is no

basis for an estoppel no title can be passed by the buyer of goods under such a contract though he has possession of the goods and the purchaser from him has no notice of the reservation." See Ford Motor Co. v. National Bond and Investment Co., *supra*.

However, section 23, Uniform Sales Act of Illinois, Smith-Hurd Ill. Anno. Stats., ch. 121½, p. 499, provides: "(1) Subject to the provisions of this act, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell."

Whether or not the plaintiff has, under the facts of this case, by its conduct precluded itself from denying the seller's authority to sell under the provision of this statute, we must look to the Illinois decisions.

The situation presented in National Bond and Investment Co. v. Shirra, 255 Ill. App. 415, is as follows: Defendants bought the Peerless car in question and placed it in the salesroom of the Advance Motor Sales Co. It was placed there for display purposes only and was not to be offered for sale. On October 12, 1926, a conditional sale contract was executed between these parties. It contained the usual provisions that title was to be retained by the seller. On October 22, 1926, the Advance Company sold the car to Ben Baldon, its secretary and treasurer and apparently its sole owner. A conditional sale contract was entered into between the Advance Company and Baldon on that date. On the same day this conditional sale contract was assigned to the plaintiff therein. The car remained in the possession of the Advance Company until November 10, 1926, when Baldon disappeared. The defendant then took possession of the car under the provisions of its conditional sale contract. It further appears that when a Peerless car was sold from the showroom of the Advance Company, from which this car was sold to Baldon, the car on display would not be delivered to the purchaser but a car would be delivered from the

warehouse. The car in question remained on the floor of the salesroom of the Advance Company at all times until it was repossessed by the defendant. The Advance Company was engaged in selling automobiles. It also sold other makes of cars. The question involved was the rights of the respective parties under these two conditional sale contracts. The trial court found for the plaintiff. In affirming that decision the opinion states the question must be determined under the provisions of the Uniform Sales Act, Smith-Hurd Ill. Anno. Stats., ch. 121½, s. 23, p. 499. As stated in the opinion: "As a general rule, where the true owner of the property allows another to appear as the owner of or to have full power to dispose of the property, so that a third party is led into dealing with the apparent owner, an estoppel may operate against the true owner which would preclude him from disputing the existence of a title which he has caused or allowed to appear vested in another. Drain v. LaGrange State Bank, 303 Ill. 330."

The case of Gordon Motor Finance Co. v. Aetna Acceptance Co., 261 Ill. App. 536, is between two finance companies, each the holder of a conditional sale contract on the same car. Plaintiff sold the car under a conditional sale contract to H. J. Monroe, president of Auburn-Woodlawn Motors, Inc., either individually or as president of the company. The Auburn-Woodlawn Motors, Inc., was engaged in the selling of automobiles in the city of Chicago. Thereafter Monroe turned the car in to his company which sold it to Harold Mandelbaum under a conditional sale contract which was purchased by the defendant. In affirming a judgment in favor of the defendant the court states the basis for its opinion as follows: "Under the doctrine announced in Sherer-Gillett Co. v. Long, 318 Ill. 432, construing section 23 of the Uniform Sales Act (Cahill's St. ch. 121a, par. 26), the Gordon Motor Finance Co., as conditional vendor, retained title to the car as against the purchaser from the conditional vendee, unless it was by its 'conduct precluded from denying the seller's authority to sell,' as provided by section 23. The determination of the question of estoppel under

the statute depends upon the facts and circumstances attending the sale." The court then goes on to say: "However, we do not believe the protection of the statute should be extended to those who by their own acts place the indicia of ownership in a person or corporation under circumstances where it can be reasonably foreseen that fraud on innocent persons will result therefrom."

The case of L. B. Motors, Inc. v. Prichard, 303 Ill. App. 318, 25 N. E. 2d 129, discloses the following situation: The plaintiff was engaged in the automobile business in Chicago. Plaintiff sold the car in question to Hunt, a car dealer located at Plano, Illinois, under a conditional sale contract but did not deliver to Hunt the certificate of title to the car. Hunt then sold the car on conditional sale and sold the conditional sale contract to the defendant. This action involves the rights between these two conditional sale contract holders. From a judgment for the defendant the plaintiff appealed. The judgment was affirmed.

Applying the facts of this case, as disclosed by the record, to the law of Illinois under this statute as it has been decided by the decisions of that state, we think the lower court was right in finding in favor of Meeks.

Meeks complains that the court did not allow any damages when it found for the defendant and ordered a return of the money deposited in lieu of the car. In Schrandt v. Young, 62 Neb. 254, 86 N. W. 1085, this court in answer to the inquiry as to what is the measure of damages stated: "Ordinarily it is interest upon the value of the property. Hooker v. Hammill, 7 Nebr., 231; Hainer v. Lee, 12 Nebr., 452; Dodge v. Runels, 20 Nebr., 33." As stated in State Bank of Omaha v. Murphy, 110 Neb. 526, 194 N. W. 442: "In an action of replevin, a plaintiff who wrongfully seized an automobile truck under the writ is liable for interest on its adjudicated value from the time of the seizure until he returns it or pays for it, where the net usable value is not shown by the evidence." And as stated in Stull v. Taylor, 121 Neb. 200, 236 N. W. 442: "In an action for replevin where the property in suit is returned, damages for its de-

tention, in the absence of special damages shown, are limited to the extent of lawful interest on the value of the property during the time it was wrongfully detained." The trial court should have allowed the defendant six percent interest on money deposited in lieu of the car from the date the car was seized.

As modified, the judgment of the lower court is affirmed.

AFFIRMED AS MODIFIED.

INTERNATIONAL HARVESTER COMPANY, APPELLEE, V. THE COUNTY OF DOUGLAS, NEBRASKA ET AL., APPELLANTS, 20 N. W. 2d 620

FILED NOVEMBER 16, 1945. Nos. 31948, 31949, 31950.

1. Trial: PLEADING. A motion for judgment on the pleadings, like a demurrer, admits the truth of all well-pleaded facts in the pleadings of the opposing party, together with all reasonable inferences to be drawn therefrom. The party moving for judgment on the pleadings necessarily admits, for the purposes of the motion, the untruth of his own allegations insofar as they have been controverted.
2. Taxation. If a person claims a tax, or any part thereof, to be invalid for the reason that the property upon which it was levied was not liable to taxation, he shall proceed as required by sections 77-1729 to 77-1734, R. S. 1943.
3. ———. The Legislature is not authorized by the Constitution to exempt from taxation intangible property in this state.
4. ———. The Legislature in the 1921 Revenue Act included intangible property within the classifications of property that shall be taxed.
5. ———. The 1921 Revenue Act requires that all intangibles in this state (not exempt) shall be returned, assessed, and taxed in Nebraska, and that without regard to whether the owner is a resident or nonresident of this state.
6. ———. The situs of such property controls except in those cases where the situs of the property is in one county and the domicile of the taxpayer in another county in Nebraska.
7. Courts. The rule of stare decisis has a limited application in determining whether settled legal principles are applicable to a particular fact situation; and the positive authority of a decision is coextensive only with the facts on which it is founded, and

can apply only in subsequent cases in which the issues are similar.

8. **Case Distinguished.** The opinion in Massey-Harris Co. v. Douglas County, 143 Neb. 547, 10 N. W. 2d 346, is distinguished.

APPEAL from the district court for Douglas County: ARTHUR C. THOMSEN, JUDGE. *Reversed and remanded with directions to dismiss.*

Kelso Morgan and *Joseph D. Houston,* for appellants.

Ellick, Fitzgerald & Smith and *Seymour L. Smith,* for appellee.

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

SIMMONS, C. J.

Plaintiff in this action sued to recover taxes paid. Defendants answered separately. Plaintiff moved for judgments on the pleadings. The trial court sustained the motions and entered judgments as prayed. Defendants appeal. The appeals are consolidated here. We reverse the judgment of the trial court.

The rule is: "A motion for judgment on the pleadings, like a demurrer, admits the truth of all well-pleaded facts in the pleadings of the opposing party, together with all reasonable inferences to be drawn therefrom. The party moving for judgment on the pleadings necessarily admits, for the purposes of the motion, the untruth of his own allegations in so far as they have been controverted." Brown v. Royal Highlanders, 140 Neb. 54, 299 N. W. 467.

In view of the above rule we state a summary of the facts material here, as gathered from the pleadings.

Plaintiff is a corporation, organized under the laws of New Jersey with its principal place of business in Chicago, Illinois. It does business in Nebraska. It has branch offices at Omaha, Lincoln, and Grand Island for the purpose of selling machinery and parts at wholesale to dealers, and motor trucks and parts at both wholesale and retail.

Defendants are the County of Douglas, the City of Omaha, and the School District of Omaha.

In May 1942, plaintiff filed a personal property return of its taxable property on the prescribed foreign corporations

form. This return was signed "International Harvester Co. By W. H. Bedford, Branch Manager Agent." It there listed class A intangible property in the amount of $1,931. It listed class B intangible property, notes secured and unsecured, except notes secured by mortgages on real estate situated in this state, in the amount of $288,000; and book accounts, open accounts, judgments, choses in action, contracts for cash, labor or any other valuable thing whether due or about to become due, in the amount of $85,000. Thereafter the county assessor raised the value of said class B intangibles to $500,000. Plaintiff then filed its complaint with the board of equalization, claiming that its personal property was assessed too high and asking that the assessment be reviewed. The board reduced the assessment to the amount originally returned. No appeal was taken from that action. On that basis plaintiff was taxed $2,984. Plaintiff on February 4, 1943, paid the tax with interest, without protest or notice of protest. The tax moneys so paid were allocated one-sixth to the state general fund, one-sixth to the county general fund, one-third to the city general fund, and one-third to the school district general fund.

On February 24, 1943, plaintiff, pursuant to section 77-1923, Comp. St. 1929, subdivision SECOND, filed a demand upon the county treasurer and ex officio treasurer of the other defendants demanding the repayment of the sums allocated to said defendants. Plaintiff stated in the demand that it had paid the tax in all respects as though it were legal and valid, and claimed the tax was null and void for the reason that plaintiff was a foreign corporation, did not reside in Nebraska, and was not liable to taxation in Nebraska for any class B intangible property whatsoever. The payment demanded was refused and this suit was instituted.

The secured and unsecured notes and the accounts receivable were all payable in this state; they arose out of the sale of plaintiff's property in this state; they were taken, accepted, and kept at all times in Nebraska, and were subject to collection in this state and were in this state on April 1, 1942, in the custody or control of plaintiff's agent and

branch manager in his representative capacity. Among said notes were conditional sales contracts and chattel mortgages which were recorded in the counties of this state. Judgments included in the return were rendered by the courts of Nebraska. The cash in the bank so returned was the working fund for operating expenses and was subject to withdrawal by plaintiff's branch manager in Omaha.

The defendants contend that the intangible property so acquired and held had a taxable situs in Douglas County on April 1, 1942, and was liable for taxation under the provisions of section 77-703, Comp. St. Supp., 1941 (now sections 77-713 and 77-714, R. S. 1943). It further was contended that the form upon which plaintiff returned said property was one which had been in use since 1929, and that plaintiff and other foreign corporations had for a number of years paid taxes on property so held and returned, evidencing an administrative construction of the statute.

It was contended that plaintiff could not recover said taxes in an independent action, but was required to proceed under the provisions of subdivision FIRST of section 77-1923, Comp. St. 1929. To these the county adds the contention that the plaintiff, having claimed and received relief from the board of equalization, and not having appealed the value, it is now res adjudicata and plaintiff is estopped from inquiring into the taxable value of said intangible property.

By their briefs, the parties here treat these various contentions as applicable to all the defendants.

Defendants, as appellants, contend that the trial court erred (1) in holding that the plaintiff had pursued the proper remedy, (2) in holding that the matter had not been finally determined when plaintiff failed to appeal from the action of the board of equalization, (3) in holding that the intangible property involved here was not assessable, and (4) was not subject to taxation in Nebraska.

We first take up the procedural question. The statute in effect when this action was brought was section 77-1923, Comp. St. 1929. Subdivision FIRST of that section provides that if a person claims a tax or any part thereof to be

invalid for the reason "that the property upon which it was levied was not liable to taxation," or that the property had been twice assessed in the same year and taxes paid thereon, he could pay the taxes under protest and receive a receipt showing payment under protest and the grounds therefor. It provided that the money so paid should be held by the county treasurer, subject to the order of the county board. The statute then provided for the filing of a statement, for a hearing before the board, and for an order refunding the money if it should be found that the property was not liable for taxation, or that it had been twice assessed in the same year and the taxes paid. If it was found that the grounds of the protest were not true, then the board was to order the disposal of the money as though not paid under protest. It contained a provision for an appeal and directions in that event.

Defendants claim that plaintiff should have proceeded under subdivision FIRST, and that not having paid under protest and not having proceeded as therein provided, this action cannot be maintained.

Plaintiff claims that it properly proceeded under subdivision SECOND, which provides that if any person claim the tax 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," and he shall have paid the same as though it were legal and valid, he may then demand payment from the treasurer of the state or subdivision for whose benefit, or under whose authority, or by whose request it was levied, and if repayment is not made, he may sue.

Obviously, the "for any other reason except as hereinbefore set forth" refers to the provisions in subdivision FIRST that the property is not liable for taxation or has been twice assessed in the same year. It is so stated in sections 77-1729 and 77-1735, R. S. 1943.

The claim for a refund, which plaintiff makes a part of its petition by reference, is based upon the proposition that plaintiff is a foreign corporation, not resident in this state,

and its intangible property "is not liable to taxation" in this state. Thus plaintiff clearly has anchored its case within the provisions of subdivision FIRST, and without the provisions of subdivision SECOND.

Both subdivisions deal with a claim that a tax is invalid. The remedy available to the taxpayer under subdivision FIRST depends upon a classification of his property, is it liable to taxation, or was it twice assessed in the same year and taxes paid thereon. The remedy available under subdivision SECOND depends upon a classification of the tax, was it levied or assessed for an illegal or unauthorized purpose, or is it invalid for any other reason than that the property was not liable to taxation, or had been twice assessed in the same year and taxes paid. The procedure is fixed by a determination of the basis of the claimed defect in the tax. This distinction was directly and fully stated in Chicago, B. & Q. R. Co. v. Nemaha County, 50 Neb. 393, 69 N. W. 958. It runs through all our decisions construing this statute. "In a sense property is not liable for taxation for an unauthorized purpose, but the statute clearly distinguishes between such levies and levies upon property not taxable for any purpose, and has provided distinct remedies for each situation." Lennemann v. Harlan County, 110 Neb. 742, 194 N. W. 814.

The facts of plaintiff's case, as well as the exact language of its claim, bring it within the terms of subdivision FIRST of the statute. We are of the opinion that plaintiff has mistaken its remedy and that the trial court erred in its holding.

This conclusion makes unnecessary a decision with reference to the other assignments. However, in view of an apparent erroneous construction of our recent decision in Massey-Harris Co. v. Douglas County, 143 Neb. 547, 10 N. W. 2d 346, and the importance of the question to the public revenues, we decide the principal question: Is the plaintiff's property involved in this action liable to taxation in this state?

The plaintiff makes the forthright assertion that class B intangible property of a foreign corporation is not taxable in Nebraska.

The Constitution of 1875 provided that "The Legislature shall provide such revenue as may be needful, by levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property and franchises, the value to be ascertained in such manner as the Legislature shall direct, * * * ." Const. 1875, art. IX, sec. 1. It provided in section 2 of article IX for certain exemptions, none of which applies to the case at bar. It further provided in section 4 of the same article as follows: "The Legislature shall have no power to release or discharge any county, city, township, town or district whatever, or the inhabitants thereof, or any corporation, or the property therein, from their or its proportionate share of taxes to be levied for state purposes, or due any municipal corporation, nor shall commutation for such taxes be authorized in any form whatever."

The Constitution was amended in 1920 to provide: "The necessary revenue of the state and its governmental subdivisions shall be raised by taxation in such manner as the Legislature may direct; but taxes shall be levied by valuation uniformly and proportionately upon all tangible property and franchises, and taxes uniform as to class may be levied by valuation upon all other property. Taxes, other than property taxes, may be authorized by law. Existing revenue laws shall continue in effect until changed by the Legislature." Const. 1920, art. VIII, sec. 1.

Following section 2, article IX of the 1875 Constitution, the 1920 amendments provided for the exemption of certain property (Const. 1920, art. VIII, sec. 2). It exempted from taxation the property of the state and its governmental subdivisions and household goods of the value of $200. It authorized the Legislature to exempt certain other property, not material here. It then provided: "No property shall be exempt from taxation except as provided in this section."

It will be noted that under the 1875 constitutional provision the Legislature was required to provide revenue by levying a tax so that "every person and corporation" should pay a tax based on the valuation of "property and fran-

chises." Const. 1875, art. IX, sec. 1. In Aachen & Munich Fire Ins. Co. v. City of Omaha, 72 Neb. 518, 101 N. W. 3, we said: "The law knows no distinction between persons or corporations, or between foreign or domestic corporations, under the powers granted by this clause." By the 1920 amendment (sec. 1, art. VIII) taxes were required to be levied by valuation upon all "tangible property and franchises." It further was provided that taxes uniform as to class might be levied by valuation upon "all other property."

A reading of the proceedings of the 1920 Constitutional Convention clearly indicates that the framers of these amendments, by the use of the term "other property," had reference to and meant to include therein intangible property; that it was their purpose so to draft the constitutional provisions that all property in the state would be subject to taxation and be taxed. They recognized that intangibles were then taxable but not being reported for taxation. In an address to the people explaining the proposed amendment, the Constitutional Convention said: "The purpose of the amendment is to enable the Legislature to make ample provision for reaching a large amount of property that now escapes taxation and provide for raising revenue by other methods in addition to property taxes, thereby more equitably distributing the burdens of taxation." 2 Constitutional Convention Proceedings, 1919-1920, p. 2847. They provided for a separate classification as to intangibles in order that this class of property might be dealt with separately, brought out of hiding and placed on the tax rolls. The permissive "may be levied" provision was to enable the Legislature to avoid double taxation. They recognized that if the new constitutional sections distinguishing between tangibles and intangibles were adopted, and before the Legislature acted pursuant to the new provisions, a question might arise as to whether intangibles were then taxable. To make certain that intangibles would not be exempt they placed the provision in section 2 above quoted that no property shall be exempt from taxation, and, trusting the Legislature to enact the proper legislation to carry out the constitutional

intent, they provided that existing revenue laws should continue in effect until changed by the Legislature, so that until so changed, intangible property would continue to be taxable, the same as theretofore. All intangibles in this state were to be taxed the same as tangibles until legislation dealing therewith should be subsequently adopted.

As we read these provisions, in the light of the proceedings and debates of the convention, the Legislature was not authorized to exempt intangible property from taxation, but was authorized to levy taxes thereon uniform as to class and by valuation. The underlying purpose was to empower the Legislature to tax intangibles in such a way that more of them would appear on the tax rolls. We find no purpose to exempt intangibles from taxation. The constitutional provisions negative any such a purpose or power. There is nothing in the constitutional provisions which gives comfort or help to plaintiff's major premise in this action.

What then were the revenue laws of 1920 which were continued in effect until changed by the Legislature?

In 1869, the Legislature passed an act to provide a system of revenue. Laws 1869, p. 179; G. S. 1873, ch. 66. A second act was passed in 1879. Laws 1879, p. 273; Comp. St. 1881, ch. 77. A third general act was passed in 1903. Laws 1903, ch. 73, p. 389; Comp. St. 1905, ch. 77. These acts were amended at different times.

The act of 1869 exempted certain property from taxation. Laws 1869, s. 1, p. 179. It then provided: "All other property, real and personal, within this State, is subject to taxation * * * ." Laws 1869, s. 2, p. 180. It was enacted that this provision intended to embrace, among other things, "money, whether in possession or on deposit, and including bank bills, money, property or labor due from solvent debtors on contract or in judgment, and whether within this State or not; mortgages and other securities, and accounts bearing interest; * * * all moneys used in merchandizing; * * * ." Laws 1869, s. 2, p. 180.

The act of 1879 provided that all real and personal property in this state (not exempted) was to be assessed and

taxed. It further provided: "All moneys, credits, bonds, or stocks, or other investments, the shares of stock of incorporated companies and associations, and all other personal property, including property in transitu to or from this state, used, held, owned or controlled by persons residing in this state" shall be assessed and taxed. Laws 1879, subd. 2 of s. 1, p. 276. Exemptions consistent with section 2, article IX of the 1875 Constitution, were provided.

The act of 1903 defined property to include "every kind of property, tangible or intangible, subject to ownership." Laws 1903, ch. 73, s. 3, p. 389. It also provided: "All property in this state not expressly exempt therefrom, shall be subject to taxation, * * * ." Laws 1903, ch. 73, s. 12, p. 390. The exemptions provided were likewise consistent with the 1875 constitutional provision. Thus stood the statutory law of this state when the 1920 constitutional provision was adopted.

After the adoption of the 1920 constitutional provisions, the Legislature met and enacted an act relating to public revenue. Laws 1921, ch. 133, p. 545. It provided: "The word 'property' includes every kind of property, tangible or intangible, subject to ownership." Laws 1921, ch. 133, art. I, s. 1, p. 545. This is an exact re-enactment of section 3 of the 1903 act and is now section 77-102, R. S. 1943. The 1903 act contained a provision that "The term 'personal property' includes every tangible and intangible thing which is the subject of ownership and not real property as defined in section one of this act." Laws 1903, ch. 73, s. 2, p. 389. The 1921 act further provided: "The term 'personal property' includes all property other than real property and franchises. * * * The term 'tangible property' includes all personal property possessing a physical existence, but excluding money. The term 'intangible property' includes all other personal property, including money." Laws 1921, ch. 133, art. I, ss. 3 and 4, p. 545. These are now sections 77-104 and 77-105, R. S. 1943. The Legislature further provided: "All property in this state, not expressly exempt therefrom, shall be subject to taxation, and shall be valued and

assessed at its actual value." Laws 1921, ch. 133, art. II, s. 1, p. 546. This is now section 77-201, R. S. 1943. So far as the taxability of property is concerned this was an exact re-enactment of the provisions of section 12 of the 1903 act. The exemptions provided in the 1921 act have no bearing upon the property involved in this action.

These provisions, from the beginning to the present time, show a legislative intent to tax all intangible property in this state. As a part of the 1921 act, the Legislature enacted article VIII, entitled, "Intangible Property Tax." Laws 1921, p. 582. It now appears with amendments in chapter 77, article 7, R. S. 1943. The statutes now in force provide: "Intangible property, other than notes secured by mortgages on real estate situated in this state and other than bonds of the United States, of this state or governmental subdivisions of this state, shall be separately classified, listed and taxed as follows: (1) Class 'A' shall consist of money, United States legal tender notes and other securities of the United States payable on demand, savings accounts, all bank deposits, bills of exchange, checks and drafts. (2) Class 'B' shall include all other kinds of intangible property which is not included in class 'A'." Sec. 77-701, R. S. 1943. "All intangible property in Class 'A' shall be taxed where it is assessed at the rate of two and one-half mills on the dollar of the actual value thereof." Sec. 77-702, R. S. 1943. "All intangible property in Class 'B' shall be taxed where it is assessed at the rate of eight mills on the dollar of the actual value thereof, to be assessed and collected where the owner resides." Sec. 77-703, R. S. 1943. "Every owner of intangible property and every person or corporation having intangible property in his or its custody or under his or its control as agent, trustee, executor, administrator, guardian or other representative capacity in this state, shall on or before the last Monday in May each year list the same for taxation as of April 1 next preceding. The precinct assessor shall list or aid in listing intangible property and the return for intangible property shall be made a part of the return of tangible property. A return for intangible property

shall be prepared and filed by all taxpayers of the state, whether owners of intangible property or not, but a husband and wife living together, each of whom have taxable property, may either file separate returns for intangible property or include the intangible property of both in a joint return." Sec. 77-713, R. S. 1943. "Returns shall be filed with the county assessor or, if there be no county assessor, with the clerk of the county in which the taxpayer is domiciled." Sec. 77-714, R. S. 1943. "Where a taxpayer domiciled within a county has failed to file a return for intangible property, or has omitted any intangible property from his separate intangible tax return, a notice by registered mail shall be sent to such taxpayer to appear before the Tax Commissioner or his duly authorized agent at a designated time and place, within fifteen days, in the county in which the taxpayer resides, for examination as to ownership of intangible property. The intangible property not returned or omitted shall thereupon be taxed at the rate of tangible property. In like manner any intangible property omitted from the taxpayer's separate intangible return shall be assessed at the rate for tangible property in his taxing district." Sec. 77-716, R. S. 1943. "If any foreign corporation is taxed in this state upon any tangible or intangible property, then the value of its gross shares of stock shall be ascertained by deducting from the actual value of the foreign corporation's paid-up capital stock, surplus and undivided profits, the assessed value of its property taxed in this state; * * *." Sec. 77-722, R. S. 1943.

Intangibles held in this state for nonresident owners were taxable prior to the adoption of the 1921 act. The question then is: Did that act exempt them from taxation? Article 7, chapter 77, R. S. 1943, dealing with intangibles, is an integral part of the revenue act and must be construed in connection with other provisions of the revenue law. It is not to be construed or applied separate and apart from the balance of the act. The general provisions heretofore cited clearly include intangibles in this state within the classifications of property that shall be taxed. An intent that

intangibles in this state owned by a foreign corporation shall be taxed is clearly shown in section 77-722, R. S. 1943. There it is provided that if a foreign corporation is taxed in this state upon any tangible or intangible property, then the assessed value of its property so taxed shall be deducted from the actual value of its paid-up capital stock in ascertaining the value of its gross shares of stock. The intangible property provision of this section becomes a nullity if such property owned by a foreign corporation is nontaxable in this state.

But it is urged that there are specific provisions in the statute that exclude from taxation intangibles owned by a foreign corporation. Reliance is placed on section 77-703, R. S. 1943, stating that the tax on class B intangibles is to be assessed and collected "where the owner resides" and on section 77-714, R. S. 1943, providing that returns shall be filed with the assessor of the county "in which the taxpayer is domiciled." Reference also should be made to section 77-716, R. S. 1943, providing a procedure that "where a taxpayer domiciled within a county" fails to file a return, he is to appear "in the county in which the taxpayer resides" for examination as to his "ownership of intangible property." It is urged that the plaintiff not being domiciled in Nebraska, its intangibles held in this state accordingly are without the provisions of these statutes.

The language "where the owner resides" is not subject to the restricted interpretation which plaintiff urges. In Clay, Robinson & Co. v. Douglas County, 88 Neb. 363, 129 N. W. 548, we had for construction a statute which provided that personal property should be listed and assessed "where the owner resides." The plaintiff in that action was a partnership with its principal place of business in Chicago. The partners were all nonresidents. The partnership, however, maintained an office and transacted business in this state. We there held that plaintiff had acquired a domicile in this state for all practical purposes and was subject to taxation upon at least so much of its property as it employed and controlled within this state. This construction of the de-

cision was recognized in Massey-Harris Co. v. Douglas County, *supra*. In the opinion in the Clay, Robinson & Co. case we said: "The plaintiff's person, although intangible, is within the state of Nebraska, and, in so far as the doctrine that movables follow the person of their owner applies, it holds the credits in dispute within this state." That decision had been made before the 1920 constitutional provisions herein discussed were adopted and before the 1921 act was enacted. It further should be noted that the provisions of the statute construed in the Clay, Robinson & Co. case were substantially continued in force in the present statute. The act there construed was part of article 1, chapter 77, Comp. St. 1909. Section 2 of the act there cited is now substantially section 77-104, R. S. 1943. See, also, secs. 77-102, 77-103, and 77-105, R. S. 1943. Section 12 there cited is now section 77-201, R. S. 1943. For section 28 of the act there cited, see section 77-1201, R. S. 1943. For section 29 there cited, see sections 77-1202 and 77-1203, R. S. 1943. For section 44 there cited, see section 77-1218, R. S. 1943.

But the Legislature did not stop there in the intangible property statutes. Section 77-713, R. S. 1943 requires the listing of all intangible property in this state for taxation. The listing of the property is not limited to the owner but is required from the owner and every person or corporation having intangible property in this state in his or its custody or under his or its control as agent, trustee, executor, administrator, guardian, or other representative capacity. The return is not one limited to the owners alone, but is required from the taxpayers "whether owners of intangible property or not." These returns are to be filed where the "taxpayer is domiciled." Sec. 77-714, R. S. 1943. See, also, secs. 77-716 and 77-1229, R. S. 1943.

We are of the opinion that the Legislature used the word "taxpayer" as a broader and more inclusive term than "owner." This conclusion is substantiated directly by section 77-210, R. S. 1943, which provided that where property is assessed to any person as agent for another, or in a rep-

resentative capacity, such person shall have a lien upon the property of his principal in his possession for the taxes thereon.

It may be pointed out also that the Legislature has provided in several other instances that the situs of personal property shall control over the residence or domicile of the owner. See secs. 77-1204, 77-1205, 77-1206, 77-1210, 77-1217, 77-1218, and 77-1221, R. S. 1943.

We have heretofore pointed out that plaintiff made its return by its branch manager as "Agent" and have set out the provisions of section 77-713, R. S. 1943, and the applicability of that provision to the case at bar. The Legislature also provided that "The property of manufacturers and others in the hands of an agent shall be listed and assessed at the place where the business of such agent is carried on." Sec. 77-1206, R. S. 1943. This is a re-enactment of a provision in the 1903 act. Laws 1903, ch. 73, s. 32, p. 396. With a slight modification it was in the 1879 act. Laws 1879, p. 280. It is cited here for this reason. In Clay, Robinson & Co. v. Douglas County, *supra,* one of the statutes cited and relied upon was section 44, article I, chapter 77, Comp. St. 1909. It was enacted as section 44, chapter 73, Laws 1903. With slight modification it is now section 77-1218, R. S. 1943. The major difference in the two statutes is that section 77-1206, R. S. 1943, refers to property "in the hands of an agent," while section 77-1218, R. S. 1943 does not contain that qualification. Both statutes require that the property be listed and assessed where the business is done. By the provisions of section 77-102, R. S. 1943, the word "property" includes every kind of property, tangible or intangible, that is subject to ownership.

It may be further pointed out that section 77-1201, R. S. 1943, requires the listing of the property of manufacturers and others in the hands of an agent. This language was in the 1903 act. Laws 1903, ch. 73, s. 28, p. 395. This provision was also in the 1879 act. Laws 1879, p. 279.

These statutes sustain our conclusion that the Legislature has carried out the constitutional mandate that no property

in this state shall be exempt from taxation, except as to certain authorized items, and has implemented the general provision of the revenue act that all property in this state, not expressly exempt, shall be subject to taxation. Sec. 77-201, R. S. 1943.

We are of the opinion that the Legislature intended that all intangibles in this state (not exempt) should be returned, assessed, and taxed in Nebraska, and that without regard to whether the owner was a resident or nonresident. So construed, the act is in accord with the powers granted and withheld in the Constitution. It is the situs of such property that controls, except in those cases where the situs of the property is in one county in Nebraska and the domicile of the taxpayer in another county in Nebraska. In the latter situation the distinction made in Joyce Lumber Co. v. Anderson, 125 Neb. 886, 252 N. W. 394, is applicable.

Such we think has been the law of this state as provided in the Constitution, enacted by the Legislature and construed by this court from the early days of the state to the present.

In Jones v. Seward County, 10 Neb. 154, 4 N. W. 946, it was held that debts due were credits as then defined in the law, and were taxable. The comparable statute is now section 77-107, R. S. 1943.

In Finch v. York County, 19 Neb. 50, 26 N. W. 589, it was held that the Legislature had the power to separate the situs of personal property, whether tangible or intangible, from the domicile of the owner, and if such property in any form is within its jurisdiction, it may tax it. We there had for construction an act which provided for the taxation of intangibles "used, held, owned, or controlled by persons residing in this state." This act may be compared with the language of section 77-713, R. S. 1943, for similarity of expression. See, also, sec. 77-1201, R. S. 1943. We there held that intangibles owned by a resident of New York, but held by an agent in Nebraska, were taxable in Nebraska, and that the act did not require that the owner be a resident of the state to render the property taxable. See, also, Clay, Robinson & Co. v. Douglas County, *supra*. The statutory

provisions cited in Finch v. York County, *supra,* remain substantially in the statutes at the present time. See secs. 77-201, 77-1201, and 77-1210, R. S. 1943.

It is recognized that in Joyce Lumber Co. v. Anderson, *supra,* we held that taxation was purely a statutory matter; that the Legislature had the right to change judicial definitions; and that the return for intangibles should be filed in the county where the taxpayer was domiciled. The question there was, which county in Nebraska was entitled to tax the property. That question is not involved here. The question of whether or not it was taxable in this state was not involved. The fact that we there held a specific statute on the matter to be controlling does not require that general statutes be not considered, or relieve the property from taxation. As was stated in Jones v. Seward County, *supra,* it was not the design of the specific provisions to permit property to escape taxation altogether, but merely to avoid a conflict of jurisdiction in the collection of taxes.

As has been pointed out, we held in the early case of Finch v. York County, *supra,* that the Legislature had the power for purposes of taxation to separate the situs of personal property, whether tangible or in the form of choses in action, from the domicile of the owner, and that if such property, in any form, was within its jurisdiction, it might tax it. Again, in Aachen & Munich Fire Ins. Co. v. City of Omaha, *supra,* it was said: "The general rule is that the domicile of the owner is the situs of personal property for the purpose of taxation. This rule has its exceptions, and the legislature has the power, where personal property is actually within this state, to separate it from the domicile of a nonresident owner for the purpose of taxation. When, however, both the residence of the owner and his tangible personal property are outside of the limits of the state, no power exists in the legislature to make such property a subject of taxation."

It is clear from an examination of the act here considered that the Legislature has exercised that power in several instances and specifically with reference to the situs of such property as was taxed in Nebraska in the instant case.

Plaintiff places its reliance here principally upon the opinion in Massey-Harris Co. v. Douglas County, *supra*. First, plaintiff argues that we there held that residence and domicile of the owner is the controlling factor. Plaintiff overlooks the basic facts of that opinion. There are two. First, the property sought to be taxed was not in Nebraska. Second, the owner was not domiciled in Nebraska. What was there said with reference to the rule that the situs of intangible personal property for the purposes of taxation is the domicile of the owner, and the discussion of the nonresidence of the owner must be read in the light of the factual problem which was presented. The opinion sharply challenges attention to the fact that the rules there announced apply only to the factual situation presented. The conclusion there reached that intangible personal property not in this state, which is owned by a nonresident, is not taxable in Nebraska, is in accord with our decisions and is reaffirmed. However, it is recognized that there are statements made in the course of that opinion, when considered separate and apart from the factual situation there presented, from which conclusions may be drawn which are in conflict with the conclusions here stated. To the extent of the conflict those statements are not controlling.

Second, plaintiff would strengthen its position under the Massey-Harris case by having us go behind the fact basis that the property was not in this state. Plaintiff would have us re-examine the record in that case, and urges that there was evidence that some of the intangibles were in Nebraska. It would thereby create a factual situation comparable to its own case in part, and have us apply to property in this state a decision made with reference to property without the state. Obviously, the controlling effect of a decision must relate to the factual condition as stated in the opinion. To go behind facts so stated and materially to change the fact basis is to remove the decision as an authority.

"The doctrine of stare decisis relates only to legal principles; accordingly judicial precedents are valuable only in

so far as they state definite rules for guidance in future similar cases.

"However, the rule of stare decisis has a limited application in determining whether settled legal principles are applicable to a particular fact situation; and the positive authority of a decision is coextensive only with the facts on which it is founded, and can apply only in subsequent cases in which the issues are similar. Thus, while a decision is binding in a later case where the issues and the facts are the same or substantially the same, it is not conclusive in a later case where the facts are different, except where they present an even stronger case than the facts in the former decision; * * *." 21 C. J. S., Courts, s. 210, p. 383.

Finally, plaintiff urges that we should take judicial notice of the fact that there was introduced in the 1943 session of the Legislature LB 273 relating to revenue and taxation, to provide that intangible property, belonging to a nonresident but having a business situs in this state, shall be taxed in the same manner and at the same rate as other intangible property, the tax to be assessed and collected where the nonresident maintains its principal place of business within the state. Plaintiff states that this bill was indefinitely postponed by the revenue committee and its action was final; that no attempt was made to amend the statute in the 1945 session; and that hence it will be assumed the interpretation which it places upon the Massey-Harris case expresses the legislative intent. We shall not undertake an analysis of the proposed bill. Plaintiff overlooks some important facts and dates. LB 273 was introduced on January 29, 1943, and was, as plaintiff states, indefinitely postponed by the revenue committee on March 26, 1943. Legislative Journal 1943, p. 807. However, on April 14, 1943, the Legislature refused to concur in the committee report and placed the bill on general file by a vote of 32 to 0. Legislative Journal 1943, p. 991. Thereafter on April 30, 1943, on motion of the sifting committee, the bill was placed on the calendar for consideration. Legislative Journal 1943, p. 1194. Finally, on May 19, 1943, all bills except two on general

file were indefinitely postponed by the Legislature. Legislative Journal 1943, p. 1519. All this happened before the Massey-Harris decision was filed by this court on July 2, 1943. It can hardly be said that the Legislature acted with reference to that decision. Further, it is to be noted that certified copy of the first notice of appeal in the instant cases was filed in this court on February 14, 1945, during the early days of the 1945 legislative session. We see no merit in this contention of plaintiff.

We reach the inescapable conclusion that intangible property such as is involved in this action has been and now is liable to taxation in Nebraska.

The judgment of the district court is reversed and the cause is remanded with directions to dismiss.

REVERSED.

Wenke, J., participating on briefs.

WENKE, J., concurring in the result.

I concur with the conclusion arrived at in the majority opinion both for the reason that the taxpayer followed the wrong procedure and that the facts of the case make the intangible property here involved taxable under the provisions of section 77-713, R. S. 1943.

However, I do not agree with the opinion insofar as it holds that under the provisions of our Constitution and the laws of this state that all intangibles in this state should be returned, assessed, and taxed in Nebraska without regard to whether the owner is a nonresident, nor do I find any decision of this court cited in the opinion that so holds.

This court has always held that the taxable situs of intangibles is the residence of the owner. In the early case of Finch v. York County, 19 Neb. 50, 26 N. W. 589, this court announced this rule in the following language: "The power of the state to tax all property within its own limits must be conceded. For the purposes of taxation and the collection of revenue the state possesses all the attributes of sovereignty, and its power to tax property within its borders is ample and unlimited. But that power is limited to the persons and property within its jurisdiction. Ordinarily the

situs of moneys and credits follow the domicile of the owner, and if he lives in one state, and has money owing to him from citizens or residents of another state, the state of his residence, only, has the power to tax such credits. And it has been held that where the credits were represented by notes and mortgages, and such notes and mortgages were not in his immediate possession, but were deposited in the state where the debtor resided for payment or collection, yet they were not taxable there for the reason that the notes and mortgages are not the debt itself, but the evidence of it, and the debt followed the owner. People v. Eastman, 25 Cal., 603. Appeal Tax Ct. v. Patterson, 50 Md., 368. Latrobe v. Baltimore, 19 Md., 13. The tax is not on the money, the land on which the security is taken, nor upon the paper upon which the promise and security are written, but upon the chose in action, or right to collect the debt. State v. Earl, 1 Nev., 394. Desty on Taxation, 330. Cooley on Taxation, 43." This principle is again restated in Nye-Schneider-Fowler Co. v. Boone County, 99 Neb. 383, 156 N. W. 773, as follows: "It is elementary that 'movables follow the person,' in the absence of statutes providing otherwise, and that the credits of plaintiff would be assessable at the domicile of the corporation but for the statute." In Massey-Harris Co. v. Douglas County, 143 Neb. 547, 10 N. W. 2d 346, we restated the same principle as follows: " 'The general rule is that the situs of intangible personal property for the purposes of taxation is the domicile of the owner. This rule is usually bottomed on the legal maxim, *"mobilia sequuntur personam,"* i. e., "moveables follow the person;" or, as sometimes stated, the situs of personal property is the domicile of the owner.' Crane Co. v. City Council of the City of Des Moines, 208 Ia. 164, 225 N. W. 344, 76 A. L. R. 801." See Aachen & Munich Fire Ins. Co. v. City of Omaha, 72 Neb. 518, 101 N. W. 3.

There is no question but what the taxable situs of such property, when within this state, may be separated from that of the nonresident owner. As stated in Finch v. York County, *supra*: "But the power of the legislature to separ-

ate, for purposes of taxation, the situs of personal property, whether of a tangible nature, or in the form of choses in action, from the domicile of the owner is unquestioned, and if such property, in any form, is within its jurisdiction it may tax it. Swallow v. Thomas, 15 Kan., 68. Tappan v. Bank, 19 Wall., 490. Griffith v. Carter, 8 Kan., 565." This is again stated in Aachen & Munich Fire Ins. Co. v. City of Omaha, *supra*, as follows: "The general rule is that the domicile of the owner is the situs of personal property for the purpose of taxation. This rule has its exceptions and the legislature has the power, where personal property is actually within this state, to separate it from the domicile of a nonresident owner for the purpose of taxation."

It is therefore clear that the question here involved is not one of exemption or release from taxation but rather one of inclusion. In the absence of either constitutional provision or statutory enactment expressly separating the taxable situs of intangibles from that of nonresident owners such intangibles in this state would not be subject to taxation. In the case of Finch v. York County, *supra*, where the intangibles of a nonresident were held taxable under a statute that was applicable to the facts of that case because such property was held and controlled by a resident agent, we stated: "By the foregoing it will be seen that a distinction must be maintained between cases of the kind at bar and that class of cases where the property taxed is not in the hands of an agent, and has no situs apart from the residence of the owner. Thus in Hunter v. Supervisors, 33 Iowa, 376, it was held that a resident of that state who had deposited for safe keeping in Illinois promissory notes which he had never brought with him to Iowa, was subject to taxation in Iowa, but the court held that a different rule would prevail if he had conferred authority upon some one as his agent to loan, manage, receive, and collect the same for him, citing The People v. Gardner, *supra*." And in Massey-Harris Co. v. Douglas County, *supra*, we stated: "This principle of *mobilia sequuntur personam* as to intangible personal property has been the rule in force for so

long in this state that if it is to be changed or modified as to taxation it should be by the legislature and then only by provisions plainly written in the statute, for the power of taxing this class of property in the hands of nonresidents must, if it exists, be clearly set forth."

This court has consistently held, and correctly so, that the taxable situs of intangibles in this state owned by nonresidents is the domicile or residence of the owner. That the state has the power to separate the taxable situs of such intangibles from that of the nonresident owner and make them taxable here is also without question but in the absence of the exercise of such power such intangibles are not taxable here. While the Legislature has enacted legislation which is applicable to certain fact situations and which has the effect of separating the taxable situs of intangibles within this state from that of the nonresident owner, such as in the case at bar where section 77-713, R. S. 1943, applies, however, an examination of all the constitutional and statutory provisions cited in the majority opinion or that I have been able to find that are on the subject, none have any provision that has the effect of separating the taxable situs of such intangibles as a whole from that of the nonresident owner. And this seems logical because if the Legislature had passed an act that was generally applicable to all intangibles in this state that are owned by nonresidents then it would have been unnecessary and illogical for them to have enacted the sections referred to in the majority opinion which are applicable to intangibles in this state of nonresidents under the particular situation as therein set forth.

While it may be desirable to include, for the purposes of taxation, all intangibles in this state that are owned by nonresidents, however, that is a matter of legislative and not judicial concern. Until the state makes specific provisions for that purpose, I am not willing to do so by judicial opinion.

LUVERDA M. GORDON, APPELLEE, V. CLAUDE E. YOUNG, AGNES M. YOUNG ET AL., APPELLANTS.

20 N. W. 2d 616

FILED NOVEMBER 16, 1945. No. 31940.

1. **Accord and Satisfaction.** A payment or other performance by a third person, accepted by a creditor as full or partial satisfaction of his claim, discharges the debtor's duty in accordance with the terms on which the third person offered it.
2. **Mortgages.** A grantee of land need not pay a mortgage thereon which constituted no part of the consideration of his purchase, and was not made in good faith for real indebtedness, notwithstanding his deed is expressed to be subject to mortgages of record.
3. **Deeds: ESTOPPEL.** Where the encumbrance is not made a part of the consideration and not deducted from it, and where it is not assumed by the grantee, the recital in a deed that the conveyance is subject to mortgages of record, does not estop the grantee from showing that what purports to be an encumbrance is not one in fact because of its invalidity.

APPEAL from the district court for Douglas County: CHARLES LESLIE, JUDGE. *Reversed and dismissed.*

Monsky, Grodinsky, Marer & Cohen, for appellants.

Fromkin, Houston & Sutton, for appellee.

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

MESSMORE, J.

This is an action in equity to foreclose a second mortgage upon real estate.

The plaintiff's petition alleges in substance that she is the widow of Henry Osborne, deceased, who died September 7, 1937, and by virtue of his last will and the proceedings in probate thereof, she became the owner and holder of a second mortgage made and executed by the defendants, John Stickley and his wife Jerene Stickley, to Henry Osborne August 30, 1934, in the amount of $431, with interest at 5 percent per annum; that on or about July 3, 1937, Stickleys sold their interest in the mortgaged premises to the defend-

ants Claude and Agnes Young, husband and wife, who are in possession. Plaintiff prays for foreclosure in the usual form.

The defendant, Metropolitan Utilities District, was dismissed from the case. The defendants Stickley made no appearance and filed no pleadings and default was entered against them. The defendants Young filed an answer containing a general denial and set forth the facts upon which they seek to have the second mortgage declared null and void. The reply is a general denial.

The court rendered judgment for the plaintiff, finding that there was due and owing the amount of $570.22, that the mortgage was a lien superior to all right, title, and interest that the defendants might have in the real estate, and ordered the property sold to pay the mortgage indebtedness. The defendants Young filed a motion for new trial which was overruled, and from this order they appeal.

The record discloses that on March 17, 1931, Lloyd Osborne who was engaged in the real-estate business in Omaha, Nebraska, and his wife Mabel, contracted to and did sell to John and Jerene Stickley, husband and wife, the real estate described in the pleadings, the consideration being $3,000, with a down payment of $332.34, the balance of $2,667.66 payable in installments of $40 per month. Payments were made on this contract until about April 1934, when the unpaid balance amounted to $1,960.65, with interest in the amount of $10.34, making a total of $1,970.99. In 1933, by act of Congress, the Home Owner's Loan Corporation, hereinafter referred to as the corporation, was created, and for the purpose of making loans under the act, adopted certain rules and regulations. The Stickleys were in arrears in payments and in default of their contract. To avoid foreclosure Lloyd Osborne suggested that the Stickleys apply to the corporation for a loan. To make a loan, the corporation required the mortgagee to consent to take its bonds. On May 2, 1934, Lloyd Osborne consented to take the corporation bonds in the amount of $1,506 in full settlement of the mortgagee's claim for $1,970.99. On July 30,

1934, Mabel Osborne assigned all her interest in the corporation's bonds to Lloyd Osborne. On August 15, 1934, Lloyd Osborne signed an authorization for the delivery of the corporation bonds. The corporation completed its transaction on August 15, 1934, and its mortgage was recorded August 27, 1934, and on August 30, 1934, Lloyd and Mabel Osborne delivered the warranty deed to the Stickleys. This deed was recorded September 5, 1934. Simultaneously with the delivery of the deed there was delivered to Lloyd Osborne $1,500 of the corporation's bonds, together with accrued interest of $1.57 and cash in the amount of $4.43, making a total of $1,506 for which Lloyd Osborne receipted September 5, 1934, in full payment of the amount due him from the Stickleys. On August 30, 1934, Lloyd Osborne and his uncle, Henry Osborne, procured a second mortgage in the amount of $431 from the Stickleys. Lloyd Osborne testified that the house needed repairs and Stickleys needed money to buy millwork, window casings, and to repair the furnace, and that in addition, Stickley owed him the balance over and above the amount the corporation had settled with him for, which amounted to between three and four hundred dollars; that his uncle gave him between three and four hundred dollars and the balance went to Stickley. This resulted in the mortgage in controversy made to Henry Osborne, the uncle, which was recorded October 15, 1934. That repairs were placed on the house or the furnace repaired is controverted by the testimony of Claude Young who testified that the house was in a bad state of repairs.

Legal bulletins, constituting a part of the rules and regulations in force and effect with the corporation and which had to do with the giving and taking of second mortgages to take up the difference between the amount which the mortgagee agreed to accept from the corporation and the amount he claimed under the mortgage or loan, are in evidence and disclose that the corporation deals with any loss that may have been suffered by the mortgagee in taking the bonds of the corporation.

On July 3, 1937, the Stickleys deeded the property to the

defendants Young. This deed recited that the property was "subject to balance due on mortgages of record" and was recorded October 30, 1937.

We adduce from the evidence that Henry Osborne and his nephew, Lloyd Osborne, knew the manner in which the corporation was then making loans; that there must be a consent to take the bonds of the corporation upon an agreed amount in full payment of the debt; that it would be a matter for the mortgagee to either accept or reject the bonds in payment of the debt; and likewise it was known to both that a receipt for the bonds in full payment of the debt would be required. It was clear to Henry Osborne that if the full debt had been paid there would have been an amount in excess of the corporation bonds still owing to his nephew by the Stickleys. He knew the loss sustained by Lloyd Osborne and the exact amount thereof, $431, which is apparently correct from Lloyd Osborne's own figures.

This second mortgage was procured by Henry and Lloyd Osborne on August 30, 1934. Six days thereafter Lloyd Osborne, on September 5, 1934, receipted for the corporation bonds in full payment of the debt. The second mortgage was withheld of record until October 15, 1934. In this connection the testimony of Lloyd Osborne is that the corporation preferred not to have the second mortgage recorded until after its mortgage had been recorded. However, the record is void of competent evidence to show that the corporation had any knowledge of this second mortgage. In fact, it was a secret second mortgage, exacted as a condition of the acceptance of the corporation bonds by Lloyd Osborne. The corporation made its loan and delivered the bonds to Lloyd Osborne, with a complete understanding that it was in full payment of the debt owing by the Stickleys to him. Lloyd Osborne, in 1934, handled many loans with the corporation and was acquainted with the rules and regulations of the corporation in making its loans. He suggested to the Stickleys that they refinance the mortgage to him, so on April 28, 1934, John Stickley made application to the corporation for a loan, setting forth the history of his

indebtedness to Lloyd Osborne. The transaction proceeded, Lloyd Osborne took the corporation bonds in full and complete settlement of the Stickleys' mortgage debt, and the corporation did not consent to the second mortgage here in controversy. It is apparent that by the method and manner in which Henry and Lloyd Osborne procured the second mortgage, they sought to circumvent and evade the rules and regulations of the corporation in making its loans. From the evidence it is doubtful if Henry Osborne ever advanced Lloyd Osborne any money for the benefit of the Stickleys, or that they received any money from him to repair the house and furnace.

The appellants contend that under the circumstances the second mortgage is null and void and nonenforceable for all purposes.

In Tarascio v. Mancuso, 141 Neb. 225, 3 N. W. 2d 400, a case involving a second mortgage which the plaintiff sought to declare null and void when the mortgage debt was settled in full by acceptance of H. O. L. C. bonds and a second mortgage was taken by the original mortgagee over and above the H. O. L. C. bonds, this court determined the case on contract law, holding as follows: " 'A payment or other performance by a third person accepted by a creditor as full or partial satisfaction of his claim, discharges the debtor's duty in accordance with the terms on which the third person offered it.' Restatement, Contracts, sec. 421."

Applying the rule to the case at bar, the corporation, the third person, paid the creditor, Lloyd Osborne, an agreed amount of its bonds in full satisfaction of Lloyd Osborne's claim against the Stickleys. This discharged the debtors' duty in accordance with the terms on which the corporation offered the payment which was accepted by the creditor. Therefore, the debt of the Stickleys was terminated.

" 'Payment by a third person of a sum less than the amount due, with the understanding that it shall be in full satisfaction thereof, is a valid accord and satisfaction, and no action will lie against the debtor to recover the balance. In such case there is a new consideration from a new party,

and the general rule that the receipt of a smaller sum is not a good accord and satisfaction of a larger one, does not apply.' 1 C. J. 545." Tarascio v. Mancuso, *supra*. See, also, Murphy v. Omaha Loan and Bldg. Ass'n., 141 Neb. 230, 3 N. W. 2d 403; Fender v. McCain, 144 Neb. 58, 12 N. W. 2d 541.

The appellants further contend the grantee of mortgaged real estate is not estopped to question the validity of a mortgage, where the grantee is not bound to pay a mortgage which does not constitute a part of the consideration of the purchase price, and the mortgage is not definitely described in the conveyance. In this connection the record discloses that Claude Young was employed by a realty company, and John Stickley owed some payments to the company and was unable to meet them, so arrangements were made whereby Claude Young purchased the property from John Stickley for a nominal amount and assumed and agreed to pay the corporation's mortgage. After the deed had been delivered and the abstract was being examined, the examiner informed Claude Young of the second mortgage. Thereafter Claude Young contacted John Stickley and the corporation with reference to the validity of the mortgage, and was informed by them that the mortgage was invalid.

Lloyd Osborne testified that when Claude Young made the deal with John Stickley, he came to Osborne's office and wanted to know the balance due on the second mortgage, that he was trading with Stickley for the property. Lloyd Osborne informed Claude Young that there were payments due on the second mortgage, and Young told him that he hoped to be able to make payments, that he was contemplating going to Chicago where he could obtain a better salary, and the matter drifted on and no payments were made.

Claude Young testified that Lloyd Osborne informed him that he had the note and mortgage for collection and asked that it be paid, and Claude Young agreed to pay it if it was a legal mortgage, but he had been informed to the contrary; that no demand had ever been made on him by the appellee or by her husband prior to his death, or by the appellee's at-

torney, for payment of this mortgage; and that the mortgage constituted no part of the consideration in the purchase price, and when the agreement to purchase was made with Stickley, he had no knowledge of the mortgage.

In Robinson Bank v. Miller, 153 Ill. 244, 38 N. E. 1078, 46 Am. St. Rep. 883, 27 L. R. A. 449, it was held that the grantee of land who takes it subject to encumbrances is not bound to pay a mortgage thereon which did not constitute a part of the consideration of his purchase and which was not made in good faith for a real indebtedness.

"Where an incumbrance is not made a part of the consideration of an absolute conveyance, and is not deducted from it, and it is not assumed by the grantee, the recital in the deed that the conveyance is subject to an incumbrance does not estop the grantee from showing that the purported incumbrance is not one in fact because of its invalidity, * * * ." Brooks v. Owen, 112 Mo. 251, 20 S. W. 492.

A conveyance reciting that it is subject to all liens of mortgages does not constitute an admission that there are any such liens, and the recital does not estop the grantee from denying the validity of a lien upon the premises. See Sherman v. Goodwin, 12 Ariz. 42, 95 P. 121; Annotation to L. R. A. 1917C 832; 37 Am. Jur., Mortgages, s. 984, p. 318.

From an analysis of the evidence, it is apparent that when the appellants Young purchased the property from John Stickley, the mortgage in controversy constituted no part of the consideration for the purchase price. Under the circumstances the appellants are not estopped to raise the invalidity of the mortgage.

We conclude that the mortgage is null, void, and nonenforceable against the appellants.

For the reasons given in this opinion, the judgment of the district court is reversed and the appellee's cause of action dismissed.

REVERSED AND DISMISSED.

JAMES FRANKS, APPELLEE, V. JOHN R. JIRDON ET AL., APPELLANTS.

20 N. W. 2d 597

FILED NOVEMBER 16, 1945. No. 31977.

1. **Trial.** It is the duty of the trial court to present to the jury those issues which are raised by the pleadings and which find support in the evidence.
2. **Evidence.** One desiring to make an experiment in court or to introduce evidence of an experiment made out of court should first show that the experiment is to be made or was made, as the case may be, under conditions and circumstances similar to those prevailing at the time of the occurrence involved in the controversy.
3. ———. It is not, however, necessary in order to render experiments permissible or to admit evidence of experiments made out of court that the conditions be identical with those existing at the time of the occurrence; it is sufficient if there is a substantial similarity.
4. ———. A discretion is conferred upon the trial court in the reception of evidence of experiments and in order to authorize the reversal of a judgment on account of the admission or rejection of such evidence there must have been a clear abuse of discretion.
5. **Trial.** The proper method of presenting a case to the jury is a clear and concise statement by the court of those issues which find support in the evidence and not by substantially copying the pleadings of the parties and if, by doing the latter, it results in prejudice to the complaining party it is a sufficient ground for reversal.

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

Mothersead & Wright, for appellants.

F. J. Reed, for appellee.

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

WENKE, J.

Plaintiff brought this action at law to recover from the defendants the balance due on the purchase price of potatoes. From a verdict for the plaintiff the defendants appeal.

This case has previously been in this court. 144 Neb. 693, 14 N. W. 2d 372. It was reversed and remanded for retrial because the record contained competent evidence that required the court to submit the case to a jury. A retrial was had and the case again appealed.

A sufficient statement of the case can be found in our former opinion and the evidence will not again be set forth, except as it may be necessary to discuss it in connection with the errors complained of.

The appellants contend that the court submitted the case to the jury upon the wrong theory. It is, of course, the duty of the trial court to present to the jury the issues raised by the pleadings and supported by evidence.

By instruction No. 6 the court told the jury: " * * * You are further instructed that the only issue of fact presented by this case for the jury's consideration is the quantity of potatoes in the 14 bins on or about March 1, 1942, that would have passed over an inch and one-half potato screen with cuts, rots and greenheads discarded. Therefore, if you find that the plaintiff has proved by a preponderance of the evidence that there were over 4,375 hundred-weight of potatoes in the 14 bins that met or would have met the specifications of the sales contract as set out herein, you will find for the plaintiff, * * * ." The court further instructed the jury as follows: "You are instructed that upon the title to the potatoes in the 14 potato bins passing to the defendant, the defendant's liability for said potatoes was fixed at $1.45 per hundred-weight for all of the potatoes in said 14 bins that would have met the specifications of the sales contract and the plaintiff in order to recover is not required to prove where the potatoes were transported or what was done with them. The plaintiff in order to recover for the potatoes is not required to prove that they reached the defendants' warehouse or any other place."

The evidence shows that the appellants' country crew took possession of the appellee's potato cellar, in which the 14 bins of potatoes here involved were located, on or about March 1, 1942, and remained in possession thereof until all

of the potatoes in the 14 bins had been removed therefrom and processed.

On the other hand the appellants offered instructions, which the court refused, that would have submitted the case on the theory that they were liable only for the potatoes actually taken. The proposed instructions contain this language: "You are instructed that the sole question for your determination in this case is the number of plaintiff's potatoes that were taken and accepted by the Defendant. This is not an action for a breach of contract to purchase, but purely an action to recover for the potatoes actually taken, weighed and accepted by the defendant. You will therefore not allow plaintiff anything for potatoes that the defendant did not take and accept although said potatoes may have been potatoes that would have passed over a one and one-half inch screen, rots, cuts and green heads out. * * * You are instructed that the burden of proof is on the plaintiff to show by a preponderence of the evidence the amount of potatoes taken and accepted by the defendant under the contract involved in this suit."

The appellee's amended petition contains the following allegations: " * * * this plaintiff sold and the defendant bought all of the potatoes contained in the potato bins * * * defendants agreed that they would run all of said potatoes over a one and one-half inch potato screen and would discard 'rots, cuts and greenheads' and pay this plaintiff $1.45 per hundredweight for all of the saleable potatoes salvaged from the fourteen potato bins aforesaid by the above mentioned process. * * * That shortly thereafter * * * the defendants accepted and received all of said potatoes, appropriated same under the sale aforesaid and removed all of said potatoes from the premises where they were stored. * * * That there were in the fourteen potato bins aforesaid at the time of the aforesaid sale and at the time of the removal of said potatoes by the defendants, in excess of 5965 hundredweight of marketable potatoes that would have passed over a one and one-half (inch) potato screen after discarding all 'rots, cuts, and greenheads'."

Appellants, in their answer, admit: " * * * that under the terms of said sale the defendants agreed to pay plaintiff $1.45 per hundred weight for all of the potatoes that would pass over a 1½ inch potato screen except the rots, cuts and green-heads, all the processing, the moving and hauling of the potatoes to be done by the defendants, * * * ."

Ted Currier, one of the appellants and the party who negotiated for the purchase of the potatoes, testified to the offer he made the appellee as follows: "I offered Mr. Franks two different propositions on the purchase of his potatoes. One price of $1.50 over an inch and seven-eighths screen, cuts, rots and greenheads out. The other price was $1.45 over an inch and a half screen with the cuts, rots and green-heads out. * * * He took the $1.45 price."

In our former opinion in this case we said:

"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. * * *

"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?"

The appellee, on the second trial of this case, introduced evidence to show the kind, quality, quantity, and condition

of the potatoes sold as of about March 1, 1942, and then introduced evidence to show how much cubical space potatoes of that kind, quality, and in their then condition would occupy in order to produce a bushel or 60 lbs. of potatoes that would meet the specifications of the contract. On the other hand the appellants offered evidence of what was actually done in processing the potatoes, the kind and quality of the potatoes that they processed together with their records of the potatoes they said they actually removed. They also introduced evidence as to the cubical space that either a bushel or a hundredweight of potatoes would occupy. Under the issues raised by the pleadings, the evidence and the issue as defined in our former opinion, we think the court properly submitted the case on the correct theory.

There is some evidence as to what was done with the potatoes which the appellants left in the cellar after they had finished processing. These consisted of some 600 to 800 partial sacks. The appellee testified that Ted Currier told him to process them and clean up the cellar and that he would pay for doing so. The appellee subsequently processed what was left and from them he obtained some 528 sacks of various grades. There is testimony that from 50 to 75 percent of these were of a grade that should have gone under the contract. Appellee disposed of these potatoes but testified that the work had in connection therewith was worth more than the salvaged potatoes. Under the issues submitted the appellants bought all of the potatoes of a certain kind in these bins that would meet the specifications of the contract and if they failed to properly process them and left potatoes in the cellar that met the specifications it was their liability. If they subsequently had another reprocess of what was left at an expense greater than the value of what was obtained therefrom they cannot complain for under their contract they were required to process the potatoes in these 14 bins according to definite specifications and their failure to do so cannot relieve them of their liability.

Appellants contend that the court erred in refusing ad-

mission of their exhibits A, B, and C. These exhibits were the appellants' records made in connection with the washing of the potatoes taken to their Morrill warehouse. All the potatoes that the appellants claim were taken to their Morrill warehouse are set out in exhibits 14, 14-A, 14-B, and 14-C which exhibits were admitted in evidence and which set forth the number of bags and weight of the potatoes taken there. The admitted contract does not require the potatoes to be washed. The record made in connection with the washing is immaterial and irrelevant. The trial court was right in sustaining the objections made thereto.

The appellants contend that the court erred in striking all of the testimony of Carl Thomas relating to an experiment he made with sprouted potatoes to show the loss in weight and admonishing the jury not to consider it. Carl Thomas is a farmer living near Morrill, Nebraska. He testified that on July 3, 1942, he took a box that was constructed so that it had an opening one foot square and filled it with potatoes. The potatoes used were severely sprouted and had been placed on the warehouse floor where the experiment was conducted. He attempted, as nearly as possible, to level the top of the potatoes in the box. He then weighed the potatoes in the box with the sprouts and they weighed 36½ lbs. He then removed the sprouts from the potatoes in the box and from sufficient more of those on the warehouse floor so that he could again fill the box level full with the potatoes from which the sprouts had been removed. These weighed 41 lbs.

We think the court was right in striking this testimony and admonishing the jury not to consider it. The experiment was not based upon a sufficiently similar situation of fact as the one here involved to make it admissible. The potatoes used in the experiment were nearly all severely sprouted and getting soft and were loose on the warehouse floor so that in placing them in the box many of the sprouts must necessarily have come between the potatoes and thus materially decreased the number that could be placed therein while the potatoes here involved were placed in the cellar

when they were firm and without sprouts so that whatever sprouts they developed would have to grow in the voids between the potatoes. As stated in 20 Am. Jur., Evidence, s. 756, p. 628: "One desiring to make an experiment in court or to introduce evidence of an experiment made out of court should first show that the experiment is to be made or was made, as the case may be, under conditions and circumstances similar to those prevailing at the time of the occurrence involved in the controversy; otherwise, the courts will not, as a general rule, permit the making of the experiments or the introduction of evidence thereof. It is not, however, necessary in order to render experiments permissible or to admit evidence of experiments made out of court that the conditions be identical with those existing at the time of the occurrence; it is sufficient if there is a substantial similarity. Minor variations in the essential conditions go to the weight rather than to the admissibility of the evidence. If, on the other hand, the requirement of substantial similarity is not satisfied, the courts have uniformly refused to admit experimental evidence."

There is another reason why the ruling of the court should be sustained. As stated in Crecelius v. Gamble-Skogmo, Inc., 144 Neb. 394, 13 N. W. 2d 627: "This court recognizing the difficulties attending an offer of evidence of illustrative experiments has adopted the rule that in such cases a discretion is conferred upon the trial court and that unless there is a clear abuse of discretion a judgment will not be reversed on account of the admission or rejection of such evidence." We do not think that the trial court abused its discretion in refusing the admission of the evidence of this experiment.

Appellants complain that the court, in presenting the issues to the jury, largely copied the appellee's amended petition and in so doing presented issues upon which there was no evidence. Appellants refer particularly to that part of instruction No. 2 which is as follows: " * * * that the defendants removed said potatoes in various quantities within said period of time, and that the defendants afforded plain-

tiff no opportunity of ascertaining the number of bags removed therefrom and no opportunity to weigh, measure or ascertain the actual quantity of potatoes separated as marketable potatoes from said bins by the defendants; that the defendants weighed only a part of the potatoes which they processed as marketable potatoes. Plaintiff further alleges that the defendants in processing said potatoes caused the aggregate of said potatoes to be run over a screen having a mesh of one and seven-eighths inches instead of one and one-half inches as agreed, all of which was done by the defendants to defraud plaintiff in making it appear that the amount of saleable potatoes purchased were less than said bins actually contained; * * *."

This court has frequently criticized the practice of copying the pleadings as a method of stating the issues to a jury and where they contain allegations not supported by evidence it may be reversible error to include such allegations in defining the issues if the reviewing court is satisfied that the jury may have been misled thereby. See Hutchinson v. Western Bridge & Construction Co., 97 Neb. 439, 150 N. W. 193; McClelland v. Interstate Transit Lines, 139 Neb. 146, 296 N. W. 757. However, the fact that the court copied the pleadings in presenting the case to the jury is not alone sufficient to cause a reversal unless it can be said that the complaining party was prejudiced thereby. See Scott v. New England Mutual Life Insurance Co., 128 Neb. 867, 260 N. W. 377; Merritt v. Ash Grove Lime & Portland Cement Co., 136 Neb. 52, 285 N. W. 97.

Applying these principles to that part of instruction No. 2 of which the appellants complain, we do not find that the appellants were prejudiced thereby so that a retrial should be had. Taking first that part of the instruction which refers to the processing of the potatoes over a one and seven-eighths inch screen: The appellee testified that by the terms of their contract the potatoes were to be run once over a one and one-half inch screen and that running them more than once would cause damage. The appellants did run the potatoes over a one and seven-eighths screen and then what

went through were run over a one and one-half inch screen to get one-drop seed potatoes. Appellee knew this was being done after three bin spaces of potatoes had been processed. Second, that part of the instruction which recites that the appellants weighed only a part of the potatoes processed as marketable: Appellants and their witnesses testified they weighed all of the processed potatoes and paid for them. Appellee offered evidence to show the amount of potatoes in the bins at the time of the sale and what part thereof would comply with the contract requirements. The appellants' evidence was not conclusive. It was a question for the jury. Third, that part of the instruction which recites that the appellants removed said potatoes in various quantities within said period of time and that the appellants offered appellee no opportunity of ascertaining the number of bags removed therefrom and no opportunity to weigh, measure or ascertain the actual quantity of potatoes separated as marketable: This statement finds no support from the evidence in the record outside of possibly the first three bin spaces emptied.

The court instructed the jury that these instructions merely set forth the contentions of the parties and were not to be considered as evidence. The issues were subsequently limited and defined in other instructions. While it would have been better to have left out of instruction No. 2 the allegations discussed under the first and third phases of the criticized language, however, we do not think the jury could have been misled by the language used in view of the instructions as a whole and therefore come to the conclusion that it does not constitute prejudicial error.

For the reasons herein stated the verdict and judgment should be sustained.

AFFIRMED.

ANDREW KOZINA, APPELLANT, V. J. B. WATKINS LUMBER COMPANY ET AL., APPELLEES.

20 N. W. 2d 606

FILED NOVEMBER 23, 1945. No. 31947.

1. **Pleading.** A demurrer to a pleading admits the truth of the facts well pleaded for the purpose of determining their sufficiency as a cause of action or defense, but it does not admit the correctness of the conclusions of law drawn therefrom by the pleader.
2. **Trusts.** Where the facts in an amended petition fail to show a relationship with respect to property that would subject the person by whom the title of the property is held to an equitable duty to convey it to another on the ground that his acquisition or retention of the property is wrongful and that he would be unjustly enriched if he be permitted to retain the property, a contructive trust is not established.
3. ———. Where the facts pleaded in an amended petition fail to disclose sufficient circumstances to raise an inference that the settlor does not intend that the person taking or holding title shall have the beneficial interest, a resulting trust is not created.
4. **Pleading.** Where the laches of the plaintiff and the staleness of his claim are apparent from his petition, objection may be taken by demurrer.
5. **Equity.** Independently of any limitation for the guidance of courts of law, equity may, in the exercise of its own inherent powers, refuse relief where it is sought after undue and unexplained delay, and when injustice would be done, in the particular case, by granting the relief asked.
6. ———. Where the facts pleaded in an amended petition by a person claiming the right to redeem disclose that such person has been guilty of inexcusable negligence and that it would be inequitable to enforce his claim where there has been a change in the condition or relation of the property or parties, the doctrine of laches is applicable.
7. **Pleading: TRUSTS.** Facts pleaded in the amended petition held insufficient to state a cause of action against demurring defendants, and demurrers were properly sustained.

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

Anson H. Bigelow, for appellant.

J. J. Krajicek, for appellees.

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

MESSMORE, J.

This is an action in equity to redeem from two real-estate mortgages as the equitable owner thereof, and for an accounting.

The plaintiff's amended petition discloses the following facts: Early in 1925, the plaintiff, a building contractor, purchased by contract lot 16, block 2, Begley Park, an addition to the city of Omaha, and began the construction of a residence thereon for investment purposes. To complete the building and replenish his working capital, he deeded the property to his wife without consideration save their mutual covenants, under an oral agreement with her that the property was to be used only for procuring additional capital and to secure business debts; that he would repay all such sums and discharge the debts from his personal funds and hold her harmless therefor, and that the property, though held in her name, should remain his, with all its burdens, thereby in better protection of his wife should anything happen to him before the obligations were fully paid. On August 8, 1925, he joined with his wife in executing a note for $1,500 with interest, due August 8, 1930, and to secure the note, he joined with her in executing a mortgage on this real estate. With his capital replenished he carried on his business and later became indebted to the J. B. Watkins Lumber Company for materials furnished. To secure this indebtedness he and his wife joined in a note on May 29, 1929, in the amount of $2,054.46, bearing interest at six percent per annum, payable in installments of $50 per month. For further security, he and his wife entered into a second mortgage which was executed and delivered to J. B. Watkins personally, on the same property, in payment of plaintiff's obligation to the company. On August 8, 1930, the first mortgage became due and remained unpaid. On November 17, 1930, the lumber company pro-

cured an assignment from the plaintiff, bearing only his signature, of all the rents from the mortgaged property, knowing that the first mortgage was due and unpaid and that the plaintiff's wife still remained the titleholder. The assignment provided the rent received was to be applied on expenses incurred by the property, and any excess to be applied on unpaid accounts of the plaintiff with the company, the assignment to concern insofar as any interest the plaintiff appears to have in the property. Under the terms of the assignment the company took over the management of the property and collected the rentals, believed to average about $30 per month, for a period of 14 years without objection from the titleholder. The company assumed interest payments on the first mortgage and paid interest to August 12, 1933. On the same day the first mortgagee, in pursuance to an oral agreement had with the titleholder for a seven-year extension and renewal of the covenants of the first mortgage, prepared a written agreement, the effect of which was to extend the first mortgage to August 8, 1937. The extension was executed by the titleholder, then an unmarried woman, the plaintiff having procured a decree of divorce from her in October of 1932, which became final April 24, 1933. The plaintiff was not a party to the extension agreement. The divorce decree contained no modification or adjudication of the property rights of the parties respecting the property in controversy. After the first mortgage again became due, the lumber company paid it and became the owners thereof by assignment.

The plaintiff claims that the company concealed the facts with reference to the ownership of the first mortgage from him. He further claims he was refused information as to the rentals collected and expenses and payments made by the company on either mortgage, though he was entitled to this information as a coobligor on both original mortgages and as a beneficial mortgagor or the real owner of the equity of redemption in the mortgaged property.

By information obtained from various sources, the plaintiff believed the mortgage indebtedness was wholly or near-

ly paid. As a result thereof, he made demand on the lumber company and J. B. Watkins personally, by letter dated April 28, 1944, for an accounting, for the purpose of redemption, or to release the liens. There was no compliance with this demand.

The plaintiff further claims that the lumber company and J. B. Watkins, in bad faith, thereafter attempted to balk the plaintiff in his declared purpose to redeem the real estate, by fraudulently and collusively procuring and recording a warranty deed to the real estate from the plaintiff's divorced wife.

The prayer of the amended petition is to the effect that plaintiff be found entitled, as beneficiary of a trust, as co-obligor or otherwise, to the right of redemption; that the amount necessary to redeem be determined; that plaintiff be found entitled to an order of cancellation or satisfaction of either or both mortgages, if found fully paid, or upon payment within the time fixed of the amount found justly due, to an order, when redemption money has been paid or other conditions met, to operate as a conveyance to, or as quieting title in him; and for such other and different relief to which, in equity, he may be found entitled.

The tenants were made defendants to this action, and no cause of action is pleaded against them. For the purposes of this appeal they have no rights to be determined herein.

The plaintiff, appellant, for convenience hereinafter will be referred to as plaintiff, and the defendant appellees will be referred to as defendants.

The defendants demurred to the amended petition for the reason that the amended petition does not state sufficient facts to constitute a cause of action against each demurring defendant. The separate demurrers of each defendant were severally sustained. The plaintiff elected to stand on his amended petition, and not to plead further. Thereupon the court dismissed the plaintiff's cause of action. Plaintiff appeals, contending the court erred in severally sustaining the separate demurrers of the defendants and dismissing plaintiff's cause of action.

"A demurrer to a pleading admits the truth of the facts well pleaded for the purpose of determining their sufficiency as a cause of action or defense, but it does not admit the correctness of the conclusions of law drawn therefrom by the pleader." American Water-Works Co. v. State, 46 Neb. 194, 64 N. W. 711; Thurston County v. Farley, 128 Neb. 756, 260 N. W. 397.

With the foregoing rule in mind, the question is, does the amended petition state facts sufficient to constitute a cause of action against the defendants?

It is the plaintiff's contention that the facts pleaded in the amended petition establish a constructive trust.

"A constructive trust is a relationship with respect to property subjecting the person by whom the title of the property is held to an equitable duty to convey it to another on the ground that his acquisition or retention of the property is wrongful and that he would be unjustly enriched if he were permitted to retain the property * * * ." Restatement of the Law, Trusts, s. 1, p. 5. See, also, Wilcox v. Wilcox, 138 Neb. 510, 293 N. W. 378; Fisher v. Keeler, 142 Neb. 728, 7 N. W. 2d 659.

The purpose of the conveyance is clear. The wife was to use the property to procure additional capital and to secure the husband's business debts. He agreed to repay such debts from his personal funds. No requirement was made that the property be held in trust for him, or in any event that he would receive back the title to the property, or in the event she failed to use the property for the purposes for which it was agreed to use it, the title would revert to him. He sought to save her harmless. He conveyed the title to his wife to protect her in the event something should happen to him before the obligations were fully paid.

The amended petition discloses the plaintiff obtained a decree of divorce from Anna Kozina in October 1932, which became final on April 24, 1933.

Under the provisions of section 42-321, R. S. 1943, it is in the discretion of the court to award to the innocent party a share or interest in the real estate of the guilty party.

Gaster v. Estate of Gaster, 92 Neb. 6, 137 N. W. 900; Maxwell v. Maxwell, 106 Neb. 689, 184 N. W. 227. See Lippincott v. Lippincott, 144 Neb. 486, 13 N. W. 2d 721, and cases cited therein.

The plaintiff required no adjudication of the property here involved, and the record title remained in the wife. Obviously the husband recognized that he had deeded the title of the property to the wife and there it would remain. It is significant to note that when the first mortgage was extended the husband was not a party to the extension. The former wife, then an unmarried person, was looked to by the first mortgagee as the titleholder and the one to agree with to extend the mortgage. Having the record title, the former wife subsequently, as an unmarried person, by warranty deed deeded to the lumber company. It is apparent that the plaintiff parted with the title when he made the conveyance to his wife in 1925. The plaintiff's contention that a constructive trust is established by the facts pleaded in the amended petition cannot prevail.

The question next arises, are the facts pleaded in the amended petition sufficient to create a resulting trust in favor of the plaintiff? Such a trust is one which results in law from the acts of the parties, whether they intended to create a trust or not, sometimes called a presumptive trust because the law presumes such trust to be intended by the parties from the nature and character of their transactions with each other, although the general foundation of this kind of trust is the natural equity that arises when parties do certain things. See 1 Perry on Trusts and Trustees (7th ed.), s. 124, p. 183.

Restatement of the Law, Trusts, s. 1, p. 6, "A resulting trust arises where circumstances raise an inference that the settlor does not intend that the person taking or holding title shall have the beneficial interest (See sec. 404)."

Without repeating the facts as pleaded in the amended petition, it is obvious they do not meet the requirements to establish a resulting trust. On the contrary, they show clearly the grantor fully expected his wife to receive the

beneficial interest in the property. This is manifest by his conduct as heretofore set out.

This court is also committed to the doctrine that where the laches of the plaintiff and the staleness of his claim are apparent from the petition, objection may be taken by demurrer. Hawley v. Von Lanken, 75 Neb. 597, 106 N. W. 456. In the cited case the court said: "'* * * it is now well settled that, independently of any limitation prescribed for the guidance of courts of law, equity may, in the exercise of its own inherent powers, refuse relief where it is sought after undue and unexplained delay, and when injustice would be done, in the particular case, by granting the relief asked. * * *'" In Severson v. McKenzie, 122 Neb. 827, 241 N. W. 774, this court quoted with approval from Hawley v. Von Lanken, *supra*, the following statement: "Courts of equity have inherent power to refuse relief after undue and inexcusable delay independent of the statute of limitations." See, also, Abraham v. Ordway, 158 U. S. 416, 15 S. Ct. 894, 39 L. Ed. 1036; Barger v. City of Tekamah, 128 Neb. 805, 260 N. W. 366; Bend v. Marsh, 145 Neb. 780, 18 N. W. 2d 106.

"Laches does not grow out of the mere passage of time. It is founded upon the inequity of enforcing a claim where there has been a change in the condition or relations of the property or parties." Platte Valley Bank v. Lemke, 141 Neb. 218, 3 N. W. 2d 396. See, also, Galliher v. Cadwell, 145 U. S. 368, 12 S. Ct. 873, 36 L. Ed. 738.

The plaintiff parted with the record title to his former wife in 1925. Since that time, as shown by the facts heretofore set out, he made no effort to assert any claim or interest in the real estate here involved, until he brought this action in June of 1944, a period of 19 years. On November 17, 1930, he gave the assignment, personally signed by him, to the lumber company. All the assignment does is to assign to the lumber company all rents received from the property to be applied on expenses incurred by the property and if any excess remains, the excess to be applied on other unpaid accounts with the company. Under this as-

signment the lumber company went into possession as mortgagee and collected the rents. As far as the assignment is concerned, it is clear that there was no requirement that any excess over and above the expenses incident to the property would be applied on the mortgage indebtedness. This is in keeping with the plaintiff's pleading, in that he would pay the indebtedness from his personal funds. Approximately 15 years from the time of making this assignment the plaintiff seeks an accounting against the lumber company and J. B. Watkins personally. During the interim many changed conditions resulted. We make reference to the facts heretofore set out as pleaded in the amended petition.

The negligence of the plaintiff by his acts and conduct in the instant case is inexcusable. Laches is founded upon the inequity of enforcing a claim where there has been a change in the conditions or relation of the property or parties, cases previously cited.

We conclude the court properly sustained the separate demurrers of the defendants.

AFFIRMED.

Wenke, J., participating on briefs.

BYRON (BUD) MORROW, PLAINTIFF IN ERROR, V. THE STATE OF NEBRASKA, DEFENDANT IN ERROR.

20 N. W. 2d 602

FILED NOVEMBER 23, 1945. No. 31971.

1. **Trial**: APPEAL AND ERROR. 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 gist of the offense in a prosecution for larceny as bailee is the conversion of property lawfully obtained with

the knowledge and consent of the owner thereof with intent to steal.

3. ———. In order to prove a charge of larceny as bailee the burden is on the state to establish that the accused came into possession of the property which is the subject of the charge lawfully and that he thereafter unlawfully and with intent to steal converted it to his own use.
4. Appeal and Error. Unless the record discloses an objection or an exception to remarks of a trial judge a complaint with regard thereto cannot be reviewed on appeal.
5. ———. An assignment of error in a motion for a new trial to the effect that the trial court erred in giving a group of instructions does not require a consideration of such assignment further than to ascertain that one of the instructions was properly given.
6. ———. It is not error for the court to refuse to give an instruction cautioning the jury that where sheriffs and deputy sheriffs are called to testify as witnesses in a criminal case greater care should be exercised in weighing their testimony than that of ordinary witnesses.

ERROR to the district court for Thurston County: SIDNEY T. FRUM, JUDGE. *Affirmed.*

Mark J. Ryan, for plaintiff in error.

Walter R. Johnson, Attorney General, and *C. S. Beck,* for defendant in error.

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

YEAGER, J.

This is a criminal action wherein in the district court for Thurston County, Nebraska, Byron (Bud) Morrow, plaintiff in error here and defendant there, was prosecuted on an information containing two counts. In the first count he was charged with the offense of larceny as bailee of five hogs, the property of one Charley Parker. In the second count he was charged with larceny of the same five hogs.

The plaintiff in error will be referred to hereinafter as the defendant.

A trial was had to a jury. The jury returned a verdict of guilty on the charge of larceny as bailee and a verdict of not guilty of the charge contained in the second count of

the information. Motion for new trial was duly filed and overruled whereupon the defendant was sentenced to serve a term of one year in the State Penitentiary.

After receiving his sentence the defendant filed his petition in error in this court, the object and purpose of which is to obtain a reversal of his conviction and sentence.

In his brief the defendant sets out numerous assignments of error. Not all of them require consideration and discussion.

The first assignment is that the court erred in not sustaining defendant's motion to dismiss count one of the information. The third is that the evidence is insufficient to sustain the conviction. The two assignments do not require separate treatment. Obviously the contention is that the charge therein was not supported by the evidence. This then calls for a brief review of the evidence.

The testimony on behalf of the state was to the effect that Charley Parker was the owner of five Hampshire hogs each of the weight of about 75 pounds. The hogs were last seen on his premises about October 21, 1944. A search was made for them thereafter but they were not found. Later a check was made at the Pender Livestock Sales Company sale pavilion and it was ascertained that the defendant had delivered five hogs to the pavilion on October 27, 1944, and that they were sold on October 28, 1944. The sheriff was called and a search was made. The hogs which had been sold by defendant were traced to the people to whom they had been sold. They were identified by Charley Parker as his own. They were also identified by his wife, his son, and his daughter. The defendant claimed ownership of the hogs and denied that they were or ever had been the property of Charley Parker.

This evidence presented to the jury for decision and determination a disputed question as to the ownership of the hogs and while not assuming to weigh it here on review we do not hesitate to say that the evidence was sufficient upon which to sustain a finding by the jury that Charley Parker was the owner of the hogs. The appropriate rule in this

connection is the following: "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; Phillips v. State, 144 Neb. 772, 14 N. W. 2d 606. This being true this phase of the assignment must be resolved in favor of the state.

The fourth assignment is that there was no evidence tending to establish a bailment. This assignment must be considered in determining whether or not assignments one and three are available to defendant since without proof of bailment of the hogs of Charley Parker in the defendant proof of the first count fails.

In order to prove the charge of larceny as bailee the burden was on the state to establish that the defendant came into possession of the hogs of Charley Parker lawfully and that he thereafter unlawfully and with intent to steal converted them to his own use. Sec. 28-540, R. S. 1943; Ford v. State, 46 Neb. 390, 64 N. W. 1082; Davis v. State, 54 Neb. 177, 74 N. W. 599; Cohoe v. State, 82 Neb. 744, 118 N. W. 1088; Frades v. State, 131 Neb. 811, 270 N. W. 314.

The evidence of the state as to the manner in which the hogs came into the possession of defendant is altogether circumstantial. They were allowed to run at large by Parker. The defendant sold them at Pender. If the defendant sold Parker's hogs obviously he converted them to his own use. If there was a conversion the evidence was sufficient to justify the jury in concluding that within the meaning of the statute it was with intent to steal.

There remains on this question the propriety of the jury in finding that the intent to convert was conceived after the hogs came lawfully into possession of the defendant. They had a choice since they had the two counts before them. Felonious intent to convert at the time of obtaining possession would have amounted to larceny. Felonious intent conceived thereafter amounted to larceny as bailee. After examining the record we are unable to say that their choice was the wrong one.

If then within the meaning of the law the evidence was sufficient to establish the existence of a bailment we cannot say that the court erred in refusing to sustain defendant's motion to dismiss count one or that the evidence was insufficient to sustain the conviction.

The defendant contends substantially that even if the jury were correct in finding that he came into possession of the hogs of Parker that such possession did not amount to a bailment. With this contention we are not able to agree. This court in Ford v. State, *supra,* in explanation of the meaning of the statute, said: "The gist of the offense in such a prosecution (for larceny as bailee) is the conversion of the property without the knowledge and consent of the owner thereof with the intent to steal the same." Neither the statute nor the decisions go beyond this declaration. There is no requirement that a bailment within the meaning of this statute shall be created in any particular way. With the reported cases as illustrations it becomes clear that the statute is satisfied if it be proved that the property be received lawfully and thereafter converted with intent to steal. Ford v. State, *supra,* is a case wherein a ring was borrowed and later pawned. Cohoe v. State, *supra,* is a case wherein money was found and converted. Frades v. State, *supra,* is a case wherein a bull was borrowed and converted. This court held in all three of these cases a bailment existed. The principle of these cases is not different than the one involved here. Under the evidence the jury was justified in finding that defendant came into possession of the hogs as bailee.

The second assignment is that the court erred in refusing to sustain defendant's motion to dismiss count two of the information. Whether or not the court was in error is of no consequence since the jury found the defendant not guilty on this count.

The next assignment to which we shall direct attention is the eighth. It is that the court erred in commenting upon the testimony of the witness Emilie Parker.

From an examination of the testimony and of the remark

we do not consider that it comes within the category of remarks by trial judges condemned by this court. Be that as it may the defendant on the record is precluded from making any complaint here with regard thereto. He took no exception to the remark by motion to strike, motion for mistrial, or otherwise.

It has long been the rule that unless the record discloses an objection or an exception to remarks of a trial judge a complaint with regard thereto cannot be reviewed on appeal. In Ford v. State, *supra,* it was said: "The record failing to disclose any exception to the remarks of the trial judge, of which complaint is here made, the same cannot be reviewed." See, also, Payne v. Clark, 117 Neb. 238, 220 N. W. 262; Pittenger v. Salisbury & Almquist, 125 Neb. 672, 251 N. W. 287; Kennedy v. Woods, 131 Neb. 217, 267 N. W. 390.

The ninth assignment of error is that the court erred in overruling objections and permitting the witnesses for the state to repeatedly change their testimony. This assignment is very general and is difficult to follow through the arguments in the brief. The bill of exceptions has been examined and it is apparent therefrom that there are some discrepancies in the testimony of certain witnesses but it cannot be said that these discrepancies result from any ruling of the court. We do not pretend to account for all of them but some obviously resulted from misunderstanding of questions propounded and some from inadvertence in statement. Clearly the control thereof could not be said to have been properly in the hands of the court. The weight of this evidence and the credibility of the witnesses was for the jury.

The fifth assignment of error is that the court erred in giving instructions No. 3, 4, 5, and 6, of its own motion, and the sixth that the court erred in giving of its own motion instructions No. 13, 14, and 15. These two assignments will be treated together since from an examination of the motion for new trial the assignments may not be considered if a single one of the instructions numbered from 3 to 9 inclusive and 11, 12, 13, 14, 15, 19, 21, and 22 correctly states the

law. The assignment of error in the motion for new trial is an attack upon this group of instructions as a whole and not separately. It has long been the rule of this court that an assignment of error in a motion for a new trial to the effect that the trial court erred in giving a group of instructions does not require a consideration of such assignment further than to ascertain that one of the instructions was properly given. Weir v. Burlington & M. R. R. Co., 19 Neb. 212, 26 N. W. 627; City of South Omaha v. Powell, 50 Neb. 798, 70 N. W. 391; Holst v. Warner, 116 Neb. 208, 216 N. W. 659; Anderson v. Nebraska Defense Corporation, *ante* p. 466, 20 N. W. 2d 322.

An examination of the instructions discloses that at least some of them correctly state the law. These two assignments of error therefore require no further consideration.

The seventh assignment charges that the court erred in refusing to give instruction No. 6 requested by the defendant. The request was that the court instruct the jury that in weighing the testimony of law enforcement officers who are specially charged with the duty of securing evidence, greater care should be used than in weighing the testimony of ordinary witnesses because of a natural and unavoidable tendency of such officers to procure and remember with partiality such evidence as would be against a defendant.

This court has held repeatedly that it is not error to refuse to give an instruction cautioning the jury that where sheriffs and deputy sheriffs are called to testify as witnesses in a criminal case greater care should be exercised in weighing their testimony than that of ordinary witnesses. McCartney v. State, 129 Neb. 716, 262 N. W. 679; Koch v. State, 130 Neb. 119, 264 N. W. 172; Schlegel v. State, 143 Neb. 497, 10 N. W. 2d 264.

The tenth and last assignment of error in the brief of the defendant is that the trial court erred in requiring defendant to plead to the charge or charges contained in the information.

Just what defendant's legal theory is in this connection is not made clear. There is no attack on the information or

the proceeding by motion, plea in abatement, or demurrer and no objection to trial upon the information has been registered. We can conclude only that the assignment is without merit.

Finding no reversible error in the record the judgment of the district court is affirmed.

AFFIRMED.

HENRY H. HASSMANN, APPELLEE, V. THE CITY OF BLOOMFIELD, NEBRASKA, APPELLANT.
20 N. W. 2d 592

FILED NOVEMBER 23, 1945. No. 31951.

1. **Workmen's Compensation.** The burden of proof is upon the claimant in a compensation case to establish by a preponderance of the evidence that personal injury was sustained by the employee by an accident arising out of and in the course of his employment.
2. ———. A compensation award cannot be based on possibilities or probabilities, but must be based on sufficient evidence that the claimant incurred a disability arising out of and in the course of his employment.
3. ———. The rule of liberal construction of the Workmen's Compensation Act applies to the law, not to the evidence offered to support a claim by virtue of the law. The rule does not dispense with the necessity that claimant prove his right to compensation within the rules above set out, nor does it permit a court to award compensation where the requisite proof is lacking.

APPEAL from the district court for Knox County: FAY H. POLLOCK, JUDGE. *Reversed and dismissed.*

Votava & McGroarty, for appellant.

Frank L. Burbridge, for appellee.

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

CHAPPELL, J.

This is a workmen's compensation case. After a hearing before one judge of the compensation court and dismissal of

plaintiff's claim, rehearing before the full court was waived and appeal taken by plaintiff to the district court. That court granted plaintiff an award and defendant appealed to this court, assigning as error that the award is not supported by the evidence and applicable law. Upon examination of the record we are of the opinion that the findings of fact made by the trial court are not conclusively supported by the evidence and the cause will be considered de novo, as provided by sec. 48-185, R. S. 1943. Zanski v. Yellow Cab & Baggage Co., 143 Neb. 340, 9 N. W. 2d 302. In doing so we find that defendant's assignments of error should be sustained and an award denied.

It has long been the policy of this court to give a liberal construction to the Workmen's Compensation Act so that its beneficent purposes may not be thwarted by technical requirements of interpretation. Zanski v. Yellow Cab & Baggage Co., *supra*. However, it must be remembered that the rule of liberal construction of the Workmen's Compensation Act applies to the law and not to the evidence offered to support a claim by virtue of the law. The rule does not dispense with the necessity that claimant prove his right to compensation within the rules hereinafter set forth nor does it permit a court to award compensation where the requisite proof is lacking. Chambers v. Bilhorn, Bower & Peters, 145 Neb. 277, 16 N. W. 2d 173.

In that connection the rule is that the burden of proof is upon a claimant in a compensation case to establish by a preponderance of the evidence that personal injury was sustained by the employee by an accident arising out of and in the course of his employment. A compensation award cannot be based on possibilities or probabilities but must be based upon sufficient evidence that the claimant incurred a disability arising out of and in the course of his employment. Kaffenberger v. Iverson, 142 Neb. 257, 5 N. W. 2d 687; Zanski v. Yellow Cab & Baggage Co., *supra*; Chambers v. Bilhorn, Bower & Peters, *supra*.

With these rules in mind we will briefly review the evidence which predicates the result. Plaintiff was a large

man, 63 years of age at the time of trial. He had served as city marshal for defendant city many years. His health had been good except for recurring rheumatism, which was improved by removal of his teeth, and "belly aches" which occurred "not very often," as he stated it.

He testified that on December 25, 1941, while on duty and heavily dressed he slipped on the curb, fell flat, and felt a pain in his right side. Upon seeing his physician pass on the street he went with him to his office. There the physician dressed his hand, which had been slightly injured upon another occasion not connected with the fall. He then told the physician about his fall and complained of pain in his side and ankle. Examination of his abdomen and ankle disclosed no evidence of bruises or marks of violence and there were then no objective symptoms of a ruptured gall bladder.

Plaintiff also testified that on December 27, 1941, he slipped and fell again. He first testified that he fell on his head but later that he fell on his hip. Later his physician was called to the home where plaintiff complained of pain in his knee, ankle, and abdomen. At that time there was a slight bruise on his knee and slight muscle rigidity of his abdomen. The next day, not feeling well, he did not report for duty. Examination of plaintiff and X-ray taken December 29, 1941, disclosed no evidence of fracture of the knee or ankle. On December 30, 1941, he became quite ill and was taken to a hospital in Sioux City, Iowa.

His surgeon testifies that at that time plaintiff gave him a history of several recent falls on icy streets, the most severe of which was a few days previously at which time he injured his knee and bruised his upper right abdomen of which he had no previous complaint. An examination made at that time by the surgeon was mostly negative except for tenderness and some rigidness in the upper right quadrant. However, from the history given by plaintiff the surgeon's diagnosis was possible fracture of the liver. X-rays disclosed a nonfunctioning gall bladder. On January 12, 1942, plaintiff was dismissed from the hospital and returned

to his home for rest and preparation for subsequent surgery.

He was readmitted to the hospital on January 29, 1942, and a drainage operation disclosed an abscess secondary to rupture of his gall bladder. A few stones were found in the abscessed cavity and removed. Plaintiff was dismissed from the hospital on February 17, 1942, but readmitted on May 7, 1942, with a biliary fistula secondary to his drainage operation. A second operation was then performed which consisted of the removal of plaintiff's gall bladder, with stones therein and drainage of the common duct. He was dismissed from the hospital on May 23, 1942, and has recovered.

Plaintiff's physician testified that rupture of the gall bladder was very rare and resulted from two causes, disease and trauma, a very minute percent of which result from the latter and most of them from direct blows or stab wounds. He admits that if no marks of violence were present, as in the case at bar, it would be a very rare case since the gall bladder has a tough wall and is very well protected by other parts of the body, including the liver. He testified that he was of the opinion that the rupture of plaintiff's gall bladder resulted from his falls but admits that the rupture could have been caused by trauma or could have been caused by an infection or a necrosis resulting from stones and if plaintiff had never fallen he would say that it resulted from the latter.

Plaintiff's surgeon reported in writing to plaintiff's physician in part as follows: "I don't know how Mr. Hassmann is going to come out with the insurance company. There is no question but that he had an empyema of the gall bladder with perforation—a walled-off abscess. Whether such condition could be caused by an injury is questionable." In another letter to the physician he said in part: "The only leg Mr. Hassmann has to stand on is the history of no previous symptoms before his falling and his sequence following the fall."

The surgeon testified that a ruptured gall bladder is ordi-

narily associated with a previously diseased gall bladder and is ordinarily due to obstruction or infection causing distention whether by stones, streptococcus, typhoid, or other factors. He admits that the rupture of plaintiff's gall bladder could be explainable solely on the basis of disease but the sequence of events would make him think that trauma had something to do with it. However, without history of a fall he would say it was caused by disease since it could be present without recognizing the symptoms. He admits that in the absence of stab wounds or pressing injury the conclusion that it was caused by trauma could not be based solely on the history given. Finally the surgeon said that to be honest the alleged fact that the fall aggravated plaintiff's diseased condition is purely conjectural since his condition was explainable as well solely on the basis of disease, regardless of any fall.

A physician who specializes in internal medicine and diagnosis and is an associate professor of medicine at the University of Nebraska, College of Medicine, testified for defendant. He had during his practice seen and treated a large number of gall-bladder cases. He describes the gall bladder as a conical, suspended, stout, elastic, muscular sac under and attached to the liver. It stores the bile and of necessity expands and contracts. He says that it is very difficult to rupture except by direct blow, such as gunshot wounds, and that there are two kinds of diseased gall bladder, one with and the other without stones. The evidence conclusively supports his statement that plaintiff must have had chronic gall-bladder disease with stones at the time of his accidents. He explained that if a stone obstructs the return of bile to the common duct it sets up an irritation and pressure, resulting in inflammation, shutting off circulation leading to necrosis and perforation, the size of which determines the extent of subsequent symptoms. After perforation nature then attempts to seal it but if unable to do so an abscess develops or if the perforation is large enough an abscess does not develop but the patient goes into immediate shock and disablement requiring opera-

tion. Such perforations are not rare in chronic gall-bladder disease with stones but very, very rarely caused by trauma. If an abscess develops it demonstrates that originally it was a small perforation. If stones are found in the abscess, as in this case, it simply means that the perforation of the gall bladder subsequently became large enough for them to escape. He says that plaintiff undoubtedly had a ruptured gall bladder but just when it started is purely conjectural since the result in plaintiff's case is no different from those cases without history of accident. He testified that trauma could not produce stones or inflammation and resulting necrosis, therefore the only question was whether plaintiff's accidents hastened the rupture of his gall bladder and that since the same result could as well follow without accident the answer would be purely conjectural.

We conclude that the evidence supporting plaintiff's contention that he incurred a disability arising out of and in the course of his employment is purely speculative and conjectural, based on possibilities and probabilities, which will not support an award. For the reasons heretofore given the judgment of the trial court is reversed and the case is dismissed.

REVERSED AND DISMISSED.

Wenke, J., participating on briefs.

YEAGER, J., dissenting.

I cannot agree with the majority opinion in this case. It appears to me that this court has taken a position on undisputed facts which position, in this case and for the future, places a claimant in a workmen's compensation action in a less favorable position than a plaintiff in a common law action for damages for personal injuries or in an action to recover for injuries under an accident insurance policy. This ought not to be true. This court ought not to add to the disadvantage of workmen's compensation claimants already imposed by the Legislature wherein it declared among other declarations that there could be no recovery in the absence of objective symptoms of injury at the time of accident.

Sec. 48-151, R. S. 1943; Shamp v. Landy Clark Co., 134 Neb. 73, 277 N. W. 802. This is not true in an action at common law or on an insurance policy. This statement requires no citation.

I am finding no particular fault with any principle of law announced in the majority opinion but I do seriously contend that the court has failed to recognize the true purport and effect of the facts.

I am in accord with the proposition that the burden of proof is upon the claimant in a compensation case to establish that personal injury was sustained by the employee by accident arising out of and in the course of his employment. I am also in accord with the proposition that a compensation award cannot be based on possibilities or probabilities but must be based upon sufficient evidence that the claimant incurred a disability arising out of and in the course of his employment.

My point is that the plaintiff herein did meet the requirements of these rules of law the majority opinion to the contrary notwithstanding.

The majority opinion disposes of the question of objective symptoms in the following words: "Examination of his abdomen and ankle disclosed no evidence of bruises or marks of violence and there were then no objective symptoms of a ruptured gall bladder."

In my opinion this is neither a complete nor proper disposition of this question. The statute as applied to this case does not exact objective symptoms of a ruptured gall bladder. It only requires "objective symptoms of an injury." Of course I would not contend that objective symptoms not in the vicinity of the ultimate injury complained of would satisfy the statute, but surely if objective symptoms were found in the immediate vicinity the burden of proof in this respect would be met. Surely the Legislature did not intend, when it placed this already unusual burden on a workmen's compensation claimant, to have the court interpret it to mean that there could never be a recovery unless the objective symptom was a manifestation of the disabling injury.

I think there was evidence of objective symptoms within the true meaning of the statute. Within a short time after the first fall the plaintiff called upon his doctor to have a hand dressed. The condition of the hand had no connection with the fall. At the time, however, it is apparent that an examination of plaintiff's abdomen was made. Testifying with regard to it the physician said: "I dressed his hand and examined his abdomen and I couldn't find much outside of his complaint—much symptoms. There wasn't a great deal of tenderness or a great deal of rigidity of the muscles, but he still complained of his pain and appeared sick." It is clear to me that this amounts to a statement that rigidity of abdominal muscles—objective symptoms—was found.

This court is powerless to do anything about the unfavorable inequality of claimants in workmen's compensation cases with plaintiffs in common law actions for personal injuries and plaintiffs in actions on accident insurance policies created by the Legislature but it should not add to that inequality by a strained interpretation of "objective symptoms."

Coming now to the question of whether or not, aside from the question of objective symptoms, plaintiff has sustained the burden of proof imposed upon him by law, I respectfully insist that he has done so sufficiently and without contradiction.

The majority insist that his evidence leaves him in the realm of possibility, probability, and speculation. With this I cannot agree.

The attending physician and the operating surgeon each gave it as his opinion that the ruptured gall bladder came about in consequence of the fall or falls. The pertinent portion of the testimony of the physician was the following: Q. "Do you know at this time what the diagnosis should be? A Today? Q Yes. A He had a ruptured gall bladder. Q He had a ruptured gall bladder? A That was found on surgery. Q To what do you attribute that, Doctor? * * * A From his symptoms and the times I saw him and for the conditions that he complained of and his physical condition,

I would say that it was the result of his falls. Q The result of the falls of December 25th and December 27th? A Yes. * * * Q Well, Doctor, from the history and your findings, what would you say that Mr. Hassmann suffered there on December 25th and 27th as a result of this fall? A I believe he suffered abdominal injury and the findings from the surgery indicated that abdominal injury was a ruptured gall bladder."

The pertinent portion of the testimony of the surgeon was the following: "Q This abscess that you spoke about, Doctor, where was that? A Well, that was a walled-off abscess in the region of the gall-bladder. Q Connected with the gall-bladder? A Yes. Q In your opinion what caused that? A Well, I would just have to say this: that he evidently had had this gall-bladder trouble, which evidently didn't give him symptoms, but following the trauma the symptoms became evident. * * * Q In other words, the condition there in the gall-bladder was aggravated by this fall? * * * A Well, the only thing I can say is that the sequence of events would make one have to consider that the trauma precipitated his trouble. Q In other words, in your opinion then this condition he had at the hospital was precipitated by this fall or aggravated? * * * A Yes."

On cross-examination this surgeon gave the following testimony: "Q But isn't it a fact, Doctor, that this roll that this fall played in aggravating this diseased condition is purely conjectural? A Well, I suppose to be honest one would have to say that too. * * * Q But in this particular case it is questionable, isn't it, Doctor? A There you fellows are right back to the same spot and I am trying to be honest with you and tell you it is just the association of the history and the subsequent findings."

It is true that the testimony of the surgeon on cross-examination would seem to cast some doubt upon his opinion but that is not true of the testimony of the physician.

As against the considered opinion of these two witnesses the defendant called a specialist in internal medicine and diagnosis. This witness based his testimony on experience

and knowledge of the subject in hand, the history of the case, hospital records, and the testimony given by other witnesses. He did not refute or attempt to refute the opinions of plaintiff's witnesses. He expressed no opinion. The pertinent part of his testimony is the following: "Q In other words, you wouldn't tell this Court this fall had nothing to do with the perforation, would you? A No; I cannot say that it did; or I cannot say that it didn't. I am perfectly open minded about it." And again: "I have seen them there and if the trauma was there, there is no difference between this case and the cases that I have seen and handled where there is no history of trauma indicated. It is purely conjecture. I could not say. Anything is possible."

All that he did or attempted to do was to speculate. Is the proper and competent evidence of plaintiff to be overcome by admitted speculation? It would be a strange rule that a plaintiff should be required to prove his claim by proper and competent evidence and he must remove himself from the realm of speculation but mere speculation on the part of his adversaries without denial may be sufficient to defeat his claim founded upon evidence.

In the light of the recent cases of Long v. Railway Mail Assn., 145 Neb. 623, 17 N. W. 2d 675, and McNaught v. New York Life Ins. Co., 145 Neb. 694, 18 N. W. 2d 56, it is clear that if this were a case triable to a jury the evidence of plaintiff here would be sufficient upon which to base a verdict. In truth a comparison of the evidence here with that in Long v. Railway Mail Assn., *supra,* will disclose that if this were a jury case the evidence alone of the surgeon, weakened as it is by the answers on cross-examination, would be sufficient to sustain a verdict.

This being true and there being no evidence to counter that of plaintiff, should this court, on the mere record, in the face of the fact that the trial court had opportunity to observe the witnesses who appeared in court and testified, and found and decreed that the plaintiff had proven a right of recovery under the workmen's compensation law, disbelieve the plaintiff's testimony and overturn that finding and decree? I respectfully insist that it should not do so.

IN RE ESTATE OF JOHN W. SEXTON.
HARVEY E. SEXTON, APPELLEE, V. HARRY POPKAY, ADMINISTRATOR, APPELLANT, IMPLEADED WITH DELLA SEXTON BUSCHHUSEN ET AL., APPELLEES.

20 N. W. 2d 871

FILED NOVEMBER 30, 1945. No. 31909.

1. Wills. Section 30-217, R. S. 1943, precludes anyone but a party concerned from contesting a will.
2. ———. Under the provisions of section 30-217, R. S. 1943, a party concerned, who may appear and contest the probate of a will, is one who has a direct pecuniary interest in the estate of the alleged testator, which will be defeated or impaired if the instrument in question is held to be a valid will.
3. ———: EXECUTORS AND ADMINISTRATORS. An administrator of an intestate estate, as such, is not a party concerned within the meaning of section 30-217, R. S. 1943, and does not have a right to contest a purported will presented for probate in the estate that he is administering.
4. ———: ———. An interest in the fees of administration is not sufficient to entitle an administrator to contest a purported will.

APPEAL from the district court for Sioux County: EARL L. MEYER, JUDGE. *Affirmed.*

Porter & Porter, for appellant.

R. R. Wellington, for appellee.

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

SIMMONS, C. J.

A purported will was offered for probate in an estate where intestate proceedings were being had. The administrator and heirs contested. The will was admitted to probate. The administrator filed a motion for a new trial. The trial court dismissed his motion. We affirm the judgment of the trial court.

On August 4, 1937, a petition was filed in the county court of Sioux County alleging that John W. Sexton had died intestate, naming the petitioner, Edward Harvey Sexton, a brother, as survivor, and praying that letters of adminis-

tration be granted to Harry Popkay. The county court found that deceased had died intestate and granted the prayer of the petition, naming Harry Popkay as administrator. He qualified and the administration of the estate proceeded.

Thereafter a petition was filed by Della Bessie Sexton Buschhusen alleging that she and two others were the sole and only heirs at law of the deceased, and praying for such a determination. The county court found that the three named persons were the daughters and the sole and only heirs of the deceased.

An allowance was made to the administrator for his services. The administrator filed his final account and petition for distribution. While that matter was pending, a purported last will of deceased was filed, and the brother petitioned for its probate. Harry Popkay, as administrator, filed objections to the probate of the will. A hearing was had, the instrument was admitted to probate, and W. E. Mumby was appointed to administer the estate under the will. It is recited in the county court's decree that the three daughters were contestants, although how or when they became such is not disclosed. Thereafter the administrator and the three daughters filed a notice of appeal.

A transcript of the proceedings was filed in the district court. A jury was waived and trial had, resulting in a finding that the instrument was the last will and testament of the deceased and should be allowed and probated as such. The administrator filed a motion for a new trial. It was submitted and while being considered the proponent of the will orally moved to dismiss the administrator's motion for a new trial for the reason that he was not a proper party appellant. The trial court sustained the motion.

The administrator appeals, presenting the sole question of his right to be a party appellant. The answer to this question depends upon the right of an administrator, who has entered upon the duties of his office, to contest a will afterward presented for probate, for if he does not have the right to contest, it is obvious that he would not have a right to appeal.

The statute provides that when a petition is filed for the probate of a will, a time and place for proving it shall be fixed, notice thereof given and "all concerned may apppear and contest" the probate of the will. Sec. 30-217, R. S. 1943. The legislative meaning of the word "concerned" is indicated in the proviso to the section that "anyone who is or claims to be an heir of or otherwise interested in the estate" where a will has been admitted to probate without publication of notice may under certain circumstances assert and protect his interest. The statutory provision precludes any but a party concerned from contesting a will. In re Goldsberry's Estate, 95 Utah 379, 81 P. 2d 1106.

"An 'interested person' or an 'aggrieved person' is one who has a direct pecuniary interest in the estate of the alleged testator which will be defeated or impaired if the instrument in question is held to be a valid will." 2 Page, Wills, s. 610, p. 154.

The administrator of an intestate estate is an officer of the court. His duty is to the court and to properly administer the estate entrusted to his care. As such administrator he is not concerned with whether the title to property passes by will or by the law of descent.

While the authorities are not uniform, we think the better reasoned judgments are that the administrator as such is not interested within the meaning of the statute giving the right to contest to a party "concerned." See Braeuel v. Reuther, 270 Mo. 603, 193 S. W. 283, Ann. Cas. 1918B, 533 and note 536; Annotation, 31 A. L. R. 326; Cajoleas v. Attaya, 145 Miss. 436, 111 So. 359, 58 A. L. R. 1457 and annotation page 1462; In re Fallon's Will, 107 Iowa 120, 77 N. W. 575; In re Miller's Estate, 54 Ariz. 58, 92 P. 2d 335; In re O'Brien's Estate, 13 Wash. 2d 581, 126 P. 2d 47; In re Santini's Estate, 56 Nev. 350, 53 P. 2d 338; Arai v. Saenz, (Tex.) 52 S. W. 2d 383; In re Glynn's Estate, (Tex.) 62 S. W. 2d 1019; In re Sanborn's Estate, 98 Calif. 103, 32 P. 865.

The decisions likewise sustain the proposition that an interest in the fees of administration is not sufficient to entitle an administrator to contest a purported will. In the case of

In re Estate of Craig, 101 Neb. 439, 163 N. W. 765, we said that the law does not permit the person who represents the estate to use it for his individual purposes.

We are of the opinion that the administrator as such had no right to contest the will, hence, had no appealable interest, and that the trial court properly dismissed his motion for a new trial.

AFFIRMED.

JAY REETZ, APPELLEE, V. OLE OLSON ET AL., APPELLANTS.
20 N. W. 2d 687

FILED NOVEMBER 30, 1945. No. 31975.

1. **Trusts.** Where an oral agreement provides that a party is to pay all rents in default on a school lease, the necessary expenses to procure such lease on a reletting, and also the rents as set forth therein, and to remain in possession, with the further provision that the lease be taken in the name of another party until such payments are made and then to be assigned to the party making the payments, and the evidence establishes such facts, a resulting trust is created.
2. **Statute of Frauds: TRUSTS.** The resulting trust thus created is not affected by the statute of frauds.
3. **Appeal and Error.** Upon appeal on an action in equity, when the testimony of witnesses orally examined before the court on the vital issues is conflicting, this court will, while trying the case de novo, consider the fact that the trial judge observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the other.

APPEAL from the district court for Knox County: FAY H. POLLOCK, JUDGE. *Affirmed.*

C. W. Peasinger, for appellants.

Arthur L. Burbridge, for appellee.

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

MESSMORE, J.

The plaintiff brought this action in equity in the district court for Knox County to obtain judgment that he be de-

cleared the actual owner of a school lease entered into with the Commissioner of Public Lands and Buildings of Nebraska on certain land located in Knox County, and to compel the defendant, Ole Olson in whose name the lease was taken, to assign the lease to the plaintiff pursuant to and in compliance with an oral agreement made by and between the plaintiff and the defendant, Ole Olson. The defendant Frieda Olson, wife of Ole Olson, appearing to have no interest in the subject matter, has no rights to be determined in this appeal.

The record discloses that for several years the school lease in question had been in the plaintiff's family; in 1934, the plaintiff was the owner of the lease and in default of rent payments; the lease was delinquent in March 1934, and was to be relet in December 1934. The plaintiff was not eligible to bid on the lease at the reletting by rule of the Board of Educational Lands and Funds, being in default of rent payments. The plaintiff testified in substance that he talked the matter over with the defendant, his brother-in-law, and they orally agreed that the lease should be taken in the defendant's name and the plaintiff would pay the required amounts to procure the lease, the balance due the state, and all rentals as provided for in the lease, and remain in possession of the land, and when the payments in default were made, and it being understood the defendant had no interest in the lease, the defendant was then to assign the lease to the plaintiff. The plaintiff improved the premises by placing a tubular well thereon, moving the windmill, and putting in some steel posts, at an expense of approximately $200. The defendant denied that any such oral agreement was made with the plaintiff; that the plaintiff was in default of rent payments and could not raise the money to bid on the lease, therefore the defendant bought the lease as an investment, permitting the plaintiff to use the land until such time as the defendant would require its use. A witness, a brother-in-law of both parties and county chairman of the A. A. A. and in such capacity having business with the plaintiff, testified in substance that plaintiff

spoke of the lease being in the name of the defendant and he did not know whether he could have the use of the land for the year subsequent.

There is no dispute with reference to the following facts: The lease was executed by the Commissioner of Public Lands and Buildings, dated February 20, 1935; the defendant Ole Olson was named as lessee and the rent payments were set forth; the plaintiff paid the necessary amount to procure the lease in the name of the defendant, and all the rents as the same became due except a payment made by the defendant in July 1944, after difficulties arose between the plaintiff and defendant; and also paid all rents that were in default at the time the lease was taken in the defendant's name, as evidenced by check, letter, and receipt exhibits appearing in the record, dated October 29, 1943, November 2, 1943, and November 3, 1943, respectively.

The foregoing constitutes the material evidence necessary to a determination of this case.

The trial court found generally for the plaintiff and against the defendant; that the school lease described was the property of the plaintiff and the defendant had no interest therein, but acted only as agent for the plaintiff in taking the lease in his own name; and that the plaintiff was entitled to an assignment thereof within 30 days from the entry of the decree, which was February 1, 1945. The defendant filed a motion for a new trial, which was overruled, and the defendant appeals, setting forth as error that the judgment is contrary to the evidence and the law, and that the oral contract alleged to have been made between the plaintiff and defendant was void and barred by the statute of frauds, citing section 36-105, R. S. 1943.

From an analysis of the evidence and the attendant circumstances, we are convinced that a resulting trust was created. "Although the term has been broadly defined as a trust which is raised or created by the act or construction of law, in its more restricted sense and contradistinguished from constructive trusts a resulting trust has been defined to be one raised by implication of law and presumed always

to have been contemplated by the parties, the intention as to which is to be found in the nature of their transaction, but not expressed in the deed or instrument of conveyance (in the instant case the school lease). Such trusts are also called 'presumptive' trusts, and are frequently defined in terms of or in connection with the character of the transaction out of which they most frequently arise, namely, where one person pays the consideration for a purchase and the title is taken in the name of another, * * * ." 65 C. J., Trusts, s. 13, p. 222. See, also, 1 Perry, Trusts and Trustees (7th ed.), s. 124, p. 183; Restatement of the Law, Trusts, s. 2, p. 6, also, s. 404, p. 1250.

The law is well established in this state that when one person buys real estate and pays the purchase price thereof, and the title is taken for convenience in the name of another, the person taking the title will hold the property in trust for the person paying the purchase price. Doll v. Doll, 96 Neb. 185, 147 N. W. 471; 99 Neb. 82, 155 N. W. 226. See, also, Auker v. Hendrickson, 145 Neb. 687, 17 N. W. 2d 878; Lamb v. Sandall, 135 Neb. 300, 281 N. W. 37; Chicago, B. & Q. R. Co. v. First Nat. Bank of Omaha, 58 Neb. 548, 78 N. W. 1064, 59 Neb. 348, 80 N. W. 1039; Bailey v. Dobbins, 67 Neb. 548, 93 N. W. 687; Van Etten v. Passumpsic Savings Bank, 79 Neb. 632, 113 N. W. 163. The rule could be no different where a lease is involved as shown by the evidence in the instant case.

It is well settled that trusts arising by implication or by operation of law are excepted from the operation of the statute of frauds. Both resulting and constructive trusts fall within the exception. See Doll v. Doll, *supra;* Windle v. Kelly, 135 Neb. 143, 280 N. W. 445; O'Shea v. O'Shea, 143 Neb. 843, 11 N. W. 2d 540.

The testimony of the plaintiff and defendant is in conflict. In this connection, upon an appeal of an action in equity, when the testimony of the witnesses orally examined before the court on the vital issues is conflicting, this court will, while trying the case de novo, consider the fact that the trial judge observed the witnesses and their manner of tes-

tifying, and must have accepted one version of the facts rather than the opposite. Rogers v. Casady, 134 Neb. 227, 278 N. W. 267; Lamb v. Sandall, *supra*.

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

AFFIRMED.

LEO C. HORN ET AL., APPELLANTS, V. WILLIAM C. STUCKEY ET AL., APPELLEES.
20 N. W. 2d 692

FILED NOVEMBER 30, 1945. No. 31958.

1. **Contracts**: SPECIFIC PERFORMANCE. Specific performance of a contract will not be decreed unless the minds of the parties to the contract have met.
2. ———: ———. In order to establish a contract capable of specific enforcement it must be shown that there was a definite offer and an unconditional acceptance.
3. **Statute of Frauds**. To be enforceable a contract for the sale of real estate or some memorandum thereof must be in writing and signed by the seller.
4. **Contracts**: VENDOR AND PURCHASER. A valid contract in writing for the sale of real estate may be made by correspondence if all of the elements of a valid and binding contract are contained in the correspondence passing between the parties.

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

Johnson & Johnson, Dwight Elliot, and *Frank Glebe,* for appellants.

Schaper & Runyan and *Willard F. McGriff,* for appellees.

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

YEAGER, J.

This is an action by Leo C. Horn, Claret L. Horn, Melvin Horn, Floyd S. Horn, and Edwin Maupin, plaintiffs and appellants, against William C. Stuckey and Sam Swenson, defendants and appellees, the primary purpose of which is to

obtain specific performance of a contract for the sale of real estate claimed to have been entered into by and between the plaintiffs, through the plaintiff Leo C. Horn, and the defendant William C. Stuckey. The defendant Swenson was made a party as tenant in possession and purchaser of the land with notice of the existence of the contract of sale between the plaintiffs and the defendant Stuckey.

The appeal is from the action of the district court in sustaining a general demurrer to the petition and dismissal of the action.

The petition sets forth that the defendant was the owner of certain real estate in Custer County, Nebraska, and that a valid and binding written contract was entered into between the parties by written offer and acceptance contained in six letters which letters are copied in full in the petition and made a part thereof.

The petition further sets forth that the offer was withdrawn after acceptance by plaintiffs by letter which letter is set out and made a part of the petition.

The seven letters including the one which plaintiffs contend is a repudiation of the alleged contract are the following:

"Gering, Nebr.,
Dec. 15-1943

Mr. Leo C. Horn
Eddyville, Nebr.,
Received your letter of Dec. 12th and also your letter of Oct. But at that time I got your Oct letter I was pretty busy harvesting potatoes & beets short of labor keeps me pretty busy.

I still want the same price I wrote you before.

I will take $5,000.00 dollars cash, and if you do not want to buy the place I would like to trade 80's that would straighten both of our places line.

I think this is a good deal for both of us. I do not care to sell just the 80 alone.

Yours truly,
W. C. Stuckey"

"Broken Bow, Nebraska
December 18, 1943

Mr. W. C. Stuckey
Route 2
Gering, Nebraska.
Dear Mr. Stuckey:

I received your letter of December 15th with reference to your property that joins mine and which I wish to buy. Today I went up with my attorney to check over the records to see the condition of the title. A patent was issued to a part of this land to 'the heirs of John K. Stuckey, deceased.' Later his widow conveys this land as the sole heir of John K. Stuckey, deceased. The deed states that at the time of his death he was a resident of Bedford County, Pennsylvania. I am advised by my attorney that the Pennsylvania laws at the present time provide that a widow only receives a portion of the real estate of her deceased husband. If no children or if only one child, she would inherit an undivided one-half interest. If more than one child she would receive an undiyided one-third interest.

I presume that the laws were the same at that time as now, and if so she would not be his sole and only heir at law. Of course, there is the possibility that John K. Stuckey left a Last Will and Testament in which he devised all of his real estate to his widow. If so, then an authenticated copy of the will and of the order admitting the same to probate in Bedford County, Pennsylvania, will have to be obtained and short form proceedings instituted here to probate this foreign will.

If he did not leave such a will devising the entire interest to his widow and if by law she was not the sole heir of her husband, if he did not leave a will, then it would be necessary to quiet the title.

There are also three mortgages that are unreleased, but I am advised that these mortgages are barred by the Nebraska statutes.

I am advised by my attorney that there will be an expense

of approximately $250.00 in order to see that I have merchantable title if I purchase this property. I think it is only fair that we should divide this expense, and I will then stand the expense of furnishing myself an abstract. I am today having a letter written to the probate court of Bedford County, Pennsylvania, to find out if there was a will or not so as to be able to determine which procedure will be necessary or advisable.

I have the money in the bank with which to buy the land. If we can agree you may rest assured that immediately upon receipt of your deed your money will be paid over to you. It might be you would want me to have a deed prepared and sent to your bank with instructions to deliver the same upon payment of the amount we agree upon.

The improvements consist mainly of a couple of small buildings, windmill and tower, and fence and cross-fence. I presume that whatever improvements and fence now located upon said premises are yours and would go with the place and would not be removed or claimed by the tenant.

Won't you kindly let me hear from you right away?

Yours very truly,
LEO C. HORN,
Eddyville, Nebraska"

"Gering, Nebr.
Dec 21-1943

Mr. Leo C. Horn
Eddyville, Nebr.,
Dear Sir:

Your letter of December 18th received. In regards to 1/2 expense of the title I did not mean to take that price. for the place and stand part payment for the title. I meant $5000.00 cash and no deductions for title or abstract.

I have written Mr. Sam Swenson about the buildings about all I claim of the improvements is the well and wind mill and fence & cross fence and a small house, not knowing of any other building maybe Mr. Swenson has put up some thing else lately.

I have written Mr. Sam Swenson a letter in regards to the place and I will send you a copy of the letter. You will see by the letter what I want to know from him and maybe you could see him and find out these things, for they are slow in writeing back.

Yours truly,
W. C. Stuckey"

"December 24, 1943.

Mr. W. C. Stuckey
Route 2
Gering, Nebraska
Dear Mr. Stuckey:

Leo C. Horn was in the office this afternoon, together with your last letter in response to one he recently wrote to you, and has agreed to the terms and conditions of your letter in that he will give you $5,000 cash for this place and he is to furnish the abstract at his own expense and do all things in connection therewith at his own expense.

He had your copy of a letter to John Swensen with reference to the improvements also. I suppose Swenson will write to you or see Leo Shortly and will advise what, if any, improvements he claims and what improvements belong to you and go with the place. We will appreciate if just as soon as you have this information you will advise Leo, or if it is more convenient you can advise us and we can get in touch with Leo and give him the information.

We presume you are married, but do not know your wife's first name so we had to leave a blank space for that in the event you are a married man, and in that event, of course, she will sign and acknowledge the deed before a notary also.

We have prepared a warranty deed conveying these premises by yourself and wife to Claret L. Horn, Melvin Horn, Floyd S. Horn, Leo C. Horn and Edwin Maupin, and we are showing the consideration to be $5,000.00. Of course, the necessary revenue stamps will have to be attached thereto. The revenue stamps are a part of the deed.

All you warrant is that you have good right and lawful authority to sell this property and warrant to defend the title to said premises against the lawful claims of all persons whomsoever. Both Leo and I checked the title in the office of Register of Deeds and we know that while there will be some proceedings that will have to be taken care of, that there are no persons who can make any lawful claim as against this property. We have written to the Probate Court of Bedford County, Pennsylvania, to determine the laws of that state at the time the patent was issued to the heirs of John K. Stuckey. His widow claimed to be his sole heir and we have to know the exact situation so we will know how to proceed. Leo understands that whatever costs and expenses there will be in fixing the title, the grantees have to take care of, including the abstract and extension.

We are enclosing check of U. S. Horn by Leo C. Horn on the Lexington State Bank in the sum of $1,000.00 as the first payment on the purchase price of this real estate described as the East Half of Section 8, South Half of the Southwest Quarter, the Northeast Quarter of the Southwest Quarter, the West Half of the Southeast Quarter and the East Half of the Northeast Quarter of Section 5, all in Township 13 North, of Range 20, West of the 6th P. M., in Custer County, Nebraska.

If you will have this deed properly executed and send the same either to the Nebraska State Bank of Broken Bow, or the Broken Bow State Bank of Broken Bow, Nebraska, with instructions to deliver the deed upon payment of the balance of the purchase price, $4,000.00, your money will be forthcoming immediately, or if you prefer to hold the deed there we will send the money and instructions to whatever bank you say with instruction to deliver the money upon you delivering the deed.

If there is any additional information you desire please do not hesitate to call upon us for the same.

Yours very truly,
JOHNSON & JOHNSON
By A. Paul Johnson"

"Gering, Nebr.
Dec 29-1943

Johnson & Johnson
Broken Bow, Nebraska.
Dear Sir:

Received your letter Horn check and deed. I am holding up the check & deed. till I get straightened up with Mr. Sam Swenson. I will write him again on Jan. 4th that will give him two weeks to answered in.

I do not like to hold up the deal. But I do not know what Swenson will try to do. The $125.00 he always held back I figure was for bait of some kind.

Yours truly,
W. C. Stuckey"

"December 31, 1943

W. C. Stuckey
Route 2
Gering, Nebraska
Dear Mr. Stuckey:

Mr. Leo C. Horn was in the office this afternoon and stated that as long as you had agreed to sell and he had agreed to buy the place for the sum of $5000 that he would be glad to pay the balance of the purchase price as soon as possible and receive your deed therefor.

If you have any other deeds or papers in connection with the chain of title you should send those with the deed.

Won't you kindly advise how you desire the money for the deed handled? In other words, if you wish to send the deed to one of the local banks in accordance with our previous letter or if you wish to have the money sent to some bank that you designate with instructions to send us the deed as soon as they receive the money for your benefit.

Hoping to hear from you right away, we beg to remain,

Yours very truly,
JOHNSON & JOHNSON
By A. Paul Johnson"

"Gering, Nebr.
Jan. 5-1944

Johnson & Johnson
Broken Bow, Nebr.
Dear Sir:

Enclosed you will find your letter & Mr. Horn check and a deed you had prepared. I have sold my place to Mr. Sam Swenson and the deal is closed.

Yours very truly,
W. C. Stuckey"

The question first for determination is that of whether or not the letters do in fact and in law amount to a written contract for the sale of real estate. In arriving at a determination of this question certain controlling legal principles must be borne in mind.

One is that specific performance of a contract will not be decreed unless the minds of the parties to the contract have met. Mercer v. Payne & Sons Co., 115 Neb. 420, 213 N. W. 813; Alexander v. Turner, 139 Neb. 364, 297 N. W. 589; Gilgren v. Price, 140 Neb. 124, 299 N. W. 325.

Another is that to establish a contract capable of specific enforcement it must be shown that there was a definite offer and an unconditional acceptance. Mercer v. Payne & Sons Co., *supra*.

A third is that to be enforceable a contract for the sale of real estate or some memorandum thereof must be in writing and signed by the seller. Sec. 36-105, R. S. 1943; Campbell v. Kewanee Finance Co., 133 Neb. 887, 277 N. W. 593.

A fourth is that a valid contract in writing for the sale of real estate may be made by correspondence if all of the elements of a valid and binding contract are contained in the correspondence passing between the parties. Bradley & Co. v. Bower, 5 Neb. (Unof.) 542, 99 N. W. 490; Holliday v. McWilliams, 76 Neb. 324, 107 N. W. 578; Pottratz v. Piper, 95 Neb. 145, 145 N. W. 265; Shoff v. Ash, 95 Neb. 255, 145 N. W. 271; O'Shea v. Smith, 142 Neb. 231, 5 N. W. 2d 348.

Unless a contract meets the requirements of these principles it is incapable of enforcement.

It will be observed from the context of the first letter in the series that prior to this letter Stuckey probably had written one to Horn pertaining to this subject matter and Horn had written two to Stuckey. In this first letter it is clear that Stuckey offered to take $5,000 cash for the real estate.

From an examination of the letter in reply by Horn it will be observed that it contains no acceptance of the offer contained in the letter from Stuckey. This letter is a discussion of the condition of the title and a suggestion that if he should purchase Stuckey should bear one-half the expense of clearing the title. The sixth paragraph told Stuckey that plaintiff had the money in the bank, and it is further significant in that it makes clear that agreement for sale and price were not by the letter being agreed upon.

The third letter is from Stuckey to Horn. This letter fixes definitely and specifically the terms upon which Stuckey offered to make the sale. In this letter he makes it clear that his offer contemplates that if Horn chooses to accept he must do so on the basis of the payment of $5,000 cash without regard to the condition of the title.

No further communication was ever received by Stuckey from Horn. From this point on the correspondence was between Johnson & Johnson, attorneys for plaintiffs, and Stuckey.

As will be noted by the next letter in the series Johnson & Johnson wrote Stuckey that Horn had agreed to accept the offer of Stuckey. The acceptance was conditioned upon a warranty deed signed by the wife of Stuckey with a warranty of "good right and lawful authority to sell this property and warrant to defend the title to said premises against the lawful claims of all persons whomsoever." A check for $1,000 was enclosed and information was furnished as to the manner of payment of the remaining $4,000.

The next is a letter from Stuckey to Johnson & Johnson acknowledging receipt of the check and the proposed warranty deed. No words of acceptance or rejection are contained in the letter.

The next and last letter of negotiation is from Johnson & Johnson to Stuckey. In it Johnson & Johnson call attention to the agreement that plaintiffs contend was entered into and inform Stuckey that plaintiffs desire to pay the balance of the purchase price on reception of the deed.

A few days later Stuckey wrote Johnson & Johnson the letter in which he declined to sell to plaintiffs. With the letter he returned the check for $1,000 and the deed.

From this analysis of the letters in their chronology it becomes clearly apparent the first definite offer made by Stuckey was contained in the third letter of the series. To this letter Horn never did reply. To it Johnson & Johnson did reply apparently on behalf of Horn. For the purposes of this case we assume but do not decide that Johnson & Johnson were duly authorized agents of plaintiffs and had authority to act in their behalf.

In this letter there was no acceptance of Stuckey's offer. The letter amounts to a counteroffer to pay the named purchase price and to assume the cost of an abstract if Stuckey would execute and deliver a warranty deed signed by himself and his wife.

Stuckey replied to this letter but his reply cannot be interpreted as an acceptance of the terms of the counteroffer made by Johnson & Johnson. The next letter was from Johnson & Johnson to Stuckey and it is by fair interpretation a request for completion of the transaction on the basis of the former counteroffer. In nowise can it be said that this is an acceptance of the definite offer of Stuckey.

In the letters set forth in the petition we have been unable to find that the minds of the parties hereto met on the essential elements of a contract; we have failed to find a definite offer and unconditional acceptance; we find no writing signed by Stuckey which was unconditionally accepted by plaintiffs and no writing which amounts to the unconditional acceptance by Stuckey of an unconditional offer made by the plaintiffs. The petition of plaintiffs therefore failed to state a cause of action and the demurrer thereto was properly sustained.

The decree of the district court sustaining the demurrer of defendants and dismissing the action is affirmed.

AFFIRMED.

Paine, J., dissents.

FEDERAL FARM MORTGAGE CORPORATION, A CORPORATION, PLAINTIFF AND APPELLEE, V. ANTON GANSER ET AL., DEFENDANTS, WILLIAM A. EHLERS, DEFENDANT AND APPELLANT.

20 N. W. 2d 689

FILED NOVEMBER 30, 1945. No. 31993.

1. **Mortgages.** In the absence of an agreement to the contrary, a mortgagor is entitled to the rents and profits of mortgaged premises until such time as the mortgagee is authorized to proceed by action on the mortgage to subject the property to the payment of the debt.
2. ———. However, upon a condition being broken by which the mortgagee is authorized to commence foreclosure, if the property is inadequate security, he has thereafter an equitable lien upon the rents and profits, or so much thereof as may be necessary to the security of the mortgage debt, which he may enforce by proper proceedings.
3. **Receivers.** The appointment of a receiver in a foreclosure action is ancillary to the main action. The receiver is appointed for the purpose of conserving the mortgaged property and applying the rents and profits from said premises, or so much thereof as may be necessary, to the satisfaction of the debt secured thereby.
4. **Mortgages.** The mortgagee is entitled to have his debt satisfied out of the property pledged as security for its payment without being forced to resort to other remedies he may have.

APPEAL from the district court for Madison County: FAY H. POLLOCK, JUDGE. *Affirmed.*

William A. Ehlers, pro se, for appellant.

F. M. Deutsch, W. W. Graham, and *Lewis W. Bicknell*, for appellee.

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

WENKE, J.

This case was previously here and is reported as Federal Farm Mortgage Corporation v. Ganser, 145 Neb. 589, 17 N. W. 2d 613. After affirming the district court's confirmation of sale the opinion states: "The record discloses that the assets, such as rents and profits remaining in the hands of the receiver, have not been distributed, and the receivership has been continued until further order of the court. Therefore, there is no order of the court in the record distributing these assets to either appellant or appellee. We cannot determine in this action the rights of the respective parties to the assets remaining in the hands of the receiver. There has been no final order on such matter, and until there is and it is properly brought to this court there is nothing to determine with respect to it."

On February 13, 1945, William A. Ehlers, one of the defendants and appellant, made written application asking the district court to direct the receiver to pay over to him the full amount of rents received from the premises for the year 1943. Similar application was orally made in open court by the Federal Farm Mortgage Corporation, plaintiff and appellee, asking that such funds in the hands of the receiver be paid to it for the purpose of satisfying its judgment and decree.

Hearing was had on these applications on March 17, 1945. The court denied the application of appellant and sustained that of the appellee. The court found that after the application of the amount received from the sale of the premises there remained unsatisfied of the amount owing the appellee, as determined in the decree, a sum equal to the funds in the hands of the receiver; that the appellee was entitled to have the funds in the hands of the receiver applied thereon and so ordered. It is from this order that appeal was taken.

A sufficient statement of the case will be found in our former opinion and will not again be set forth except as it may be necessary in discussing the issue presented, that is, who is entitled to the rents collected by the receiver.

On January 3, 1934, the mortgage foreclosed in this ac-

tion was executed by the then owners of the premises, Anton Ganser and Anna M. Ganser, husband and wife. It contained, among other provisions, the following: " * * * in the event suit is brought to foreclose this mortgage the Court may appoint a receiver to take and hold possession of said premises, to rent the same, to collect the rents and profits therefrom for the benefit of the Mortgagee, to pay the taxes upon said premises, to keep the same in repair, and to apply the balance upon the mortgage indebtedness."

On October 28, 1942, the appellant became the owner of the mortgaged premises by execution had against Anton Ganser. The appellant, by virtue of the purchase, became vested with such right and title as was in Anton Ganser, the judgment debtor, at the time the lien of the judgment attached to the land, which was subsequent to the mortgage and, therefore, subject thereto. He did not, however, become personally liable for the mortgage debt.

Petition to foreclose the mortgage was filed on January 15, 1943. The petition included the following allegations: " * * * that the said mortgaged premises are insufficient to discharge the mortgage debt and are being allowed to waste and deteriorate; * * * and for the further purpose of collecting the rents, issues and profits arising therefrom to apply on the indebtedness due said plaintiff for principal, interest and any and all advances made by this plaintiff in accordance with the terms and provisions of its said mortgage and note, * * * ." The prayer includes that a receiver be appointed to collect the rents and profits in order that they may be applied upon the amount due the plaintiff. Receiver was appointed pursuant thereto on January 30, 1943. On April 24, 1943, the receiver appointed having asked to be discharged, his successor was appointed. It is the rents collected under this receivership from the mortgaged premises for the year 1943 that are here involved.

Section 25-1081, R. S. 1943, provides in part as follows: "A receiver may be appointed * * * (2) in an action for the foreclosure of a mortgage, when the mortgaged property is in danger of being lost, removed, or materially injured, or

is probably insufficient to discharge the mortgage debt; * * * ."

Under this same provision of the statute in Philadelphia Mortgage & Trust Co. v. Goos, 47 Neb. 804, 66 N. W. 843, this court said: "The second subdivision of section 266 of the Code authorizes the appointment of a receiver in an action to foreclose a mortgage when the mortgaged property 'is probably insufficient to discharge the mortgage debt.' In other words, the inadequacy in value of the premises to pay the mortgage lien thereon is alone sufficient ground to entitle the mortgagee to the appointment of a receiver to take charge of the property and collect rents accruing therefrom. (Jacobs v. Gibson, 9 Neb., 380; Ecklund v. Willis, 42 Neb., 737.)

"Our attention has been called to section 55, chapter 73, Compiled Statutes (now section 76-276, R. S. 1943), which provides: 'In the absence of stipulation to the contrary, the mortgagor of real estate retains the legal title and right of possession thereof.' It is argued that, under the foregoing provision, the mortgagor, except as otherwise stipulated in the mortgage, is entitled to the rents and profits, and the possession of the mortgaged premises until final confirmation of the sale. The mortgage under which the foreclosure in this case was made is not before us; hence we are not advised of its provisions. Assuming that it contained no stipulation as to the right of possession of the property, it does not follow that a receiver may not be appointed to collect the rents and profits, in case the premises are insufficient in value to satisfy the lien of the mortgage. That such power exists was held by this court in Jacobs v. Gibson, 9 Neb., 380. LAKE, J., speaking for the court in that case, said: 'In the absence of an agreement to the contrary, we suppose no one would contend but that a mortgagor is entitled to the rents and profits of mortgaged premises until condition broken,—or, in other words, until such time as the mortgagee is authorized to proceed by action on the mortgage to subject the property to the payment of his debt. Such, doubtless, is the law. On the other hand, it is equally clear

that on a condition broken, by which the mortgagee is authorized to commence foreclosure proceedings, if the property be inadequate security, he has thenceforward an equitable lien upon the rents and profits, or so much thereof as may be necessary to the security of the mortgage debt, which he may enforce by proper proceedings.' (See High, Receivers, sec. 666; Schreiber v. Carey, 48 Wis., 208; Pasco v. Gamble, 15 Fla., 562; Mahon v. Crothers, 28 N. J. Eq., 567; Hyman v. Kelly, 1 Nev., 179; Lowell v. Doe, 44 Minn. 144.)"

In the case of Wells v. Farmers State Bank of Overton, 124 Neb. 386, 246 N. W. 714, we said: "The appointment of a receiver in a foreclosure action is ancillary to the main action. The receiver is appointed for the purpose only of conserving the mortgaged property and applying the rents and profits of said premises to the satisfaction of the debt secured by the mortgage. Prudential Ins. Co. v. Bliss, 123 Neb. 578."

While the appellee might have obtained a deficiency judgment against anyone personally liable for the balance of the indebtedness owing, it was not necessary for it to do so. For as stated in Philadelphia Mortgage & Trust Co. v. Goos, *supra*: "The plaintiff is entitled to have his debt satisfied out of the property pledged as security for its payment, without being forced to resort to other remedies he may have." See Waldron v. First Nat. Bank of Greenwood, 60 Neb. 245, 82 N. W. 856.

Appellant took whatever interest he had in the lands subject to the appellee's rights under its mortgage. Under our holdings this consisted of a right to have a receiver appointed, if the property was insufficient to discharge the mortgage debt, and having whatever rents and profits the receiver collected from the premises applied in satisfaction thereof. The trial court having entered the only order that it should have entered, it is affirmed.

AFFIRMED.

THE COUNTY OF NANCE, APPELLEE, V. EDWARD J. THOMAS ET AL., APPELLEES, IMPLEADED WITH ELSIE PACHUNKA ET AL., APPELLANTS.
20 N. W. 2d 925

FILED DECEMBER 7, 1945. No. 31979.

1. **Judicial Sales.** The trial court has a duty to determine, by unrestricted means, whether at foreclosure sale the price is adequate or whether at a subsequent sale more would be realized.
2. **Taxation.** Substantially increased offers made in open court for property sold under tax-sale foreclosure, before confirmation of the sale to the highest bidder, are sufficient evidence to support a finding of the trial court in the exercise of its sound judicial discretion that confirmation should be denied and a new sale ordered.

APPEAL from the district court for Nance County: LOUIS LIGHTNER, JUDGE. *Affirmed.*

G. F. Rose, for appellants.

Robert C. Brower and *Carroll Thompson,* for appellees.

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

MESSMORE, J.

The County of Nance brought this action in the district court under the provisions of section 77-2039, C. S. Supp., 1941, to foreclose for delinquent taxes on various tracts of real estate located in said county. Collection of delinquent real-estate taxes through court proceedings now appearing in article 19, sections 77-1901 to and including 77-1928, R. S. 1943, are not here involved. The plaintiff's petition was regular in form, setting forth the description of the land here involved in the first and second causes of action, and that Edward J. Thomas was the owner and in possession of both tracts and in default of payment of taxes for the years 1931 to and including the year 1940, in the aggregate sum of $414.61 on each tract. Petition prayed for an accounting, foreclosure of the liens, and sale of the premises.

The record shows that on March 5, 1942, decree of fore-

closure was entered, finding that there was due on each of the two tracts, for delinquent taxes and interest, the sum of $493.13, and ordering the sale of the premises in default of payment. On May 19, 1942, the return to the order of sale discloses Nance County as the purchaser of the land described in the first cause of action for the amount of $200, and Elsie Pachunka the land described in the second cause of action for the amount of $205. The latter purchaser paid subsequent taxes in the amount of $158.11, and the county paid subsequent taxes through 1943 in full, in the amount of $124.57. More than two years from the date of the sales the county attorney filed a motion for confirmation, on June 5, 1944, to have the sales of May 19, 1942, of the lands here involved confirmed. The hearing on confirmation was continued to July 20, 1944. On July 22, 1944, one Thomas D. Thomas, not a party to the action, filed a motion to set aside the sales, and an offer to bid $350 on each of the two tracts of land, and deposited the amount of $700 by a certified check to guarantee the bid, and agreed to pay the taxes which have accrued against each of the tracts of land since the decree of foreclosure was entered. On September 6, 1944, the trial court set aside the sales and ordered new sales. On the same day Elsie Pachunka, the purchaser of the land described in the second cause of action, filed objections to the setting aside of the sale, alleging that the sale was legally conducted and the price paid represented the reasonable price and value of the premises; that the owner, with full knowledge of all proceedings relative to the sale, made no objections thereto and had taken no steps to redeem as provided by law; that the objector, Thomas D. Thomas, had no interest in the premises and no right to object to the sale, and moved the court for confirmation. Again, on September 9, 1944, Elsie Pachunka filed a like motion. On the same day William Pachunka, a resident and taxpayer of Nance County, filed a motion to set aside the order setting aside the sale to the first cause of action and to reinstate the original sale to Nance County. On January 3, 1945, the motion of Elsie Pachunka to confirm the sale to

the second cause of action was overruled. The sales under both causes of action were set aside, order was made that the premises be readvertised and sold according to law, the clerk was directed to refund to the separate purchasers the amount of their respective bids, and the question of the purchasers receiving any interest on past bids reserved for future determination. On January 3, 1945, over the objections of William Pachunka and Elsie Pachunka, and the county attorney not objecting, testimony was taken with reference to the value of the land. On January 6, 1945, William Pachunka filed a motion to set aside order sustaining the application of Thomas D. Thomas to bid on the premises involved in cause of action number one, and to cancel and set aside the application, and asked that the original sale be reinstated and confirmed. On the same day a similar motion was filed by Elsie Pachunka with reference to the second cause of action. On February 5, 1945, the two motions of January 6, 1945, filed by William Pachunka and Elsie Pachunka as heretofore set forth in substance, were overruled, and it was ordered that the purchasers, Nance County and Elsie Pachunka, should have the subsequent taxes paid by them restored to them in addition to the amounts of their bids on the two tracts of land, and the bidder, Thomas D. Thomas, in open court consented the same be paid out of money deposited on his bid. From this order William Pachunka and Elsie Pachunka appeal, and will hereinafter be referred to as the appellants, and Thomas D. Thomas, objector, will hereinafter be referred to as the appellee.

Appellants contend the trial court erred in setting aside the sales under the first and second causes of action on the application of the appellee, a stranger to the suit, and in not sustaining the appellants' motions to confirm the sales.

In this connection, appellants refer to sections 25-328 to 25-330, inclusive, R. S. 1943, to the effect that any person who has or claims an interest in the matter of litigation, in the success of either of the parties to an action, or against both, in any action pending or to be brought in any of the

courts in the state, may become a party to an action. Thus, an intervener must plead some interest in the subject matter of the litigation to give him standing in court, and must have averment of the ultimate facts evidencing his interest in the matter of litigation, otherwise he is a mere interloper, and wholly incompetent to challenge the contentions of the opposing parties. Therefore, appellants contend the actions of the appellee are a nullity. See Parker v. City of Grand Island, 115 Neb. 892, 215 N. W. 127.

This raises the question as to whether or not, under the circumstances presented, the appellee was privileged to make the bids which he made. We believe the question requires an affirmative answer.

In this respect, appropriate language for our conclusion may be found in the case of State ex rel. Spillman v. American State Bank, 122 Neb. 42, 239 N. W. 214. At the public sale of the bank building a bid was made, and objections thereto were made by a depositor. The district court, on the day fixed for confirmation, directed a resale to be held then and there in open court, whereupon a new bid was made for more than $1,300 over the bid at the public sale. The latter bid was accepted and the sale confirmed. The court, in discussing the matter, said: "The high bidder at such a sale acquires certain rights which must be protected, and he is entitled to a confirmation of the sale if there is no good reason why it should not be confirmed, and the court is faced with the equities due to the one who has made this high bid on the one hand and with the rights of the depositors and the obligations of the officers in charge of the affairs of the bank on the other hand, and this court holds that the district judge, when all the parties were before him in open court, and when it was evident that more money could be received for the depositors, acted within his rights in refusing to confirm the high bid made some days before at the public sale and in confirming the higher bid received in open court * * * ."

It is obvious that the cited case did not require a bidder to intervene in the original action in order to make his bid.

The bid was made in open court, and the court had the exercise of sound judicial discretion as to whether or not the bid was an adequate price for the property offered for sale.

In the case of State ex rel. Sorensen v. Denton State Bank, 126 Neb. 486, 253 N. W. 670, it was held: "Substantially increased offers to receiver for assets of failed bank before confirmation of sale to highest bidder at public sale are sufficient evidence to support a finding of trial court in exercise of its judicial discretion that confirmation should be denied and new sale ordered."

In the case of Occidental Building & Loan Assn. v. Beal, 122 Neb. 40, 239 N. W. 202, this court held: "There are no restrictions upon the means by which the trial court may satisfy itself that a fair price was obtained at a foreclosure sale or that a subsequent sale would not realize a greater amount."

In the case of Crews v. Alberts, 124 Neb. 671, 247 N. W. 602, this court held: "Trial court has duty to determine, by unrestricted means, whether at foreclosure sale price is adequate or whether at a subsequent sale more would be realized."

In the case of First Nat. Bank of Fairbury v. First Trust Co. of Lincoln, 145 Neb. 147, 15 N. W. 2d 386, a bid was made in open court, in a partition action, of $1,000 more than the property had sold for at public sale. A resale was ordered and the bid made in open court was accepted and the sale confirmed.

In the case of Prudential Real Estate Co. v. Hall, 79 Neb. 805, 113 N. W. 243, this court said: "The cause was brought to this court by an appeal from an order vacating and setting aside a sale of real estate, and ordering a resale thereof, for delinquent taxes, pursuant to a decree therefor made in a proceeding for statutory foreclosure under an act of the legislature commonly known as the 'Scavenger Act.' * * * The statute pursuant to which this proceeding is had requires of the court the exercise, so far as may be, of the powers of a chancellor in foreclosure cases. It is not doubted that in such cases the court is the vendor, or that he may

reject any bid which for any reason appears to him to be inadequate, or that, while the proceeding remains within his jurisdiction, he may vacate any erroneous or improvident order he may have made during its progress."

In Siekert v. Soester, 144 Neb. 321, 13 N. W. 2d 139, this court held: "Substantially increased offers to a referee for property sold by him, made before confirmation of the sale to the highest bidder, are sufficient evidence to support a finding of the trial court in the exercise of its judicial discretion that confirmation should be denied and a new sale ordered." The court said: "According to the third doctrine (See 11 A. L. R. note, pp. 417 to 419 inclusive), where there has been an advanced bid before confirmation, the entire matter of confirmation of judicial sales is left with the trial court, to be confirmed or not according to its judicial discretion. This doctrine is the one heretofore approved and adopted by this court. True, in several cases it has been held by this court that a judicial sale will not be set aside on account of mere inadequacy of price, unless such inadequacy is so gross as to make it appear that it was the result of fraud or mistake, or to shock the conscience of the court. But in these cases there was no evidence that others were willing to pay more. See State ex rel. Sorensen v. Denton State Bank, *supra*."

The record in the instant case discloses that the bid made by the appellee was approximately 75 percent more than the bid made by Nance County and the appellant, Elsie Pachunka, and furthermore, the values placed on the land by the witnesses who testified at the hearing for such purpose, indicate that the bids so made were grossly inadequate and that in the exercise of sound judicial discretion the court, having an advanced bid of 75 percent more than the original bid, and with the evidence before him as to the value of the land in question, believed that a resale would be more advantageous to the taxpayers generally and to the subdivisions of the government interested in securing their proportionate share of the taxes, and we believe that it is the equitable duty of the court to so use its sound discretion in such respect.

We conclude, on this phase of the case, that the appellee was privileged to submit a bid in open court on the land in question under tax-foreclosure proceedings, and that the court had a right to consider the bid of the appellee in its exercise of sound judicial discretion.

It is further contended by the appellants that section 77-2039, C. S. Supp., 1941, within the contemplation of Dawson County v. Whaley, 134 Neb. 509, 279 N. W. 164, restricted the right of the district court to exercise sound judicial discretion in tax-foreclosure sales, as provided for by such section. This contention is probably made for the reason that this court stated in the opinion that: "Section 77-2039, Comp. St. Supp. 1937, provides a full, complete and definite procedure by which a county may foreclose the lien of certain delinquent taxes." It was further held: "It is an established rule of construction that special provisions in a statute in regard to a particular subject control general provisions." The language appearing in section 77-2039, C. S. Supp., 1941, in part is as follows: "At any time after the expiration of two years the court shall, on motion of the county attorney, examine the proceedings, and, if they are found to be correct, and if the subsequent taxes have been paid to date, shall make and enter an order of confirmation, * * *." It would be extremely unwise so to tie the hands of the district judge as to deprive him of the power to avail of an opportunity so advantageous for the public, and this court will not take so unprecedented a step. The power vested in the district court to exercise judicial discretion in handling a judicial sale is inherent in a court of equity, and of which it may not be deprived by the Legislature, and we hold that the language so appearing in the section of the statute is ineffective to take from the district court the inherent power to exercise sound judicial discretion in tax-foreclosure sales, as in the instant case.

In analyzing the case of Dawson County v. Whaley, *supra*, we find no language stated therein depriving the district court of authority to exercise its sound judicial discretion in determining whether or not bids in foreclosure sales, such

as in the instant case, are adequate or inadequate, or whether or not a new sale would realize more for the benefit of the parties interested.

We conclude, for the reasons given in this opinion, that the judgment of the trial court should be affirmed.

AFFIRMED.

HATTIE S. GILMORE, ADMINISTRATRIX OF THE ESTATE OF NYLE M. GILMORE, DECEASED, APPELLEE, V. STATE OF NEBRASKA, DEPARTMENT OF ROADS AND IRRIGATION, APPELLANT.

20 N. W. 2d 918

FILED DECEMBER 7, 1945. No. 32029.

1. **Workmen's Compensation.** When a judge of the Workmen's Compensation Court, pursuant to section 48-178, R. S. 1943, makes and enters a judgment which he is authorized by law to make, such judgment shall be conclusive on all parties at interest, when no appeal is taken therefrom as provided by section 48-170, R. S. 1943, except as otherwise provided for by statute.
2. ———. An employer is liable, under section 48-120, R. S. 1943, for reasonable medical and hospital services and medicines when the award provides for further medical, surgical, and hospital care, and the same has been approved by the compensation court and does not exceed the regular charge made for such service in similar cases, and where such charges are not unjust, unreasonable, or exorbitant.
3. ———: ATTORNEY AND CLIENT. Under the provisions of section 48-125, R. S. 1943, where an employer appeals to the Supreme Court from an award of the district court and fails to obtain any reduction in the amount of such award, the Supreme Court shall allow the employee a reasonable sum for attorney fees for the proceedings in the Supreme Court.

APPEAL from the district court for Dawes County: EARL L. MEYER, JUDGE. *Affirmed;* appellee allowed $300 attorney fee for services in this court.

Walter R. Johnson, Attorney General, Carl H. Peterson, and *H. Emerson Kokjer,* for appellant.

Lawrence F. Welch and *Greydon L. Nichols*, for appellee.

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

MESSMORE, J.

This appeal arises out of a workmen's compensation case wherein the district court granted an award for medical and hospital expenses incurred in the treatment and care of one Nyle M. Gilmore, an employee of the state of Nebraska.

The record discloses that Nyle M. Gilmore, an assistant mechanic employed by the Department of Roads and Irrigation at Chadron, was injured on April 7, 1936, in an accident which arose out of and in the course of his employment, by stepping from the rear of a truck and falling on his spine. He was administered to by Dr. M. B. McDowell the next morning, and returned to work, and continued to work until March 31, 1941, when, as a result of the original accident, he became totally and permanently disabled. During the period of his employment he felt no ill effects from the accident except a peculiar sensation in the back of his neck on May 20, 1940, and December 7, 1940, which did not apparently interfere with his work at the time.

On August 25, 1941, Nyle M. Gilmore, as plaintiff, filed a petition in the Nebraska Workmen's Compensation Court, setting forth the history of the accident, the injury sustained, and the wages paid per week. The defendant filed an answer September 8, 1941, denying the allegations of the plaintiff's petition with the exception of employment on the date of the accident; alleging further that no claim for compensation was filed within six months from the date of the accident, and no petition was presented to the Nebraska Workmen's Compensation Court within one year from the date of the accident as provided for by law; and that the claim is barred by the statute of limitations. On November 24, 1941, the plaintiff filed a reply to the defendant's answer, denying each and every allegation of new matter therein contained. On February 16, 1942, an award was entered by a judge of the Workmen's Compensation Court, and this

award was corrected February 20, 1942. In the corrected award the compensation judge found that as a result of the latent disability plaintiff had been temporarily, totally disabled from and after March 31, 1941, to and including the date of the hearing, and continued to be temporarily, totally disabled; that as a result of the latent disability plaintiff was in need of further medical, surgical, and hospital care, the fair and reasonable costs and expense of which should be paid by the defendant; compensation in the amount of $15 per week for temporary total disability was allowed, not to exceed 300 weeks, or until the award was modified as provided by law, and certain medical expenses were allowed for an effort on the part of the physicians employed to check the progressive nature of the disability due and traceable to the accident of April 7, 1936.

In conformity with the award, the defendant paid the plaintiff workmen's compensation at the rate of $15 per week from March 31, 1941, until September 27, 1944, the date the plaintiff died, and in addition thereto, paid all of the medical and hospital bills that he incurred until November 15, 1942, then voluntarily discontinued such payments.

Section 48-178, R. S. 1943, provides in part: "The judge (compensation judge) shall make such * * * judgments as the * * * judge is authorized by law to make. * * * his * * * judgments shall be conclusive upon all parties at interest unless reversed or modified upon appeal * * * ."

Section 48-170, R. S. 1943, provides in part: "Every order and award of the Nebraska Workmen's Compensation Court shall be binding upon each party at interest unless notice of intention to appeal to the district court has been filed with the court within fourteen days following the date of rendition of the order or award; * * * ."

In the instant case, an award was entered by a judge of the Workmen's Compensation Court after a hearing on the merits in a proceeding properly brought, and such award was a final order and was not legally appealed from, and constitutes an absolute bar to a subsequent suit based upon the same cause of action, and cannot again be litigated in a

subsequent action between the same parties or their privies, except as otherwise provided for by statute. See Gray v. Burdin, 125 Neb. 547, 250 N. W. 907. See, also, 30 Am. Jur., Judgments, s. 178, pp. 920-922, and cases cited in notes 10, 11, and 12 thereof; State ex rel. Kennedy v. Broatch, 68 Neb. 687, 94 N. W. 1016; Bohmont v. Moore, 141 Neb. 91, 2 N. W. 2d 599.

On July 24, 1942, the compensation judge who entered the corrected award on February 20, 1942, entered an order finding that Dr. M. B. McDowell was the attending physician of the plaintiff, and that it was necessary to render to the plaintiff further medical, surgical, and hospital services; and following the recommendation of Dr. McDowell, that the plaintiff be sent to the University of Nebraska Hospital and the expenses in connection therewith be subject to the approval of the compensation court. Dr. McDowell had treated the plaintiff for a period of four or five years prior to the time that the plaintiff was sent to the University of Nebraska Hospital. The first time the plaintiff was sent to the University of Nebraska Hospital he remained for approximately three months. The second time was pursuant to the foregoing order. The plaintiff remained in the hospital for a period of three or four weeks, and was sent to Bailey's Sanitarium in Lincoln where he remained until he was returned to Chadron under the care of Dr. McDowell on November 14, 1942.

On July 24, 1944, the plaintiff filed in the Workmen's Compensation Court an application for additional benefits, which alleged in substance that the total disability of the plaintiff would continue for an indefinite time in the future; and that the court found that the plaintiff had incurred certain medical and hospital bills, and entered an order that the defendant should pay said bills in addition to the workmen's compensation. The bills referred to in the application for additional benefits are the bills in question, in the amount of $2,534.20 for services rendered by the Chadron Municipal Hospital, and for medical services and medicine rendered to the plaintiff by Dr. M. B. McDowell from and after November 15, 1942, in the amount of $1,273.

On November 2, 1944, an award was made by the compensaton judge that the amounts as heretofore designated were necessary and reasonable expenses, and defendant is liable for the payment thereof.

On November 6, 1944, an application for rehearing by the defendant was filed, and set forth that in making the allowances to the doctor and to the hospital, the judge acted without and in excess of his power; that the findings of fact in the award are not supported by the evidence; and that the court erred in its application of the law to the facts.

On January 3, 1945, the cause having been revived in the name of the administratrix of the estate of Nyle M. Gilmore, the administratrix filed a petition in the Workmen's Compensation Court setting forth the history of the accident and the injuries, and the payments made by the defendant, and that the bills here in consideration were incurred by necessitated care of the plaintiff until his death.

On January 10, 1945, an award on rehearing before the compensation court was entered, affirming the award of November 2, 1944. The case was appealed to the district court and the defendant filed a petition on appeal, alleging the award for allowance of medical and hospital expenses entered on January 10, 1945, is unjust, unlawful, and not in accordance with the terms and provisions of the Workmen's Compensation Act, and set forth the same objections as appear in its answer to the administratrix's petition on rehearing. The administratrix filed an answer denying the award for medical and hospital expenses was unjust and unreasonable.

Section 48-120, R. S. 1943, provides in part: "The employer shall be liable for reasonable medical and hospital services and medicines as and when needed, subject to the approval of the compensation court, not, however, to exceed the regular charge made for such service in similar cases; * * *."

The evidence in behalf of the plaintiff is that the medical and hospital bills incurred by Nyle M. Gilmore, from and after the accident and resulting injuries until his death,

were necessary and directly connected with the accident of April 7, 1936, and that the charges therefor were reasonable. The defendant's evidence does not show, and no attempt is made to show, that such charges are unreasonable, unjust, or exorbitant. Under the circumstances, the defendant cannot prevail. See Nosky v. Farmers Union Cooperative Assn., 109 Neb. 489, 191 N. W. 846; Summers v. Railway Express Agency, 134 Neb. 237, 278 N. W. 476.

Section 48-125, R. S. 1943, provides in substance that in the event the employer appeals to the Supreme Court from an award of the district court and fails to obtain any reduction in the amount of such award, the Supreme Court shall allow the employee a reasonable sum for attorney fees for the proceedings in the Supreme Court. See Lincoln Gas & Electric Light Co. v. Watkins, 113 Neb. 619, 204 N. W. 391; Derr v. Kirkpatrick, 106 Neb. 403, 184 N. W. 91; Perkins v. Young, 133 Neb. 234, 274 N. W. 596. For services rendered in this court, the plaintiff's counsel is allowed an attorney fee of $300.

The judgment of the district court is affirmed.

AFFIRMED.

CLARENCE WRIGHT HIATT ET AL., APPELLEES, V. JOSEPH MILLER HIATT ET AL., APPELLEES, IMPLEADED WITH GRACE MARIE THOMPSON ET AL., APPELLANTS.

20 N. W. 2d 921

FILED DECEMBER 7, 1945. No. 31952.

1. Wills. Where the intention of the testator can be ascertained from the will, it is the duty of the court to give it effect.
2. ———. A will is presumed to contain the final manifestation of testator's bounty, and all advancements and charges against a devisee, not saved by the will, are extinguished.
3. ———. The debt of a devisee to the testator cannot be retained from or charged on lands devised to him in the absence of language in the will making such debt a charge.
4. Courts: WILLS. In such a situation a decree of final settlement entered by the county court purporting to construe the will thereby depriving a devisee of an interest in real property devised to him under the will and giving it to other devisees to satisfy a

claim of the estate against him for a debt to the testator is void for want of jurisdiction.

APPEAL from the district court for Gage County: CLOYDE B. ELLIS, JUDGE. *Affirmed.*

Hubka & Hubka, for appellants.

Jack & Vette, for appellees.

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

CHAPPELL, J.

The issues in this appeal arose out of a suit to partition certain real property devised by the will of Colonel J. Hiatt, deceased. As suggested by counsel, appellants, Grace Marie Thompson, Mary Elizabeth Cully, and Carolyn Clausen, will hereinafter be called plaintiffs and the appellee, Joseph Miller Hiatt, defendant. The will was executed March 27, 1928. Testator's death occurred May 1, 1930. His will was admitted to probate on June 3, 1930. On May 1, 1931, all claims against the estate having been fully paid or legally barred, the county court entered its decree of final settlement construing the will and devising the property as directed therein but providing: " * * * however, the share of Joseph Miller Hiatt is subject to a charge of $800.00 with interest thereon at five per cent, per annum from March 20, 1926 as a part of said estate." That decree also provided that the executors should be discharged from their trust upon the payment of costs, expenses, and certain amounts therein directed to be paid, or the filing of vouchers showing such payments, together with the receipt of the trustees for the residue.

Thereafter two of the testator's sons assumed their duties as trustees of the property devised during the lifetime of testator's widow, as provided in the will, and served as such until March 25, 1942, when they resigned. On April 7, 1942, another was appointed successor trustee who served until the trust terminated. The testator's widow died February 3, 1944.

One of the nine devisees then filed a suit to partition the real estate devised by the will. Decree of partition was entered and a referee appointed who sold the property and collected the proceeds, together with accruing rentals. The petition in that action asserted the right to a lien upon defendant's share of the proceeds by reason of the debt to the testator theretofore charged or imposed upon defendant's devise in the decree of final settlement.

To that petition defendant filed an amended answer admitting that he owned a one-ninth interest in fee simple in the real property involved by virtue of the devise in the will of testator, a copy of which is attached to and made a part of his pleading. He then alleged substantially that the will contained no language making the debt a charge upon his share of the real property devised, therefore, the debt was extinguished and could not be a charge upon his share of the proceeds of the realty and that the provision in the decree of final distribution purporting to subject his share of the devise to a charge for the debt was void for want of jurisdiction.

Plaintiff devisees, all others disclaiming, then filed a reply admitting the provisions of the will and its probate but denying generally all other allegations of defendant's answer. They then alleged substantially that on March 20, 1926, defendant executed and delivered to Colonel J. Hiatt a promissory note for $800 at five percent, due in five years, no part of which was ever paid and that defendant had knowledge of the provision in the decree of final settlement but took no appeal therefrom and by his conduct is estopped to claim his share of the proceeds without paying the debt. They also alleged that on September 14, 1935, defendant executed a promissory note for $160, payable on demand, at five percent, to the order of the estate of Colonel J. Hiatt, no part of which had ever been paid and that it also should be retained out of defendant's share of the proceeds. They admit that no action at law was ever brought to collect either of the notes and that the statute of limitations has barred actions thereon but contend that under the circum-

stances equity should order the referee to retain such sums against defendant's share for the benefit of the other devisees.

Defendant traversed plaintiffs' reply and the issues were by agreement so presented to the trial court where a decree was entered finding generally for defendant and against plaintiffs. Their motion for a new trial was overruled and plaintiffs appealed to this court assigning as error in substance that the decree is not sustained by the evidence and is contrary to law. We find that these contentions cannot be sustained.

It is conceded that the property involved and the proceeds from the sale thereof by the referee was real estate as distinguished from personalty at all times. With reference to the rent collected, we have only recently held under comparable circumstances that rents, either share or cash, vest as real estate in the devisee or heir by reason of the passing of the title. Hahn v. Verret, 143 Neb. 820, 11 N. W. 2d 551. See, also, In re Estate of Andersen, 83 Neb. 8, 118 N. W. 1108; In re Estate of Pope, 83 Neb. 723, 120 N. W. 191.

The primary question for decision then is whether the debt of defendant to the testator may be retained from or charged on defendant's devise of real estate under the will. In Stanton v. Stanton, 134 Neb. 660, 279 N. W. 336, it was held that: "Where the intention of the testator can be ascertained from the will, it is the duty of the court to give it effect." It was further held: "A will is presumed to contain the final manifestation of testator's bounty, and all advancements and charges against a devisee, not saved by the will, are extinguished." It was also 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."

In the opinion it was said: "An heir's distributive share of the personal estate, under all the authorities, may be applied by the administrator or executor in payment of a debt due the estate by such heir. The reason is that the personal estate passes to the administrator or executor, and, while it is in the possession of the administrator or executor, he

may retain a sufficient amount of the legatee's share in the personal property to satisfy the claim of the administrator or executor against him. It is this situation that gives rise to the use of the term 'retainer.' But the title to real estate under a devise in a will is vested in the devisee at the instant of testator's death. Brown v. Webster, 87 Neb. 788, 128 N. W. 635; Fischer v. Sklenar, 101 Neb. 553, 163 N. W. 861. While it is true that the title of the devisee is subject to the right of the executor to sell the land to pay debts duly allowed against the estate and the expenses of administration, as by statute provided, the surplus will be treated as real estate, and consequently the doctrine of retainer could not apply unless it applies generally to a devise of real estate. In re Estate of Schram, 132 Neb. 268, 271 N. W. 694. * * * In this state the legislature has not changed the common law in so far as the descent of real estate is concerned. The result is that real estate descends to the devisees of a deceased free from the debts of such devisee subject only to conditions imposed by statute. Our statutes, hereinbefore cited, do not provide for advancements in testate estates, the will of testator presumably being the testator's last expression of his intention. There being nothing in the will purporting to charge the devisee with the indebtedness owing the testator, it evinces an intention to treat the notes as a simple indebtedness and to leave their enforcement to the ordinary legal methods provided by law. * * * The effect of appellee's contention is that we should substitute the court's idea as to what is fair and equitable for that of the testator. This we cannot do. It might appear to the casual observer that the will as executed produced an inequitable result, but, on the other hand, we have no knowledge of the facts that motivated the testator in drawing the will as he did. He had the legal right to dispose of his property as he saw fit and the reasons he had for making the disposition that he did make are not of concern to this court. The fact remains that the inequity of the present situation, if there be such, cannot be adjusted by depriving the appellant of its legal interest in the devise and giving it to others."

It is well established that the district court has jurisdiction in an action of partition to construe a will, to determine the rights of the parties to the land under the will, and to take an account of the rents and profits arising out of the premises partitioned therein. Annable v. Ricedorff, 140 Neb. 93, 299 N. W. 373.

The testator's will, after providing for payment of his debts and the appointment of executors to serve as such during the administration of his estate, devised all of his property to two sons in trust for the period of the natural life of his wife, to manage the same and provide her with suitable maintenance from the income and accumulate the excess, if any, for the benefit of the estate. He gave the trustees the power to sell or mortgage the property only if it became necessary for the purpose of providing his wife with suitable and comfortable support during her lifetime and the income was insufficient for that purpose. Upon the death of his wife the testator devised all the residue of the estate to his nine children of whom defendant was one, share and share alike, that is one-ninth of such residue to each of them.

We are of the opinion that upon the death of testator the title to all of his property, together with the power to sell or mortgage it only if necessary to perform the trust imposed, vested at once in the trustees in trust for the life of the beneficiary and, subject to the trust provisions, the remainder vested at once in the nine children, one-ninth to each, share and share alike. However, immediately upon the death of the wife the trust automatically terminated and the fee-simple title to all the property remaining, a part of which was the realty here involved, was complete and vested absolutely in the nine children as if the trust provisions had never existed. We find no language in the will making any debt of defendant to the testator a charge on the devise, therefore, the opinion in Stanton v. Stanton, *supra*, controls the decision.

The county court so construed the will in its decree of final settlement but it erroneously subjected defendant's

devise of land to the debt. In that connection the construction of a will in the probate court is for the information and benefit of the executor only, in order to advise him of the course to pursue and adjudicates nothing beyond his rights and liabilities in the execution of his office. Controversies between adverse claimants under a devise or bequest or between the executor and persons claiming adversely to the estate will not be affected thereby. Hahn v. Verret, *supra*. In such a situation the decree of final settlement entered by the county court purporting to construe the will, thereby depriving defendant devisee of an interest in real property devised to him under the will, and giving it to other devisees to satisfy a claim of the estate against him for a debt to the testator would be void for want of jurisdiction. See art. V, sec. 16 of the Constitution; sec. 24-502, R. S. 1943; Fischer v. Sklenar, 101 Neb. 553, 163 N. W. 861; Davis v. Davis, 112 Neb. 178, 199 N. W. 113; In re Heirship of Robinson, 119 Neb. 285, 228 N. W. 852; Merrill v. Pardun, 125 Neb. 701, 251 N. W. 834; Annable v. Ricedorff, *supra*; Hahn v. Verret, *supra*.

We find no evidence in the record upon which plaintiffs could predicate estoppel and it is conclusive that defendant's right in this action to make the defense presented by him could not be precluded by his failure to appeal from the decree of final settlement. Therefore, we conclude that the $800 note made, executed, and delivered to the testator more than two years before his will was executed could not be retained from or charged upon the interest of defendant in the real estate devised. It is nothing more than evidence of an indebtedness due the estate and, as such, passed to the executors upon the testator's death or to the trustees as provided in the will. Under such circumstances the only remedy of the executors or the trustees was to have invoked the ordinary legal remedies to enforce payment which they evidently did not do until admittedly the statute of limitations barred the debt.

From what has been heretofore said it will be observed also that the $160 demand note executed long after the

death of the testator and the closing of the estate could not be retained from or charged on defendant's share of the proceeds. Neither can there be a recovery thereon in this action upon any other theory. The record discloses that defendant's signature was identified and the note was offered in evidence. However, the only other evidence with reference to it is that it was seen for the first time by the successor trustee when found by him in a safety deposit box on February 7, 1944, after the mother's death and approximately eight and one-half years after its execution and maturity. The reason for its execution does not appear. The evidence of the successor trustee is simply that he found the note and never even talked with the defendant about it. There is no evidence that defendant by agreement or otherwise thereby obtained any improper advantage over the other devisees during the administration of the trust, which equity would not permit the defendant to retain, and there is no evidence that the respective claims of the parties before the court arose out of the same transaction permitting the application of reduction or recoupment, thereby avoiding the statute of limitations.

At most, the latter note was simply evidence of a debt from defendant to the trustees of the estate which is not available to the other devisees as a set-off against defendant's share of the proceeds involved in this action because admittedly the statute of limitations has long since barred the debt.

We conclude for the reasons heretofore stated that the judgment of the trial court was correct and it is hereby affirmed.

AFFIRMED.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1946

THE COUNTY OF ANTELOPE, NEBRASKA, THE COUNTY OF BOONE, NEBRASKA, THE COUNTY OF MADISON, NEBRASKA, THE COUNTY OF STANTON, NEBRASKA, APPELLANTS, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT, APPELLEE.

21 N. W. 2d 416

FILED JANUARY 11, 1946. Nos. 32020, 32021, 32022, and 32023.

1. **Taxation.** The State Board of Equalization and Assessment has no power or authority except as specifically conferred upon it by statute.
2. ———. The purpose of the statutory notice to counties, required by section 77-508, R. S. 1943, to be given by the State Board of Equalization and Assessment, is to give the legal representatives of each county affected by the proposed change an opportunity to appear and show cause why the valuations of their county should not be changed.
3. ———. Without the giving of the statutory notice, the State Board of Equalization and Assessment has no authority to decrease the assessed valuation of farm tractors and motor vehicles in every county in the state.

APPEAL from The State Board of Equalization and Assessment. *Reversed.*

Elven A. Butterfield, William Keeshan, Andrew D. Mapes, and *T. L. Grady,* for appellants.

Walter R. Johnson, Attorney General, Edwin Vail, and *Homer Kyle,* for appellee.

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

PAINE, J.

This is an appeal to this court from an order made July 18, 1945, by the State Board of Equalization and Assessment by the counties of Antelope, Boone, Madison, and Stanton. The order appealed from directed that a blanket reduction of 20 percent in the assessed valuation of all farm tractors and a reduction of 15 percent on all motor vehicles be made in all the counties of the state.

It appears that the said State Board of Equalization and Assessment held its regular meeting July 2, 1945, the same being the first Monday in July, as required by section 77-505, R. S. 1943.

The record discloses that protests against the valuations of motor vehicles and farm tractors had been made by a number of organizations, but by no counties. It was announced that the board would meet on July 16, 1945, for the purpose of hearing such protests. The board met on July 16, and the record shows that many persons appeared, representing various organizations, and made oral statements and submitted letters and other evidence in relation to the assessments of farm tractors and motor vehicles, and thereupon the board adjourned, subject to the call of the chairman, and met again on July 18, 1945. The record sets out that a motion was duly made and carried "that the 1945 assessed values on all motor vehicles be reduced 15% in all counties of the state; and that 1945 valuation of all farm tractors in all counties of the state be reduced 20%."

In the brief of the four county attorneys representing appellants, it is assigned as error: (1) That said order of the State Board of Equalization and Assessment is illegal and void for the reason that prior to the entry thereof no notice was issued to the respective counties of the state of Nebraska, as provided by section 77-508, R. S. 1943; (2) that said State Board of Equalization and Assessment had no jurisdiction or power to decrease the assessed valuation of any class or kind of property, except in the equalization of as-

sessments as between counties, and therefore had no jurisdiction or power to decrease the assessed valuation of a class of property by a uniform percentage in all the counties of the state.

The Attorney General admits that the State Board of Equalization and Assessment did not send out any notices to the counties, as provided in section 77-508, R. S. 1943, and contends that the board proceeded to act under sections 77-506 and 77-507, and to examine the abstracts of real and personal property assessed for taxation in the several counties of the state, and made a decrease by percentage, and certified the same to the county clerks. It is the contention that this was not an equalization between counties, but was an equalization as to two particular items over the entire state, the Attorney General contending that the notice is only required when it is an equalization between certain counties.

In examining the law affecting this question, we find that the earliest act provided for a "State Board of Equalization," in section 29, Laws 1869, p. 191, but no notice was required to be given of its meetings. In the revenue act of 1903, the name was changed to "The State Board of Equalization and Assessment." Laws 1903, s. 130, p. 434.

In Hacker v. Howe, 72 Neb. 385, 101 N. W. 255, it was held that no notice was required except the one given by the statute. The Legislature of 1909 amended the law, and provided that a notice should be issued to counties that are undervalued, requiring them to appear and show cause why the assessment of such county should not be increased. Laws 1909, s. 2, p. 447.

In Laws 1921, art. XI, s. 4, at page 591 occurs an amendment repealing the provision for the notice just discussed, and enacting in its place an entirely new requirement as to notice, reading as follows: "In the event it shall appear to the State Board of Equalization and Assessment that a just, equitable and legal assessment of the property in the state cannot be made without increasing or decreasing the valuation as returned by any county, the Board of Equal-

ization and Assessment shall issue a notice to the counties which the board deems either under-valued or over-valued and shall set a date for hearing at least five days following the mailing of such notice."

This section of the act of 1921 became section 5901, Comp. St. 1922, and came before this court in four companion cases. Three of these involved an increase in valuation of all the telephone properties in the state, and the fourth involved an increase of 10 percent in the assessed valuation of cattle in all the counties of the state. It was held by this court that, where an increase in the assessed valuation of any class of property is made by said State Board of Equalization and Assessment without notice to the counties, and without affording sufficient opportunity to be heard, then such increase was in violation of said section 5901, Comp. St. 1922. Northwestern Bell Tel. Co. v. State Board of Equalization and Assessment, 119 Neb. 138, 227 N. W. 452; American Tel. & Tel. Co. v. State Board of Equalization and Assessment, 119 Neb. 142, 227 N. W. 455; Lincoln Tel. & Tel. Co. v. State Board of Equalization and Assessment, 119 Neb. 137, 227 N. W. 454; Stanton County v. State Board of Equalization and Assessment, 119 Neb. 136, 227 N. W. 454.

The State Board of Equalization and Assessment has no power or authority except as specifically conferred upon it by statute.

In a case involving a county board of equalization, this court said: "The county board of equalization can only exercise such powers as are expressly granted by statute, and when the law prescribes the mode they must pursue in the exercise of these powers, it excludes all other modes of procedure." Brown v. Douglas County, 98 Neb. 299, 152 N. W. 545.

"The state board of equalization and assessment is, under the powers and duties conferred upon it by statute, in no sense a board of review with power to correct the errors of the county boards of equalization or assessors." Scotts Bluff County v. State Board of Equalization and Assess-

ment, 143 Neb. 837, 11 N. W. 2d 453. See, also, Des Moines Gas Co. v. Saverude, 190 Iowa 165, 180 N. W. 193.

This section of our statute relating to the required notice became section 77-1004, Comp. St. 1929, and while the act was amended in Laws 1933, s. 1, p. 505, the identical language with respect to the giving of notice to the counties was retained.

This long and involved section, found as section 77-1004, Comp. St. 1929, has now been separated into six sections, 77-505 to 77-510, R. S. 1943, but the only change made in the text was to eliminate the ambiguous phrase "and/or."

With this review of the pertinent provisions of the law, we are now ready to pass on the question presented to us in this appeal, which is: May the State Board of Equalization and Assessment enter an order reducing the value of all farm tractors 20 percent and reducing the value of all motor vehicles 15 percent in all the counties of the state, without first giving statutory notice to the respective counties?

Section 77-508, R. S. 1943, which provides for the notice, reads as follows: "In the event it shall appear to the State Board of Equalization and Assessment that a just, equitable and legal assessment of the real or personal property in the state cannot be made without increasing or decreasing the valuation of such real or personal property as returned by any county, the board shall issue a notice to the counties which the board deems either undervalued or overvalued, and shall set a date for hearing at least five days following the mailing of such notice. The notice shall be mailed to the county clerk, county assessor and chairman of the county board."

The purpose of the notice is to give the legal representatives of each county affected an opportunity to appear and show cause why the valuations of their counties should not be changed. The reducing of the amount by the State Board of Equalization and Assessment affects the counties adversely, while an increase affects the property owners adversely.

This provision for a notice has been before this court in the four companion cases discussed herein, in which the main opinion appears in the Northwestern Bell Telephone Company case, *supra*, and this court there held the increases were void because of the failure to give this required statutory notice.

We are compelled to hold that, without giving the statutory notice, the State Board of Equalization and Assessment had no jurisdiction to so decrease the assessed valuation of farm tractors and motor vehicles, and said order is void.

In the appellants' assignment of errors, they present a second question, which, stated briefly, is whether the State Board of Equalization and Assessment has power to make a blanket reduction of a particular class of property in all the counties of the state. In view of our holding in the case before us, it is not necessary or proper that we pass upon that question.

We have reached the conclusion that the order of the State Board of Equalization and Assessment complained of herein, which in express terms attempted to decrease the assessed valuation of farm tractors 20 percent and of motor vehicles 15 percent in all the counties of the state, is void.

ORDER REVERSED.

KENNETH LINN, APPELLANT, V. OSCAR G. LINN ET AL., APPELLEES.

21 N. W. 2d 283

FILED JANUARY 11, 1946. No. 31981.

1. Trusts. Attorney's fees and expenses will ordinarily be allowed a trustee where they were incurred for the benefit of the estate.
2. ———. Whether they were for the benefit of the trust estate or the trustee personally is ordinarily a question of fact to be determined from the evidence adduced.

3. **Appeal and Error.** Where it is necessary to determine such question from the evidence, this court will, in the absence of a bill of exceptions, presume that the trial court correctly determined the issue upon competent evidence.
4. **Attorney and Client.** Where the services of a litigant's attorney result in rescuing or preserving property or funds, not only for the benefit of the particular litigant but for the benefit of all others in the same class, the court may in the exercise of a sound legal discretion order a reasonable fee to be paid to such attorney from the common fund or by those benefited by it.
5. **Appeal and Error.** Where such issue must be determined from the evidence, and there is no bill of exceptions, error will not be presumed; it must affirmatively appear from the record.

APPEAL from the district court for Kimball County: J. LEONARD TEWELL, JUDGE. *Affirmed.*

Mothersead & Wright, for appellant.

Beatty & Clarke, for appellees.

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

CARTER, J.

This is an appeal from a decree entered in a suit to enforce an express trust and for an accounting by the trustee. No bill of exceptions has been prepared, served, or filed, with the result that the questions raised by the appeal must be determined from the pleadings and the decree.

The petition alleges that on March 30, 1939, Oscar G. Linn, hereinafter called the trustee, executed a declaration of trust by which he acknowledged that certain property, consisting of a stock of hardware, the capital stock of the hardware company and certain real estate, was held by him in trust for the six sons of Gus Linn, of which he was one. Under the trust as declared by him the trustee was required to operate the hardware business, pay the outstanding indebtedness for which the property was liable, and thereafter distribute the same equally between the six beneficiaries of the trust. The petition alleges the failure of the trustee to make reports as required by the declaration of trust and

prays for an accounting and a termination of the trust.

The answer admits the declaration of trust and that the six sons of Gus Linn are the beneficiaries thereunder. The answer denies that there had ever been a refusal to account, that a complete set of books had been kept at all times and that they were at all times available to the beneficiaries of the trust. The answer further alleges that the indebtedness of Gus Linn, for which the property was liable, had not been fully paid.

The trial court found in its decree filed on November 2, 1943, after a trial, that the trust was valid, even though made voluntarily without consideration. The court further found that all the indebtedness required to be paid under the terms of the declaration of trust had been paid at the time of the trial, excepting only the debts owing to beneficiaries of the trust; that the failure to account did not constitute a violation of the trust, no harm resulting therefrom; and that the trustee had made a full, complete, and accurate accounting which was approved except for one item of $5,000 which was held open for further consideration. The court further provided that the trustee should proceed to terminate the trust within a reasonable time; that he pay all costs, auditors' fees and attorneys' fees incurred; and that upon the future accounting other items of expense would be passed upon by the court.

On February 21, 1945, a second decree was filed in which the findings of the former decree in all respects were approved, the $5,000 claim of the trustee disallowed, the expenses and fees of the trustee's attorneys ordered paid, the distribution of assets approved subject to the indebtedness of the beneficiaries to the trust estate, and an order entered terminating the trusteeship upon the performance of the specific acts required by the decree to be performed. The trial court denied the application of the plaintiff for the allowance of an attorney's fee to be paid out of the assets of the trust estate.

Appellant contends that the expenses and attorneys' fees allowed the trustee were for his own benefit and conse-

quently they were not a proper charge against the trust estate. Appellant further contends that the litigation carried on by him was beneficial to others of the class he represents and that he is entitled to reimbursement for attorney's fees and expenses from the trust estate.

The decree of the trial court finds the assets of the estate to be greatly in excess of the accounting which the trustee attached to his answer. There is nothing to show how this difference came about, there being no bill of exceptions which discloses this important fact. Whether the expenses incurred and the attorneys' fees expended were for the benefit of the trust estate or the trustee personally is not disclosed by any record before us. Under such circumstances we are obliged to presume that the trial court acted correctly upon evidence sufficient to sustain his finding. Buck v. Zimmerman, 144 Neb. 719, 14 N. W. 2d 335. We must assume, therefore, that the court's finding that the expenses and attorneys' fees were to the benefit of the estate, was supported by sufficient evidence. The allowance of such expenses and attorneys' fees is addressed to the sound discretion of the court. United States Nat. Bank v. Alexander, 140 Neb. 784, 1 N. W. 2d 920. There is nothing before us that affirmatively discloses any abuse of such discretion on the part of the trial court in allowing attorney's fees and expenses to the trustee.

With respect to the claim of appellant that the trial court erred in refusing to allow attorney's fees and expenses incurred by him in carrying on the litigation, the applicable rule is: Where many persons have a common interest in a trust fund or property, and one of them, for the benefit of all, at his own cost and expense, takes legal action for its preservation or administration, the court of equity in which the suit was brought may order the successful litigant to be reimbursed for his costs and expenses, including attorney's fees, from the property of the trust. Blacker v. Kitchen Bros. Hotel Co., 133 Neb. 66, 273 N. W. 836; Allen v. City of Omaha, 136 Neb. 620, 286 N. W. 916. The practice of allowing attorney's fees and expenses to a litigant under

the foregoing rule is based on general equitable principles and such allowances are proper only for dominating reasons of justice. It must appear from the record that all in the class benefited from the action of the one making the claim. The allowance or disallowance of such a claim is left largely to the discretion of the trial court and it is only when there is a clear abuse of that discretion that this court will interfere. In the present case there is no evidence from which the facts essential to sustain an award for attorney's fees and expenses can be ascertained. Five of the sons of August Linn were parties to the litigation, two appearing as parties plaintiff and three appearing as parties defendant. All five sons who were parties to the suit were represented by legal counsel and, for aught that appears in the record before us, some or all of such counsel may have brought about or contributed materially to the result evidenced by the trial court's decree. We hold, therefore, that in the absence of evidence showing the extent of the services rendered and the benefits derived therefrom, which were beneficial to the class having an interest in the trust estate, no basis exists for disturbing the judgment of the trial court. No bill of exceptions having been filed, we must assume that there was evidence before the trial court sustaining the finding that plaintiff's action was not such as to bring him within the applicable rule.

There being no error affirmatively shown by the record, the judgment of the district court is affirmed.

AFFIRMED.

FRANK PETERS, APPELLANT, V. HENRY DREGER ET AL., APPELLEES.

21 N. W. 2d 436

FILED JANUARY 11, 1946. No. 31990.

1. **Vendor and Purchaser: BROKERS.** Where a real-estate broker, while his brokerage contract is in full force and effect, obtains a purchaser for real estate and no sale is made during the

existence of the agreement but sale was thereafter made by the owner to the person produced by the agent on substantially the terms that had been offered through the agent's efforts the broker is entitled to a commission for making the sale.

2. ———: ———. Conversely, where a real-estate broker obtains a purchaser for real estate and no sale is made during the existence of the agreement but sale was thereafter made by the owner to the person produced by the agent but not on substantially the terms that had been offered through the agent's efforts the broker is not entitled to a commission for making the sale.

3. Principal and Agent: BROKERS. A principal cannot defeat the right of a real-estate broker to recover commission by inability to convey good title to real estate because of the failure to obtain a joinder in the conveyance by a third person who has an interest.

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

Fischer, Fischer & Fischer, for appellant.

W. R. Patrick, for appellees.

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

YEAGER, J.

This is an action by plaintiff and appellant to recover from defendants and appellees a real-estate brokerage commission on the sale of a farm in Sarpy County, Nebraska. The case was tried to a jury. The verdict was for defendants. Judgment was entered on the verdict. From this verdict and judgment plaintiff has appealed. The errors assigned are that the court erred in giving instruction number 10; that the verdict is not sustained by the evidence; and that the verdict is contrary to law.

The pertinent facts out of which the action grew are the following: On April 20, 1942, the defendants signed a listing contract wherein they designated plaintiff their broker for the sale of a sixty-acre farm. The list price of the farm was $85 per acre or $5,100. The agreed commission was five percent. The period of listing as stated in the agree-

ment was as follows: "This agreement to run 30 days months from date and thereafter until _____ days written notice is given of withdrawal from market." On November 2, 1942, plaintiff submitted to defendants an offer of one S. R. Hubbard to purchase the farm for $4,800. Payment by Hubbard was to be by assignment of the balance due him of approximately $1,000 on the sale of a house and two acres of ground, payable $18 per month with 6½ percent interest, $400 cash on or before December 20, 1942, balance except $100 to be paid March 1, 1943. The contract does not disclose when the $100 was to be paid. Quite probably this represents $100 which accompanied the offer of Hubbard. The offer was not accepted by the defendants. On November 21, 1942, defendants gave notice of the termination of the listing and the brokerage agreement.

On January 4, 1943, the defendants sold the farm to the said S. R. Hubbard under contract for $4,800. Payment provided therefor was as follows: Hubbard assumed a $3,200 mortgage on the farm, $480 cash was paid on the execution of the contract, Hubbard conveyed to the defendants title to Lot 22, Layton's Addition in Douglas County, Nebraska, and assigned to them a contract of sale thereto whereon there was a balance due of approximately $860 and agreed to pay on February 1, 1943, approximately $836.20 in cash. As a part of the agreement it was provided that defendants should be permitted to remove from the farm a temporary corn crib; all woven wire chicken fence; 70 rods of hog wire; dropping boards, roosts, and nests in chicken houses; a temporary setting shack; and two iron gates.

The theory of plaintiff is that as a real-estate broker, while his contract of listing was in full force and effect, he obtained the purchaser for defendants' farm and that though his listing contract had been canceled at the time sale was actually made sale was made because of his efforts and on substantially the same terms as had been offered through his efforts and he is therefore entitled to his commission.

The theory is clearly a correct one and is sustained by the decisions of this court and he is entitled to its benefit if the facts bring him within its purview. The rule was stated in Nicholas v. Jones, 23 Neb. 813, 37 N. W. 679, as follows: " * * * when upon the procurement of the agent a purchaser is produced, with whom the seller, even himself, negotiates and effects a sale, although the terms may be somewhat changed, the agent is entitled to his commission." See, also, Dunn v. Snell, 124 Neb. 560, 247 N. W. 428.

The burden of this decision is therefore not with the theory upon which plaintiff has presented his case but upon the factual issues presented.

The case was submitted to a jury without motion for directed verdict by either party under instructions fully, fairly, and completely outlining and embodying this theory and the verdict was against him and in favor of the defendants.

Before this court would be justified in reversing the judgment on the second and third assignments of error, or either of them, it would be necessary to find that the plaintiff's evidence taken alone would require a finding at the hands of a jury in his favor, and that the evidence of defendant was insufficient in fact and in law, if believed, to amount to a defense to plaintiff's cause of action.

We do not believe that the record justifies such a finding and conclusion.

The plaintiff alleged that the defendants sold the farm to a purchaser produced by him. His evidence sustains conclusively the allegation. He alleged that notice of cancellation and revocation of his agency was given and that thereafter the sale was made on substantially the same terms as were obtained and submitted by him. The record discloses that defendants did give notice of cancellation and revocation of the agency and did thereafter make a sale of the farm. Defendants denied that the sale was consummated on the same or substantially the same terms as were contained in the offer submitted by plaintiff. They adduced evidence which they insist shows in fact a sale price sub-

stantially in excess of the offer tendered by plaintiff and terms of sale more favorable.

We have hereinbefore set out the details of the contract tendered by plaintiff and also the terms of the sale as made. It will be observed therefrom that the stated sale price in each was $4,800. Also in the offer was a tender in part payment of the purchase price of an assignment of the balance due on a real-estate contract of approximately $1,000 payable $18 per month. As against this in the sale defendants accepted an assignment of this contract, the balance due on which was approximately $860 together with title to the real estate there involved. In the sale the purchaser agreed to assume the balance due on a $3,200 mortgage on the farm. Presumably in plaintiff's tendered contract the prospective purchaser contemplated only taking subject to the mortgage. The down payment in the case of the offer was $400. In the case of the sale it was $480. The balance in each instance was to be cash. In the offer no property on the farm was reserved. In the sale property on the farm of the value of $150 was reserved. This is the value fixed by the defendant, Henry Dreger, and there is no evidence to the contrary.

The trial court on this evidence required the jury, without objection on the part of the plaintiff, to decide the question of whether or not the sale was made on substantially the same terms as those contained in the contract of sale tendered by plaintiff. The effect of the verdict was to say that they were not substantially the same. We are unable to say that the jury arrived at an incorrect conclusion.

The other error complained of, as has been pointed out, is that the giving of instruction number 10 was erroneous.

By the instruction the jury was told, which was the fact as disclosed by the record, that at the time plaintiff obtained his brokerage contract one August Nelson had a life estate in the farm in question and that the deed defining it was of record. The instruction further told the jury that the deed constituted notice to all persons having transactions relative to the farm of his interest therein and that he alone

could dispose of his interest and that this was an element that the jury could take into consideration as evidence in the case along with the other evidence and the instructions of the court.

By the instruction the jury was not told that these facts tended to prove or disprove any issue in the case but only that it had the right to consider them, and we fail to find any theory making proper the giving of the instruction. This case is not one which falls within the rule which denies to a real-estate broker his right to collect or recover a commission unless a sale is made. That rule obtains only where there is a contract between the principal and the broker to that effect, or to the effect that no commission shall be paid if the sale is not completed through fault of the prospective purchaser. Barber v. Hildebrand, 42 Neb. 400, 60 N. W. 594.

A principal cannot defeat the right of his real-estate broker to recover commission by inability to convey good title to real estate because of the failure to obtain a joinder in the conveyance by a third person who has an interest. Bell v. Stedman, 88 Neb. 625, 130 N. W. 257.

The giving of the instruction was clearly erroneous and we think prejudicial. The answer called attention to the life estate of August Nelson and pleaded that plaintiff had due notice thereof and knew that defendants could not deliver possession on account thereof.

It was evidently this proposition that the court intended to submit by the instruction. This was not a proper matter for consideration by the jury in the absence of some provision causing the broker's right to recover to depend upon the ability of defendants to deliver possession. No such provision appears.

For the reasons herein set forth the judgment of the district court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

VERNON LOUDY, APPELLEE, V. UNION PACIFIC RAILROAD COMPANY, APPELLANT.

21 N. W. 2d 431

FILED JANUARY 11, 1946. No. 31927.

1. **Negligence.** To recover under the doctrine of the last clear chance, a plaintiff must have been in a position of peril which was known or, by the exercise of ordinary care, ought to have been known to defendant in time to avoid injury by the exercise of ordinary care.
2. **Railroads: TRIAL.** The fact that a person who is injured was in a place of danger and so situated that he could have been observed by the railroad engineer in time to have avoided the accident must be proved by a preponderance of the evidence. It is facts and not probabilities that must be thus established.
3. ———: ———. It is the duty of a traveler on a highway, when approaching a railroad crossing, to look and listen for the approach of trains. He must look, where, by looking, he could see, and listen, where, by listening, he could hear and if he fails without reasonable excuse to exercise such precautions then he is guilty of contributory negligence more than slight, as a matter of law, and no recovery can be had for damages resulting from collision with a passing train.
4. **Negligence: RAILROADS.** A traveler upon a public highway, who attempts to cross a railroad track in front of an approaching train, if he knew, or ought to have known, of its approach, is guilty of contributory negligence as a matter of law which will prevent a recovery for resulting injuries, if the approaching train was in such close proximity to the crossing that a reasonably prudent person could not fairly expect to cross in safety ahead of it.
5. ———: ———. Where it is undisputed that a traveler on a highway failed to exercise reasonable precautions by looking and listening at a reasonable point where he could have seen an approaching train in time to stop before reaching the tracks, his contributory negligence, as a matter of law, will defeat a recovery for damages resulting from collision with the train at a crossing even though no signal by the locomotive bell or whistle was given as required by law.
6. **Negligence.** Ordinarily where the negligence of one party is merely passive and potential causing only a condition while that of the other is the moving and effective cause of the accident the latter is the proximate cause.
7. **Trial.** Where the facts adduced to sustain an issue are such

that reasonable minds can draw but one conclusion therefrom, it is the duty of the court to decide the question, as a matter of law, rather than submit it to a jury for determination.

APPEAL from the district court for Buffalo County: E. G. REED, JUDGE. *Reversed and dismissed.*

T. F. Hamer, G. C. Holdrege, J. C. Tye, and *R. B. Hamer,* for appellant.

Dryden & Jensen, for appellee.

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

CHAPPELL, J.

This is an action at law to recover for damages to plaintiff's automobile in a collision between it and a train owned and operated by defendant. Upon trial to a jury plaintiff was awarded a verdict and judgment. Defendant's motion for new trial was overruled and it appealed to this court. There are numerous assignments of error but since our decision must be that the trial court erred in overruling defendant's motion to dismiss or direct a verdict at the conclusion of plaintiff's evidence it will not be necessary to discuss the other assignments.

Plaintiff's petition alleged substantially that the collision and damages proximately resulted from negligence of defendant because it: (1) Negligently failed to keep in repair good and sufficient crossings over its tracks including the grading, ditches, and culverts over its right-of-way contrary to section 75-220, R. S. 1943; (2) negligently failed to blow a whistle or ring a bell continuously for at least 80 rods east of the intersection of the highway and its tracks to warn plaintiff's driver of the approach of its trains, contrary to section 74-573, R. S. 1943, and (3) negligently failed to stop its train after the position of plaintiff's car was seen or by the exercise of ordinary care should have been seen on the tracks in time to have avoided collision with it. Defendant's answer admitted the collision, denied generally that it was negligent as claimed, and alleged that

any damages suffered by plaintiff were caused solely by the negligence of the driver, plaintiff's wife.

Decision depends upon the evidence adduced in plaintiff's behalf and rules of law applicable thereto. In arriving at the conclusions hereinafter set forth we are mindful of the well-established rule that: "A motion for a directed verdict must for the purpose of decision thereon be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor, and to have the benefit of every inference that can reasonably be deduced from the evidence." Roberts v. Carlson, 142 Neb. 851, 8 N. W. 2d 175. However, we must also bear in mind that where the facts adduced to sustain an issue are such that reasonable minds can draw but one conclusion therefrom, it is the duty of the court to decide the question, as a matter of law, rather than submit it to a jury for determination. Witthauer v. Paxton-Mitchell Co., *ante* p. 436, 19 N. W. 2d 865.

The evidence adduced in plaintiff's behalf is substantially as follows: At the time of the accident, midafternoon, March 29, 1944, plaintiff's wife was permissively driving his car. Hereafter she will be called the driver. It is conceded that any negligence on her part should be imputed to plaintiff who was not then a passenger in the car. The wife's sister was riding with the driver at that time but she did not testify at the trial.

The driver proceeded west out of Gibbon, Nebraska, on Highway 30 for approximately a mile and a quarter, at which point she turned from the pavement to the left over a country road, intending to visit a brother who lived just south of defendant's tracks, which extend east and west across the road. It is approximately 100 to 125 feet south from the pavement to the north rail of defendant's tracks. The road first declines sharply down from the pavement to a chronic mud hole which at that point covered most of the road and was located inside of defendant's right-of-way fence. South of the mud hole the road inclines quite steeply

up to and over defendant's tracks. For a distance of 50 to 60 feet south between the mud hole and the tracks the road was in good, serviceable condition having both gravel and cinders upon it. There is no evidence of any defect in the railroad crossing itself.

Nothing obstructed a full view of defendant's tracks clear up to the town of Gibbon unless it was an east and west row of telephone or telegraph poles located some distance north of the tracks which only partially obstructed the view at that point for a short distance. No complaint is made that they obstructed the driver's view in any manner except for a short distance south of the pavement. It had snowed two days previously but most of it had melted. The day was fairly cold and clear with a brisk wind from the northwest. Plaintiff's car was mechanically in perfect condition and his wife was a good driver with years of experience. She was familiar with the road and the railroad crossing having driven and ridden over it many times. She had ridden over it as recently as the day before.

The car windows were all up. As the driver turned from the pavement to the south she testified that she looked both to the right and left but saw no train. She drove 10 or 15 miles an hour until she reached the mud hole having angled to the right side of the road so that only two wheels of the car tracked in the mud. There the car slowed up, started to labor and she shifted into second gear to approach the tracks.

As the driver left the mud hole she looked to the left again but says that she saw no train; says that she didn't look for smoke and didn't hear a whistle or bell ringing. However, her brother, who testified for plaintiff, said positively and with repeated emphasis that he heard the whistle blowing, "an unusual lot of whistling", "considerable whistling", at the time the train passed approximately 50 rods east of his place. Whether the bell was ringing he could not recall.

Nevertheless, the driver testified that while she was proceeding slowly, almost stopped, and at a point four to ten

feet more or less before reaching the tracks, or just as she approached the tracks, she looked again to make sure. She then saw defendant's train three or four city blocks distant coming awfully fast from the east toward her. She could not tell whether thereafter its speed slackened. Plaintiff adduced no other evidence from which the speed of the train could be ascertained.

After she saw the train, the driver did not apply her brakes and stop in a short distance or almost instantly as without doubt she could have done. Instead she tried to hurry the car on but it had slowed down so much that she saw she could not go on across so she shifted from second directly into reverse which killed the motor and the car stopped on the track. The sister then said: "Get out of the car" and started to do so. However, the driver stepped on the starter, tried everything in a quick motion but the car would not start. Thereupon, the train being a short distance away, she opened the door, jumped out, ran 10 or 15 feet northeast nearly to a fence running north and south and, almost instantly, before she could turn around the train struck the car. She thus escaped injury. The sister who attempted to escape from the right side of the car was not so fortunate and suffered personal injuries. The driver thinks that the train went on to the next crossing before it stopped and backed up to the scene of the accident.

The driver, the only eyewitness who testified for plaintiff, stated and positively reaffirmed the facts substantially as above set forth on direct examination and as positively repeated and reaffirmed them upon cross-examination. True, by further inquiry upon redirect, plaintiff's counsel did attempt, by assuming facts most of which were either contrary to or not in the evidence, to have the driver draw conclusions therefrom and place the train farther away from the crossing than it actually was and have plaintiff's car on the track longer than it could have been apparently in an effort to make operative the doctrine of the last clear chance. Be that as it may, we are of the opinion in any event that the assumptions thus presented by that inquiry

adduced answers which were at most mere possibilities or probabilities, as distinguished from facts.

To the issues and facts thus presented we must apply the law. For clarity and convenience we will first dispose of the question whether plaintiff was entitled to the benefit of the last clear chance. In Nyegomir v. Union P. R. Co., 130 Neb. 380, 264 N. W. 879, it was held: "To recover under the doctrine of the last clear chance, a plaintiff must have been in a position of peril which was known or, by the exercise of ordinary care, ought to have been known to defendant in time to avoid injury by the exercise of ordinary care." And, "The fact that the person injured was in a place of danger and so situated that he could have been observed by the railroad engineer in time to have avoided the accident must be proved by a preponderance of the evidence. It is facts and not probabilities that must be thus established." See, also, Zitnik v. Union P. R. Co., 91 Neb. 679, 136 N. W. 995; Mundt v. Chicago, R. I. & P. R. Co., 136 Neb. 478, 286 N. W. 691.

In the opinion Nyegomir v. Union P. R. Co., *supra,* this court clearly stated the factual elements which must be so proved to invoke the doctrine. In that connection it was said: "In order for the plaintiff to prove liability under this doctrine, it is incumbent upon her to prove by competent evidence that just before the accident the deceased was in a position of peril; that the railroad company or its agents knew or by the exercise of ordinary care ought to have known of his peril; that defendant, after receiving such knowledge, had the present ability, with the means at hand, to have averted the impending injury without injury to himself or others; that defendant failed to exercise ordinary care to avert the impending injury, and that deceased was injured as a result thereof. Banks v. Morris & Co., 302 Mo. 254, 257 S. W. 482."

An examination of the evidence heretofore recited discloses without doubt that plaintiff completely failed to establish these necessary factual elements by competent evidence and we conclude that he was not entitled to the benefit of the last clear chance.

We turn then to the remaining issues. It is well settled in this jurisdiction that it is the duty of a traveler on a highway, when approaching a railroad crossing, to look and listen for the approach of trains. He must look, where, by looking, he could see, and listen, where, by listening, he could hear and if he fails without reasonable excuse to exercise such precautions then he is guilty of contributory negligence more than slight, as a matter of law, and no recovery can be had for damages resulting from collision with a passing train. In Rickert v. Union P. R. Co., 100 Neb. 304, 160 N. W. 86, it was held: "A traveler upon a public highway, who attempts to cross a railroad track in front of an approaching train, if he knew, or ought to have known, of its approach, is guilty of contributory negligence which will prevent a recovery for resulting injuries, if the approaching train was in such close proximity to the crossing that a reasonably prudent person could not fairly expect to cross in safety ahead of it." These applicable rules in one form or another have also been stated and applied in Eggeling v. Chicago, R. I. & P. R. Co., 119 Neb. 229, 228 N. W. 361; Lewis v. Union P. R. Co., 118 Neb. 705, 226 N. W. 318; Haffke v. Missouri P. R. Corporation, 110 Neb. 125, 193 N. W. 257; Askey v. Chicago, B. & Q. R. Co., 101 Neb. 266, 162 N. W. 647; Moreland v. Chicago & N. W. R. Co., 117 Neb. 456, 220 N. W. 692; and Mundt v. Chicago, R. I. & P. R. Co., *supra*.

Under the circumstances presented if we assume for the purpose of argument only that plaintiff adduced competent evidence that the bell on defendant's locomotive was not ringing and that the whistle was not blowing, as required by statute, it will be of no assistance to him in establishing his case. The three latter cases above cited are authority for the rule that where it is undisputed that a traveler on a highway failed to exercise reasonable precautions by looking and listening at a reasonable point where he could have seen an approaching train in time to stop before reaching the tracks, his negligence, as a matter of law, will defeat a recovery for damages resulting from collision with

a train at a crossing even though no signal by the locomotive bell or whistle was given as required by law.

Clearly the driver's negligence in the case at bar, as a matter of law, would bar plaintiff's right to recover unless the mud hole on defendant's right-of-way was in some manner a legal excuse for her failure to look and listen or it could be said to be the proximate cause of the collision.

If plaintiff's theory is that the mud hole constituted an excuse for her admitted negligence then that contention is without merit. In Haffke v. Missouri P. R. Corporation, *supra,* plaintiff approached a railroad crossing in low gear at about two miles an hour and could have stopped within a distance of one foot. Although an approaching train was visible to a motorist on the highway for at least 24 feet before reaching the crossing, he did not see it and was struck. He sought to excuse his failure to look for the train during the last 24 feet by showing that the road was in bad condition, that it was soft and that there were ruts in it almost axle deep which required that his whole attention be centered upon his driving. In that situation the court said: "We do not consider, however, that the circumstances were such as to excuse him from looking. A mere glance occupying but a fraction of a second would have sufficed to warn him of the approaching train." The lower court's direction of a verdict because plaintiff's contributory negligence was more than slight as a matter of law and precluded recovery was sustained. See, also, Bunton v. Atchison, T. & S. F. Ry. Co., 100 Kan. 165, 163 P. 801.

In the case at bar the train admittedly could have been seen for a mile and a quarter and the driver had between 50 and 60 feet of good roadway after leaving the mud hole in which to have seen and heard the oncoming train. Certainly under such circumstances the defect could be no excuse for her failure to do so in time to have stopped the car and prevented the collision.

If we assume, without deciding, that defendant was obligated by statute to maintain the highway within its right-of-way, we must nevertheless conclude that the mud hole

was only a condition and not the proximate cause of the collision. It is the rule that ordinarily where the negligence of one party is merely passive and potential causing only a condition while that of the other is the moving and effective cause of the accident, the latter is the proximate cause. Steenbock v. Omaha Country Club, 110 Neb. 794, 195 N. W. 117; Anderson v. Byrd, 133 Neb. 483, 275 N. W. 825.

In Baltimore & O. R. Co. v. Reeves, 10 F. 2d 329 (an Ohio case), the court assumed, without deciding, that the railroad company was required under a statute similar in many respects with our own to maintain the highway. Nevertheless, it was said in the opinion: "We are satisfied that this highway defect, even if due to defendant's default, cannot constitute an independent, affirmative basis of recovery. * * * It has no direct tendency to lead to a crossing collision; it only surrounds the traveler with a condition, save for which he might not have been injured."

We are convinced that plaintiff's evidence failed to make a case for the jury and the trial court should have sustained defendant's motion to dismiss or to direct a verdict for the defendant at the conclusion of the plaintiff's evidence. For the reasons heretofore stated the judgment of the trial court is reversed and plaintiff's action is dismissed.

REVERSED AND DISMISSED.

COLUMBUS LAND, LOAN AND BUILDING ASSOCIATION, APPELLEE, V. KATIE WOLKEN ET AL., APPELLEES, FRED RABELER, JR., EXECUTOR, APPELLANT.

21 N. W. 2d 418

FILED JANUARY 11, 1946. No. 31996.

1. **Mortgages.** There can be no mortgage without a debt. There may be agreements for the performance of obligations other than the payment of money; but leaving these out of view, it is essential that there be an agreement, either express or implied, on the part of the mortgagor, or some one in whose behalf he executes the mortgage, to pay to the mortgagee a sum of

money either on account of a preexisting debt or a present loan.

2. ———. However, the personal liability of the mortgagor is not necessarily incident to a mortgage and the mortgage may be so framed or the authority to execute so limited as to exclude that element.
3. **Executors and Administrators.** Unless authorized by statute or by the terms of a will, a personal representative may not mortgage the decedent's realty.
4. ———. An executor or administrator, as such, has no inherent authority to borrow money; and loans to the representative which are not authorized by statute, will, or order of court do not bind the estate.
5. **Mortgages**: EXECUTORS AND ADMINISTRATORS. When a note and mortgage are executed and delivered by the representative of an estate pursuant to authority granted under the provisions of section 30-1201, Comp. St. 1929, it does not make the representative of the estate liable for the debt or obligation so created. In case of foreclosure the owner or holder of the debt secured thereby must look solely to the property mortgaged for the satisfaction thereof.
6. **Executors and Administrators.** The fact that the estate had been administered, final decree entered, and the property assigned and distributed to the heirs at law, and the executor discharged, did not bar or defeat this action against the executor of the estate. The trust of an executor is an enduring one, and the decree upon final accounting only discharges him from liability for the past.
7. **Mortgages.** In a suit to foreclose a mortgage on real estate the execution of the contract, the breach thereof, the identity of the real estate described therein, and the amount remaining due thereon are material and necessary issues to be determined by the decree.
8. ———. In such a suit, the findings of fact contained in the decree on issues properly pleaded are not subject to review on objections to a deficiency judgment.
9. ———. However, the foregoing rule is dependent upon a cause of action being pleaded showing personal liability and a decree finding such to be a fact and, if not, the application for a deficiency judgment is subject to any defense that the person against whom it is sought may have.

APPEAL from the district court for Colfax County: FREDERICK L. SPEAR, JUDGE. *Reversed and remanded.*

Edward Asche, and *Sidner, Lee & Gunderson*, for appellant.

L. F. Otradovsky, and *Walter, Flory & Schmid*, for appellees.

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

WENKE, J.

The Columbus Land, Loan and Building Association of Columbus, Nebraska, a corporation, brought an action in the district court for Colfax County to foreclose a mortgage on lots 12 and 13, block 2, of Railroad addition to the village of Leigh, Colfax County, Nebraska. In this action it made Fred Rabeler, Jr., executor of the estate of Bernhard Wolken, deceased, Katie Wolken, Ben Wolken, and Phillip Wolken, parties defendant. After the premises had been sold, the sale confirmed, and the proceeds received therefrom applied on the amount found due the plaintiff the court, on motion of the plaintiff, entered a judgment against the defendant, Fred Rabeler, Jr., executor of the estate of Bernhard Wolken, deceased, for the balance remaining unsatisfied. The executor has appealed from the entry of this judgment.

For the purpose of this opinion the appellee, Columbus Land, Loan and Building Association of Columbus, Nebraska, will be referred to as plaintiff and Fred Rabeler, Jr., executor of the estate of Bernhard Wolken, deceased, one of several defendants, as the executor.

The record discloses that Bernhard Wolken departed this life on March 24, 1929, a resident of Colfax County and left a will dated June 19, 1925. This will, which nominated Fred Rabeler, Jr., as executor, was offered for probate in the county court of Colfax County and was, on June 4, 1929, allowed and admitted as the will of the deceased. The executor nominated therein qualified on June 20, 1929.

This will disposed of all the property of the deceased by the following provision: "SECOND, After the payment of such funeral expenses and debts, I give, devise and bequeath all my personal property and all my real estate to my beloved wife Katie, for her use during her natural life

only, and after her death all my said personal property and all my real estate of what-soever kind, shall be sold, and the proceeds thereof shall be divided as follows:—Two-thirds of said proceeds shall be divided equally, share and share alike, between my three sons, namely Ben, Edward and Phillip, and the other One-third of said proceeds shall be divided equally, share and share alike, between my grand children, (namely, children of the above mentioned three sons of mine, whoever they may be at that time)."

The personal property of the estate proved insufficient to satisfy the claims filed and allowed against the estate together with the costs of administration. Therefore, the executor of the estate made application to the district court for Colfax County for a license to mortgage lots 12 and 13 in block 2, Railroad addition to the village of Leigh, Colfax County, property of the deceased, for the sum of $4,500. The purpose of the loan was to pay the debts and costs of administration together with the sum still owing on a mortgage indebtedness on the premises. The court, on March 25, 1930, authorized the executor to execute and deliver to the plaintiff for and on behalf of the estate a first mortgage on the property above described in the sum of $4,500 and also a note or notes in the same amount to be secured thereby. The note and mortgage upon which the plaintiff based its foreclosure was executed and delivered to it by the executor on April 1, 1930, pursuant to the authority so granted him.

The executor thereafter filed his final account. The same was approved by the county court on June 13, 1930. On July 28, 1930, the executor was discharged.

On September 18, 1936, and again on April 27, 1939, the plaintiff entered into extension agreements with Katie Wolken, Ben Wolken, Edward Wolken, and Phillip Wolken wherein it extended the time for payment of the balance then owing upon the indebtedness secured by this mortgage.

On July 19, 1941, the plaintiff commenced its foreclosure action. Decree was entered therein on September 10, 1941, finding the amount due the plaintiff to be in the sum of

$3,442.60 with interest at six percent from July 1, 1941; that said amount is a first lien; and foreclosing the mortgage and directing a sale of the premises. On September 30, 1941, the executor, by his attorney, filed a written request for stay. On June 11, 1942, an order of sale was issued and pursuant thereto a sale of the premises was had. The sale was confirmed on September 9, 1942, and the proceeds applied on the indebtedness.

Katie Wolken having departed this life on March 3, 1942, the executor filed his petition in the county court of Colfax County on May 23, 1942, asking that his discharge be vacated and set aside and that he be reinstated as executor to carry out the provisions of the will. On June 30, 1942, the county court reopened the estate proceedings, decreed that the order of July 28, 1930, discharging the executor be vacated and set aside and that the executor be reinstated to carry out the provisions of the will.

On January 6, 1943, the plaintiff made application in the foreclosure proceedings for permission to withdraw the note and extension agreements for the purpose of bringing an action at law thereon against the defendants, or some of them, for the collection of any balance owing thereon. This request was granted by the court on the same day the application therefor was filed. Pursuant thereto and on October 22, 1943, an action was filed thereon in the district court for Colfax County by the plaintiff and against the executor, Ben Wolken, Phillip Wolken, and Phillip Wolken, administrator of the estate of Herman Edward Wolken, deceased. This action is still pending. Apparently, on June 28, 1944, this action was dismissed without prejudice as to the executor and administrator.

On June 28, 1944, the plaintiff filed its motion in the foreclosure proceeding asking for a deficiency judgment against the executor for the sum of $1,160.47 with interest at six percent from October 19, 1942, being the amount due on its indebtedness as determined in the decree of foreclosure, after the application thereon of the net proceeds from the sale of the property. To this motion the executor filed ob-

jections raising the questions which will hereinafter be discussed. The plaintiff filed its reply thereto and on the issues so raised a hearing was had and on March 28, 1945, the court entered the judgment from which the executor appealed.

The principal question presented by this appeal is whether a note and mortgage executed by the representative of an estate pursuant to authority granted by license of the court under the provisions of section 30-1201, Comp. St. 1929, binds the representative, and thereby the estate represented, for any deficiency remaining after the sale of the mortgaged premises.

That part of section 30-1201, Comp. St. 1929, which is material here provides as follows: "The district court or a judge thereof may under like circumstances, upon petition supported by competent testimony, showing that the best interests of the estate demand it, grant authority to the executors, administrators or guardians of estates, to mortgage any real estate belonging to such estate for such sum as may be required to pay or redeem existing mortgages on the real estate, to pay cash bequests provided for by will, federal transfer tax, state inheritance tax, costs of administration and outstanding debts of the estate."

It will be observed that the statute provides only that, "The district court or a judge thereof may * * * grant authority * * * to mortgage any real estate belonging to such estate * * * ."

It is undoubtedly true that a mortgage contemplates a debt and that the relation of debtor and creditor must exist, for as stated in Lemke v. Lemke, 78 Neb. 525, 111 N. W. 138: "Unless they intended that the relation of debtor and creditor should arise as a result of the transaction, they certainly could not have intended that the conveyance was to operate merely as security for a debt. To constitute a mortgage the relation of debtor and creditor must exist. Budd v. Van Orden, 33 N. J. Eq. 143; Westlake v. Horton, 85 Ill. 228; Samuelson v. Mickey, 73 Neb. 852." And in Shriver v. Sims, 127 Neb. 374, 255 N. W. 60, we said: "A

mortgage is a mere security. It has no efficacy if unaccompanied by a debt or obligation. The debt is the principal thing; the land the incident. Davidson v. Cox, 11 Neb. 250." This same principle is stated in 1 Jones on Mortgages (8th ed.), s. 320, p. 401, as follows: "There can be no mortgage without a debt. There may be agreements for the performance of obligations other than the payment of money; but leaving these out of view, it is essential that there be an agreement, either express or implied, on the part of the mortgagor, or some one in whose behalf he executes the mortgage, to pay to the mortgagee a sum of money either on account of a pre-existing debt or a present loan."

However, this court has held that personal liability of the mortgagor is not necessarily incident to a mortgage and that a mortgage may be so framed or the authority to execute so limited as to exclude that element.

In the case of Seieroe v. First Nat. Bank of Kearney, 50 Neb. 612, 70 N. W. 220, the mortgage contained the following provision: "It is distinctly understood that the legal holder or holders hereof may immediately cause this mortgage to be foreclosed; but no general execution shall issue herein against the maker or indorser of said note, * * * and shall take the same (the mortgaged premises) in full satisfaction of said debt." In construing the note and mortgage together the court said: "Counsel for defendant in error argue that the construction contended for would nullify the promise to pay, which is the principal incident of the note, an interpretation, it is claimed, alike destructive of the contract and opening the doors to fraud and deceit. But to that argument we answer that an agreement such as is here involved is simply an acknowledgment by the mortgagee or pledgee that he relies upon the security exacted and not upon the personal credit of the promisor. Again, counsel overlook the fact that the note is but a part of the contract, and that the true character of the transaction is to be ascertained from the terms of each instrument as modified or limited by the conditions contained in the other. The agree-

ment in this case, when thus viewed, is susceptible of but one construction, viz., a pledge of the property described in the mortgage as security for the debt, limited by an undertaking on the part of the mortgagee to look to the property pledged for the satisfaction of his debt and exempting the makers and indorsers of the note from personal liability thereon."

In the case of Morris v. Linton, 4 Neb. (Unof.) 550, 95 N. W. 11, the mortgage and note were executed by virtue of a power of attorney. The provisions thereof material to the decision were as follows: "Know all Men by These Presents: That we, Adolphus F. Linton, and Phoebe R. E. E. Linton, his wife, of Brighton, England, have made, constituted and appointed, and by these presents, do make, constitute and appoint John Borland Finlay of the Commonwealth of Pennsylvania in the United States of America, our true and lawful attorney for us, or either of us, and in our, or either of our names, places and stead, to grant, bargain and sell, convey, exchange, assign, transfer, lease, mortgage or confirm any or all tracts, pieces or parcels or lots of real estate, as well as of coal, ore, petroleum or other valuable mineral claims, rights, interests or hereditaments, which have descended to, or been or may be acquired by or for the said Phoebe, or either of us, by gift, grant, demise, purchase, exchange or otherwise, in any of the states, districts, commonwealths or territories of the said United States of America or elsewhere." The court, in disposing of the personal liability of the Lintons upon a note and mortgage executed and delivered under the authority thereof, held: "Assuming to act under this power of attorney John B. Finlay executed the note and mortgage mentioned upon which it is sought to recover a deficiency judgment. From an inspection of the power of attorney quoted it is apparent that it furnishes no authority for the execution by the attorney in fact of a promissory note upon which either of the Lintons could be personally charged. It follows, therefore, that the order of the trial court in overruling the motion for a deficiency judgment and denying such judgment is right and should be affirmed."

"An executor or administrator, as such, has no inherent authority to borrow money; and loans to the representative which are not authorized by statute, will, or order of court do not bind the estate." 33 C. J. S., Executors and Administrators, s. 202, p. 1185. See, also, 21 Am. Jur., Executors and Administrators, s. 240, p. 508.

"Unless authorized by statute or by the terms of a will, a personal representative may not mortgage the decedent's realty, * * * ." 33 C. J. S., Executors and Administrators, s. 298, p. 1333. See, also, 21 Am. Jur., Executors and Administrators, s. 241, p. 509.

Therefore, in determining the rights of the parties under the note and mortgage, we must strictly construe the effect of the provisions of the statute pursuant to which the license was granted and limit the liability of the representative to such obligations as the statute expressly provided the court, or a judge thereof, might authorize him to make. The extent of the power expressly conferred upon the court was to authorize it, or a judge thereof, to grant authority to representatives of estates to mortgage any real estate belonging to it in order to pay certain debts and obligations thereof as in the statute specifically set forth. While the authority conferred undoubtedly permits the representative to create an obligation or indebtedness for which the mortgage is to be given as security, however, nowhere in the statute can we find any provision which authorizes the court to grant to the representative authority to bind himself to be liable therefor. In the absence of such statutory authority the representative was without authority to do so.

The executor, acting under the license granted him, executed the note and mortgage upon which it is sought to recover a deficiency judgment. From an analysis of the powers conferred upon the court, or a judge thereof, by the statute it is apparent that such license could furnish no authority for the executor to execute a note upon which he is liable and thereby obligate all other assets of the estate which he represented. Therefore, the owner or holder of such obligation, being limited in his rights to the authority

which the executor had by reason of the license granted to him, must, when he seeks to enforce it, look solely to the property mortgaged for the satisfaction thereof.

Appellee has cited the cases of Linton v. National Life Ins. Co., 104 F. 584, and Becker v. Linton, 80 Neb. 655, 114 N. W. 928, apparently for the purpose of showing that the principle announced in Morris v. Linton, *supra,* is no longer the law of this state. While these cases involve the same power of attorney as in the case of Morris v. Linton, *supra,* the opinions are not based on the same legal principles. They are in no way contrary to nor do they in any way overrule the basis of the latter decision.

The record further presents the question of whether or not the findings of fact in the decree, from which the executor took no appeal but to which he did file a stay, are such as to determine and fix his liability and prevent him from raising that question in this proceeding.

The county court had discharged the executor on June 28, 1930, and did not reinstate him until June 30, 1942, so that at the time the foreclosure was brought, the service obtained, decree entered, and stay taken he was formally discharged. However, in Hazlett v. Estate of Blakely, 70 Neb. 613, 97 N. W. 808, we held: "The law appears to be that the formal discharge contained in the decree on final accounting applies only as to the accounts of the parties up to that period. The trust of an administrator or executor is a continuing one, and a decree of final accounting does not destroy the relation of such officer, but only discharges him from liability for the past. 2 Woerner, American Law of Administration (2d ed.), sec. 571." And in Parker v. Luehrmann, 126 Neb. 1, 252 N. W. 402, we reaffirmed this holding as follows: "The fact that the estate had been administered, final decree entered, and the property assigned and distributed to the heirs at law, and the administrator discharged, did not bar or defeat this action against the administrator of the estate. The trust of an administrator is an enduring one, and the decree upon final accounting only discharges him from liability for the past. Brink-

worth v. Hazlett, *supra;* Hazlett v. Estate of Blakely, *supra;* Brownell v. Adams, *supra;* In re Estate of Bolton, *supra;* 2 Woerner, American Law of Administration (2d ed.) 1373, sec. 571."

The petition alleges in part as follows: "That on or about the 1st day of April, 1930, defendant, Fred Rabeler, Jr., Executor of the Estate of Bernhard Wolken, deceased, made, executed and delivered to plaintiff his promissory note for $4500.00, * * * there is due it thereunder for principal and interest as above set forth, the sum of $3,442.60 with interest * * * ." The note, which is part of the petition, contains the following: "Received as a loan * * * , the sum of Four Thousand Five Hundred and no/100 Dollars which sum I agree to repay * * * ." The prayer is in part as follows: " * * * that defendants, or some of them, be ordered and directed to pay plaintiff the sum so found due with interest thereon, * * * for such other and further relief as to the court may seem just and equitable." In Parratt v. Hartsuff, 75 Neb. 706, 106 N. W. 966, we held: "They also objected because the prayer of the original petition did not ask for a deficiency judgment against them. The allegations of the petition, however, were that they were the makers of the note, and this allegation was sufficient to sustain the finding in the decree that they were liable as makers of the note which the mortgage was given to secure. As against these plaintiffs in error, therefore, the judgment of the district court is fully supported." And in Smith v. Allen, 72 Neb. 170, 100 N. W. 129, we held: "As to the contention that the district court had no jurisdiction to render a deficiency judgment, it seems that this is based upon the proposition that the prayer of the cross-petition is not sufficient to justify the rendition of such a judgment against the defendant. The prayer was a general prayer for equitable relief. In Grand Island Savings & Loan Ass'n v. Moore, 40 Neb. 686, in which there was only a prayer for general equitable relief, as in this case, it was held that this was sufficient to justify the rendition of the deficiency judgment. See, also, Kelley v. Wehn, 63 Neb. 410."

The decree reads in part: " * * * the court finds generally for the plaintiff and against all defendants; finds that the allegations of plaintiff's petition are true; that the note and mortgage therein set forth were duly executed and delivered and default made thereunder as therein alleged; * * * that there is now due plaintiff on said note and mortgage from the makers thereof * * * the sum of $3,442.60 with interest * * * ." From a review of the allegations of the plaintiff's petition, which the decree found to be true, and the specific findings set out in the decree, it has been judicially determined that the district court granted a license to the executor authorizing him to execute and deliver the note and mortgage foreclosed; that pursuant to the license so granted the executor did execute and deliver the note and mortgage to the plaintiff; that the note provided that the executor would repay the sum so borrowed; that the amount due and owing on said note from the makers is in the sum of $3,442.60 with interest; that the same constitutes a first lien on the premises; that default has been made in the terms and conditions of the note and mortgage and that plaintiff is entitled to a foreclosure thereof.

As stated in Smith v. Allen, *supra*: "If the facts which determined the liability of the defendant to a judgment for a deficiency were ascertained and adjudicated upon the original decree in the foreclosure case, it is now too late for him to seek a re-examination of this question. This court has been very liberal in its holdings in regard to the right of parties to litigate the question of liability for a deficiency at any stage of the proceedings. But it has uniformly held that, where this issue has been determined in the original decree the parties will not be allowed to open up the same and relitigate the question upon a motion for a deficiency judgment."

In Union Central Life Ins. Co. v. Saathoff, 115 Neb. 385, 213 N. W. 342, we held:

"In a suit to foreclose a mortgage on real estate, the execution of the contract, the breach thereof, the identity of the real estate described therein, and the amount remaining

due thereon are material and necessary issues to be determined by the decree.

"In such a suit, the findings of fact contained in the decree on issues properly pleaded are not subject to review on objections to a deficiency judgment."

This rule is further stated in Parker v. Bourke, 131 Neb. 617, 269 N. W. 102, as follows: "Appellees contend, however, that appellants were properly served with summons in the foreclosure action and that they are now, after default, precluded from raising the defenses set out in the objections filed thereto. Appellees rely upon the cases of Parratt v. Hartsuff, 75 Neb. 706, 106 N. W. 966, Union Central Life Ins. Co. v. Saathoff, 115 Neb. 385, 213 N. W. 342, Stuart v. Bliss, 116 Neb. 305, 216 N. W. 944, and Arnold v. Hawley, 128 Neb. 766, 260 N. W. 284. It will be noted that, in each of these cases, the rule announced was dependent upon a cause of action showing personal liability being properly pleaded. But in the case at bar no cause of action was pleaded that would sustain the decree of the trial court. The decree adjudging personal liability in a foreclosure action must be sustained by the pleadings and, if not, the application for a deficiency judgment is subject to any defense that the person against whom it is sought may have."

The question of the liability of the executor upon the note executed and delivered by authority of a license granted by the district court to mortgage certain property of the estate under a statute authorizing it to do so not having been raised by the pleadings nor determined in the decree is, therefore, a proper defense that may be raised when objecting to a motion for a deficiency judgment.

Such defense being available and, under our holding herein, the representative of an estate not being liable the objections should have been sustained and the motion denied.

In view of our holdings, the other questions raised in the briefs need not be determined. The judgment of the lower court is reversed.

REVERSED.

RAY F. HOOVER, ADMINISTRATOR, APPELLEE, V. JOSEPH F. HALLER, ADMINISTRATOR, ET AL., APPELLANTS.
21 N. W. 2d 450

FILED JANUARY 18, 1946. No. 31980.

1. **Partition.** A court of equity has jurisdiction to decree partition of personal property, and, if partition in kind is not possible, to partition by sale.
2. ———: EXECUTORS AND ADMINISTRATORS. An action in equity to partition personal property may be brought in the district court by one owning an undivided interest therein against the administrator of an estate of a deceased person, which estate is also the owner of an undivided interest in the personal property.
3. **Joint Tenancy.** Where a conveyance of property is made to two or more persons, and the instrument is silent as to the interest which each is to take, the rebuttable presumption is that their interests are equal.
4. **Husband and Wife.** Where the parties are husband and wife and one spouse furnishes all or a larger part of the consideration for a conveyance, there is a rebuttable presumption that the placing of title in the name of one spouse was intended by the other spouse as a gift of the property involved.
5. **Courts.** Generally the procedure to be followed by the courts should be that which expedites rather than delays the conclusion of litigation.
6. **Abstracts of Title.** Generally where abstracts of title are furnished as an incident to the security of promissory notes, the co-owners of the notes secured are equally entitled to the use of the abstracts.

APPEAL from the district court for Sheridan County: EARL L. MEYER, JUDGE. *Reversed and remanded with directions.*

A. C. Plantz and *E. D. Crites,* for appellants.

John J. Olsson and *Robert O. Reddish,* for appellee.

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

SIMMONS, C. J.

This is an action brought in the district court in equity to partition personal property. The trial court held that the action could be maintained. We sustain the trial court as to

jurisdiction. The trial court held that the plaintiff was entitled to an undivided five-sixths interest in the property. We reverse the decision as to that and remand the case.

Plaintiff brought this action as guardian of the estate of his mother, Estella A. Powell. After the trial, and pending ruling upon a motion for a new trial, the ward died and the action was revived in the name of plaintiff as administrator.

The defendants are the administrator of the estate of Ellis Powell, deceased, and the children of said deceased.

Ellis Powell and Estella Powell were married in 1915. At that time Estella Powell was the owner of a tract of land comprising 1576.95 acres situated in Cherry and Sheridan Counties. Some time thereafter the two parties purchased, as tenants in common, two tracts of land totaling 780.5 acres. To secure funds to pay for the same they mortgaged the tract owned by Mrs. Powell and the first of the two tracts so purchased.

On April 27, 1940, the Powells sold the land for $16,000, receiving $6,000 in cash, and the balance was evidenced by ten promissory notes, each for $1,000, one payable each year thereafter and to the order of Ellis Powell and Estella Powell. The notes were secured by a mortgage on the real estate involved.

On March 30, 1941, Ellis Powell died intestate, and defendant Haller, as administrator, came into possession of the notes and mortgage. There were paid to defendant Haller, as administrator, the interest due on the notes and the principal amount due on the first three of the ten notes. Defendant Haller paid Mrs. Powell one-half of the principal and interest so collected.

Mrs. Powell became a resident of Dodge County where, on May 5, 1943, in a proceeding in the county court for that county, she was found to be incompetent, and the plaintiff was appointed and became the guardian of her estate.

Plaintiff, alleging the above facts, brought this action in partition alleging further that his mother was the owner of five-sixths of the land so sold; that the land owned by her was of equal or greater value than the land owned by Mr.

Powell; that the $6,000 received in cash was used for the benefit of the parties according to their interests in the real estate; that Mrs. Powell had contributed at least five-sixths of the consideration for the notes; that she was entitled to a five-sixths share of the payments made on the notes instead of the one-half that was paid her. Plaintiff prayed that it be determined that Mrs. Powell is the owner of an undivided five-sixths interest in the notes and mortgage and in the proceeds of the payments made; that the estate of Mr. Powell is the owner of one-sixth thereof; that an accounting be had of the amounts received by the administrator and the amounts paid to Mrs. Powell; that the administrator be required to pay the balance found due to plaintiff and, if he fail to do so, that the plaintiff have a lien therefor upon his interest in the unpaid notes of Mr. Powell's estate; that the notes be apportioned among the owners according to their interest and, if that cannot be done without prejudice to the rights of the owners, that the notes and mortgage be sold and the proceeds apportioned; and that the plaintiff be awarded five-sixths thereof plus the balance to which she is entitled from the sums already collected, and the remainder to the defendant. The petition prayed for equitable relief.

To this petition defendants demurred. Their demurrer was overruled. Trial was had resulting in a decree for plaintiff. From that defendants appeal.

At the outset we are confronted with defendants' contention that the trial court erred in overruling the demurrer. It is defendants' contention that the trial court was without jurisdiction of the subject matter in this—that the matters sought to be litigated are within the exclusive jurisdiction of the county court in which the estate of Mr. Powell is being administered.

It is obvious that the property here involved is personal property. The question is: Does the district court have jurisdiction to entertain an action to partition the property?

We have held that a court of equity has jurisdiction to decree partition of personal property, and if partition is not

possible, to regulate its use equivalent to partition, or to partition by sale. Riley v. Whittier, 100 Neb. 107, 158 N. W. 446.

A recognized authority states the rule as follows: "However expedient the partition of chattels might appear, or however desirable it might be to co-tenants, the common law furnished no instrumentality by which the partition could be judicially effected. There was not merely an inadequacy of legal remedy, there was an utter absence of it. The situation clearly demanded the intervention of equity. And although the inception of the equitable jurisdiction for the partition of chattels is not traceable with certainty, the jurisdiction itself is unquestioned; and where a literal partition is not practicable, the court will order a sale." 4 Pomeroy, Equity Jurisprudence (5th ed.), s. 1391, p. 1020.

It has been held that the co-owner of a promissory note may maintain an action for partition. Conover v. Earl, 26 Iowa 167 (cited by Pomeroy, *supra*).

Does the fact that defendant is the administrator of an estate of a deceased person prevent the district court as a court of equity from exercising jurisdiction to partition? We do not think so. The subject matter of the probate court's jurisdiction is the property of the deceased only. 40 Am. Jur., Partition, s. 60, p. 49. The obvious purpose of a partition suit is to set off to each owner that which is his. In Phillips v. Dorris, 56 Neb. 293, 76 N. W. 555, we said: "The object of a partition suit is to assign property, the fee simple title to which is held by two or more persons as joint tenants, or tenants in common, to them in severalty." That must be its result, so that as a result of the partition action there must be set off to the administrator the property of which he is given jurisdiction in the probate court.

Article V, section 16, of the Constitution gives county courts "original jurisdiction in all matters of probate, settlement of estates of deceased persons, * * * ." Section 24-503, R. S. 1943, provides that county courts "shall have exclusive jurisdiction of the probate of wills, the administra-

tion of estates of deceased persons, * * * ." It is to be noted that the language of these provisions does not go beyond the "estate" of the deceased person.

Section 30-801, R. S. 1943, provides: "No action shall be commenced against the executor or administrator except actions to recover the possession of real or personal property, and actions for relief other than for the recovery of money only, * * * ." This constitutes legislative sanction of actions against executors or administrators to recover the possession of real or personal property, and actions for relief other than for the recovery of money only. See Hazlett v. Estate of Blakely, 70 Neb. 613, 97 N. W. 808.

Certainly an action in partition is one for relief other than for the recovery of money only. Brownell v. Anderson, 117 Neb. 652, 222 N. W. 55, was a suit involving the liability of a stockholder in a state bank, brought against the executor of the estate of a deceased stockholder. The above statute was considered. It was held that the action could be maintained. Fremont Farmers Union Cooperative Ass'n v. Markussen, 136 Neb. 567, 286 N. W. 784, was a creditors' suit against the administrator of an intestate's estate and one of the next of kin to subject the latter's interest to the satisfaction of some judgments, in which it was held that the suit could be maintained against the administrator of a decedent's estate, which was in process of administration in the county court. In the course of the opinion we said: " * * * it is to be borne in mind that the doctrine of *custodia legis* is one of practical convenience only, and not *strictissimi juris*. * * * The immunity of the *custodia legis* doctrine should not be extended beyond the actual demonstrated necessities of a particular situation, * * * ." See, also, Prudential Ins. Co. v. Bliss, 123 Neb. 578, 243 N. W. 842. Cox v. Johnston, 139 Neb. 223, 296 N. W. 883, was an action for specific performance of an oral contract to bequeath property by will. One of the defendants was the executrix of the deceased. It was contended that the county court had exclusive jurisdiction and that the district court had no jurisdiction of an original action

to secure specific performance of the contract. It was held: "Section 9, art. V of the Constitution of this state, grants to district courts both chancery and common-law jurisdiction. While section 16, art. V of such Constitution, grants to county courts original jurisdiction in all matters of probate, settlements of estates of deceased persons, etc., and prohibits jurisdiction in county courts in civil actions in which title to real estate is sought or drawn in question, such section does not operate to oust the district court of jurisdiction in cases in which it is sought to impress a trust upon property, even though the property involved is that of an estate of a deceased person." It was held that the action was one to impress a trust or create a lien upon the property of an estate and was not an action for the recovery of money only.

We conclude that an action in equity to partition personal property may be brought in the district court by one owning an undivided interest therein against the administrator of an estate of a deceased person, which estate is also the owner of an undivided interest in the personal property. Accordingly, defendants' challenge to the jurisdiction of the court was properly overruled by the trial court.

Following the overruling of the demurrer defendants answered, denying generally. They admitted that the Powells were husband and wife, the death of Mr. Powell, leaving Mrs. Powell his widow and the four children as defendants, and admitting that defendant Haller was administrator of the estate of Mr. Powell. They admitted the execution and delivery of the notes and mortgage; that the administrator as such has possession thereof; and that three of the notes, together with interest, had been paid, and one-half thereof distributed to the administrator and one-half to Mrs. Powell. They further pleaded that the administrator was entitled to an undivided one-half interest in said notes and mortgage; that the estate was in process of administration; that claims had been filed and allowed; and that it had not been determined as to how much of the per-

sonal estate could be distributed to Mr. Powell's heirs.

They further pleaded that the administrator had at all times advised Mrs. Powell that the interest of the estate in said notes was a one-half interest and her interest was a one-half interest; that all sums which had been or would be collected would be distributed on that basis; and that Mrs. Powell assented thereto, and accepted and received a one-half interest thereof and was estopped to claim more.

Trial was had. The trial court decreed that Mrs. Powell was the owner of an undivided five-sixths interest in and to the mortgage and the unpaid notes and interest thereon; that the administrator was the owner of a one-sixth interest therein; and that they were entitled to receive the proceeds of the notes in that proportion. A partition of the property was decreed; a referee was appointed; the administrator was ordered to surrender the unpaid notes and the mortgage to the referee, to assign the mortgage to the referee, and to deliver the abstracts of title to the referee; the plaintiff was ordered to assign the interest of Mrs. Powell in the notes and mortgage to the referee.

The referee was ordered to divide the property into five-sixths and one-sixth parts and deliver the same to the parties, and, if unable to do so, to report for further order.

The administrator was ordered to pay to the referee the difference between the amount Mrs. Powell had received and the amount she was entitled to receive. There was a provision that if he failed to do so, the plaintiff should have a lien upon the interest of the Ellis Powell estate in said notes and mortgage.

Motion for new trial was made and overruled, and defendants appeal.

By assignments of error, defendants raise the question of the correctness of the decree in its several parts. We have disposed of defendants' first assignment of error going to the question of the jurisdiction of the court.

It will thus be seen that the basic fact issue presented by the pleadings was whether plaintiff was entitled to a one-half or a five-sixths interest in the notes. At the trial plain-

tiff offered evidence that he had been duly appointed guardian of the estate of Mrs. Powell. He further offered evidence that the land owned by Mrs. Powell was about 300 acres of hay meadow and the balance grazing land, improved with the requisite ranch buildings; that the lands purchased by Mr. and Mrs. Powell in 1919 subsequent to their marriage were grazing lands; that hay land was more valuable than grazing land; that the improved land, including the hay land, owned by Mrs. Powell at the time of her marriage was worth, acre for acre, as much as or more than the grazing land; and that acre for acre the grazing land was of equal value.

The defendant administrator was called as a witness by plaintiff and testified that he took possession of the ten promissory notes; that three had been paid; that he had the remainder of the notes and the mortgage in his possession, together with abstracts of title; and that plaintiff had requested the abstracts of title before trial and they were not surrendered. The administrator produced them in court and they, together with the certificates, were offered and admitted in evidence over the objection of defendants.

Plaintiff offered and there was received in evidence a canceled check, dated May 1, 1940, for $4,317.67 signed by Mrs. Powell, payable to Gordon State Bank, and upon which was written "Federal Land Bank Loan." Plaintiff also offered evidence that Mr. Powell listed the land for sale.

When plaintiff rested, defendant moved for a dismissal, raising the question of jurisdiction, sufficiency of the petition and facts. The motion was overruled. Defendants rested.

Defendants contend that the trial court erred in finding and adjudging that plaintiff owned more than a one-half interest, to wit: a five-sixths interest in the mortgage and notes and in the proceeds already collected.

We start with two factual situations which simplify a solution of the problem. First, we are dealing here with a transaction between husband and wife. Second, both parties concede that the other has an undivided interest in the

property involved. The question is the extent of their interest. Likewise, both parties accept the rule that where a conveyance of property is made to two or more persons, and the instrument is silent as to the interest which each is to take, the presumption is that their interests are equal. 62 C. J., Tenancy in Common, s. 24, p. 420; 14 Am. Jur., Cotenancy, s. 17, p. 88. This appears to be the rule in all the states where the principles of the common law prevail. Loring v. Palmer, 118 U. S. 321, 341. This rule applies to negotiable instruments. 8 C. J., Bills and Notes, s. 302, p. 177; 11 C. J. S., Bills and Notes, s. 659, p. 92. As these authorities indicate, the presumption is a rebuttable one.

Plaintiff argues that the evidence shows that Mrs. Powell contributed at least five-sixths, if not more, of the consideration for the notes and mortgage, and accordingly owns an undivided five-sixths interest therein; and that this evidence overcomes the presumption of co-equal ownership. Assuming that the evidence establishes that Mrs. Powell contributed five-sixths of the consideration, that fact is not decisive here.

We have long followed the rule that where the parties are husband and wife, there is a presumption that the placing of title in the name of one spouse was intended by the other spouse as a gift. Brodsky v. Brodsky, 132 Neb. 659, 272 N. W. 919. This presumption has been applied not only to cases where the husband furnished the consideration but also to cases where the wife furnished all or the larger part of the consideration. Brownell v. Stoddard, 42 Neb. 177, 60 N. W. 380; Davis v. Davis, 112 Neb. 178, 199 N. W. 113; Brodsky v. Brodsky, *supra*. See, also, Kehl v. Omaha Nat. Bank, 126 Neb. 695, 254 N. W. 397. See annotation 113 A. L. R. 346. The rule applies to personal property as well as to real estate. First Trust Co. v. Hammond, 140 Neb. 330, 299 N. W. 496. Obviously the rule would have no application except in those cases where the payer furnished all, or a larger proportion, of the consideration than was furnished by the transferee, and to a greater extent than is apparent from the title shown by the instrument of convey-

ance. The rule of a presumption of a gift is applicable here. The presumption is a rebuttable one. We need not here determine the proof necessary for that purpose, for here the record supports the presumption. When the first tract of land was purchased in 1919, the land purchased, together with Mrs. Powell's land, was mortgaged to secure the money with which to pay for the land and to pay for the second tract purchased. The title to the lands so purchased was taken by the Powells "in equal shares, as tenants in common." Plaintiff so pleads and premises his case, as to the interests of the parties in the notes and mortgage, upon that factual situation. When the lands were sold and the notes and mortgage taken payable to the order of Mr. and Mrs. Powell, there was no division of the notes and mortgage into unequal shares. Subsequently, during the lifetime of Mrs. Powell, and so far as appears before she was declared incompetent, three of the notes and the interest on the entire debt were paid by the mortgagor. A one-half part thereof was paid to and accepted by Mrs. Powell. Plaintiff so pleads and defendants so admit. Plaintiff premises his case in part upon that fact also.

Under these circumstances it must be held that each of the parties owned an undivided interest in the notes in equal shares. It follows that the trial court erred in finding and decreeing that Mrs. Powell was the owner of an undivided five-sixths interest in the property and that plaintiff was entitled thereto.

Defendants next contend that the trial court erred in decreeing partition. It is argued that partition by court order is unnecessary at this time; that the matter should be held in abeyance until the estates have been administered and then, if the parties cannot agree to a division, that partition can follow. Plaintiff is as much entitled to the possession now of the property owned by the estate which he represents as is the defendant administrator entitled to the possession of the property owned by the estate which he represents. The procedure should be that which expedites

rather than delays the administration of both estates. We see no merit in this contention.

The next assignment of error is that the trial court erred in requiring the defendant administrator to pay the plaintiff the additional one-third of the proceeds collected on the notes already paid, and in decreeing a lien against the share of Mr. Powell's estate to secure such payment. In view of the conclusion which we have reached as to the respective shares of the parties in the notes in question, it is patent that this assignment must be sustained.

The next assignment of error is that the trial court erred in ordering defendant administrator (1) to surrender to the referee the abstracts of title and (2) to assign his interest in the unpaid notes to the referee. The right of the mortgagor in the abstracts is not before us. Obviously the abstracts have been furnished to the mortgagees as an incident to the security. Plaintiff representing a part owner of the secured notes is as much entitled to the use of the abstracts as is the defendant administrator. Their surrender to the referee is a proper requirement for his use in the partition of the property. While the possession of the abstracts by the referee may not be necessary until and if a sale of the notes is ordered, we see no error in the court's order. Likewise, it appears that an assignment of the notes and mortgage to the referee by plaintiff and defendant administrator is a proper requirement as an incident to the partition. We see no merit in this assignment.

Defendants finally assign as error the admission of the abstracts in evidence to show the proportions in which the parties owned the land. In view of our conclusion on the merits we see no need to discuss or determine this assignment.

The judgment of the trial court is reversed and the cause remanded with directions to enter a decree in accord with this opinion.

REVERSED.

ELLEN ENQUIST, PLAINTIFF, V. JOHN ENQUIST, DEFENDANT. TERESA CRONIN, APPLICANT-APPELLEE, V. WILLIAM A. EHLERS, RESPONDENT-APPELLANT.
21 N. W. 2d 404

FILED JANUARY 18, 1946. No. 31970.

1. **Courts.** When one has filed a special appearance pro se, challenging the jurisdiction of the court, but remains in court and takes part in the trial, he thereby waives the failure of the court to rule on his special appearance, and has made a general appearance.
2. ———. To make an appearance in court special, and not general, every act must be consistent with the theory that the court has no jurisdiction of the person.
3. **Homesteads.** The homestead right of exemption of real property is not a proper subject for consideration upon proceedings for the confirmation of a sale of the alleged homestead on execution.
4. **Judicial Sales.** A bidder at a judicial sale whose bid has been accepted may appeal from an order setting the sale aside.
5. ———. It is a well-settled rule that the doctrine of caveat emptor applies to all judicial sales, subject to the qualification that the purchaser is entitled to relief on the ground of after-discovered mistake of material facts or fraud, where he is free from negligence.
6. ———. It is error for a trial court to direct disposition of the money paid in by a successful bidder at a sheriff's sale on execution when no defect appears in the sale and the same has not been set aside.

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

W. A. Ehlers, pro se, for appellant.
A. J. Whalen and *Charles A. Fryzek,* for appellee.

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

PAINE, J.

In a sheriff's sale of real estate on an execution, the return of the sheriff appearing to be regular, the sale was confirmed and a sheriff's deed delivered. The judgment creditor, upon receipt of the full amount due him, discharged of record and released his judgment. Thereafter,

at the same term of court, the trial judge set aside the confirmation of the sale, but the sheriff's sale itself still stands. Later, upon application of the purchaser of the property at the sheriff's sale, the court directed that the judgment creditor repay the money he received from the clerk of the court, from which order such judgment creditor appeals.

An examination of the transcript shows that this action grew out of a divorce case, in which a petition was filed against her husband by Ellen Enquist on August 20, 1925. On May 17, 1926, both parties appeared in court by their attorneys, and upon motion of plaintiff's attorney the cause was dismissed, and on motion of W. A. Ehlers, defendant's attorney, he was allowed an attorney's fee of $35, to be taxed as part of the defendant's costs.

On December 12, 1938, the judgment for said $35 was revived and renewed, with interest at 7 percent and all accruing costs. On December 10, 1943, an execution was duly issued, and the sheriff's return shows that on December 21, 1943, he levied the writ of execution upon lot two (2) of a subdivision of block five (5) in Park Place in the city of Omaha, and that thereafter the sheriff published notice for five weeks that he would sell said land at the east door of the Douglas County Courthouse on February 8, 1944, at 9:30 a. m., at public auction.

The return of the sheriff shows that at said time and place he sold said real estate to Teresa C. Cronin for the sum of $180, being the highest amount offered, and that the sheriff delivered said sum of $180 to the clerk of the district court.

On February 16, 1944, the purchaser filed motion for confirmation of said sale, and the following day the district court ratified, approved and confirmed said sale, and directed the sheriff to make a deed to the purchaser, and directed that a writ of assistance be issued by the clerk, upon application therefor, to place purchaser in possession of the property.

On February 19, 1944, the sheriff's return to confirmation shows that he had executed the deed, and on February 21,

1944, deed was delivered to William A. Ehlers, attorney for purchaser. On the same day a voucher was paid to said Ehlers for $111.32, who thereupon made an entry on the appearance docket reading as follows:

"Omaha, Neb. Feb. 21, 1944. Full and complete satisfaction of Judgment, interest and costs in this case is hereby acknowledged, and said judgment is hereby released, satisfied and discharged of record.

Witness:

David E. Larson
Deputy Clerk.

William A. Ehlers
Atty. for Pltf."

Thereafter, on March 14, 1944, an amended motion was filed by John Enquist, defendant, asking the court to set aside the sale of said property, and setting out 11 grounds therefor. It is alleged that the property has a reasonable value of $1,800, and consists of a five-room house, and that a sale for $180 is not a fair or reasonable sale; that the defendant received no notice of said sale, and the property is the homestead of the defendant, and was at the time of the confirmation of the sale, and now is occupied by him; that John Enquist and his wife Ellen never waived their homestead rights to said property. He prays that the court set aside the sheriff's sale.

On March 22, 1944, the trial court entered an order upon said motion, reciting that the court finds the facts are true and defendant is entitled to the relief prayed for. The order further recited:

"It is therefore ordered, considered, and adjudged by the Court that the order of confirmation of sale relative to the above described property entered herein on the 8th day of February, 1944, be and the same hereby is vacated and set aside and rendered void and held for naught.

"Plaintiff not appearing, although properly notified."

It will be noted that a careful reading of the trial court's order does not disclose any setting aside of the sale, hence the sheriff's sale made on the execution stands as made.

There appears in the transcript an order, signed by all the district judges, to the effect that the term of the district

court which began on February 7, 1944, adjourned sine die on April 29, 1944.

On December 26, 1944, the purchaser filed an application asking that an order to show cause by January 3, 1945, be issued in said case, directed to William A. Ehlers, to show cause why the court should not require William A. Ehlers to pay to purchaser $111.32 and that the clerk pay the balance of said money in his hands to purchaser. Applicant further prays that such order be directed to said Ehlers to show cause why the district court should not place all parties in statu quo.

On December 29, 1944, said Ehlers filed a special appearance, in which he objects to the jurisdiction of the court over his person because his judgment has been fully paid, released and discharged of record, and that the court is without jurisdiction to set aside said satisfaction, release and discharge of said judgment without the positive consent of the judgment creditor and the judgment debtors, and no such consent appears of record.

The respondent charges that the order setting aside the confirmation of sale is an absolute nullity, because no petition therefor was filed, no service of summons had upon any of the parties, and the order was unauthorized and ineffective for any purpose. The respondent further charges that his judgment was final and conclusive, and that the sheriff's sale, made in pursuance of a lawful execution, was fairly conducted and no objections were filed prior to confirmation, and upon confirmation duly made the same became final and conclusive upon all parties.

While no ruling appears to have been made on this special appearance, yet all parties were present January 6, 1945, and a trial had, evidence taken and arguments made by counsel, and the matter taken under advisement. Thereafter, on February 8, 1945, the court entered judgment, finding that, by reason of the court vacating the order of confirmation, the purchaser had received no title to said real estate, and it was ordered that said Ehlers be compelled to refund to the purchaser the sum of $111.32, and

that the clerk of the court should refund the balance of the purchase price, and that the satisfaction of said judgment executed by Ehlers be vacated and sheriff's deed be canceled. From this order the said Ehlers appeals.

The appellant assigns as error the failure of the trial court to dispose of his special appearance, which he claims should have been sustained. He argues that the application of the purchaser to be put in statu quo does not state a cause of action against him; that no petition, duly verified, to reopen the case was filed, and no summons issued or served; that such proceedings against respondent are unauthorized by law, as the order was made after expiration of two terms of court, and the pleadings and evidence are insufficient to sustain the order and vacate a judgment of the court made after the term. See sections 25-2001 and 25-2007, R. S. 1943.

We will first consider the special appearance of the appellant, which objected to the jurisdiction of the court over his person.

It was held in the early case of Hurlbut v. Palmer, 39 Neb. 158, 57 N. W. 1019, that if a defendant has not submitted himself to the jurisdiction of the district court the court will not obtain jurisdiction over him because he appeals or prosecutes error to this court. Again, this court has held that, if a meritorious special appearance is overruled and thereafter a defendant answers, but preserves the challenge to jurisdiction therein, and he goes to trial, he does not waive the objection to jurisdiction. See Barry v. Wachosky, 57 Neb. 534, 77 N. W. 1080; Anheuser-Busch Brewing Assn. v. Peterson, 41 Neb. 897, 60 N. W. 373, annotation 93 A. L. R. 1315. To the same effect is Behr v. Duling, 128 Neb. 860, 260 N. W. 281. See annotation 107 A. L. R. 1106.

But in the case at bar the appellant took part in the trial, cross-examined witnesses, and argued the various matters involved, making no objection to the failure of the court to rule on his special appearance. This confirms us in the view that he made a general appearance and waived the

failure of the court to rule on his special appearance. Barkhurst v. Nevins, 106 Neb. 33, 182 N. W. 563; Troyer Furniture Co. v. Orchard & Wilhelm Co., 121 Neb. 301, 237 N. W. 144.

To make the appearance special, and not general, every act must be consistent with the theory that the court has no jurisdiction of the person.

Next, we will make an examination of the order of confirmation, which was entered February 17, 1944. As to the sale, it reads as follows: "That the said sale, as held, was in all respects regular and in conformity to law, that the property sold for its fair value under the terms and conditions of the sale, that a re-sale of the premises would not realize a greater sum; that Teresa C. Cronin was the highest and best bidder at said sale, and that the sale should be confirmed and approved by this court."

Therefore, in the case at bar, no defect has been pointed out in the original judgment, or in the execution regularly issued thereon, or in the steps taken by the sheriff in giving notice of, or in conducting, the sale at public auction under the execution in his hands, and no grounds are shown for setting aside the sale.

We have recently held that "A successful bidder at a judicial sale becomes a party to the proceedings, may appear and urge confirmation, and appeal from an order setting the sale aside." Siekert v. Soester, 144 Neb. 321, 13 N. W. 2d 139. See, also, Dawson County v. Whaley, 134 Neb. 509, 279 N. W. 164.

Much has been mentioned in the oral arguments and in the briefs about the alleged homestead character of the real estate sold in this execution sale. However, it has been held many times by this court that the homestead right of exemption of real property is not a proper subject for consideration upon proceedings for the confirmation of a sale of the alleged homestead on execution. See Wollmer v. Wood, 119 Neb. 248, 228 N. W. 541; Prudential Ins. Co. v. Diefenbaugh, 129 Neb. 59, 260 N. W. 689; 3 Neb. Law Bulletin, 429.

"It is a well settled rule that the doctrine of *caveat emptor* applies to all judicial sales, subject to the qualification that the purchaser is entitled to relief on the ground of after-discovered mistake of material facts or fraud, where he is free from negligence. He is bound to examine the title, and not rely upon statements made by the officer conducting the sale, as to its condition. If he buys without such examination, he does so at his peril, and must suffer the loss occasioned by his neglect." Norton v. Neb. Loan & Trust Co., 35 Neb. 466, 53 N. W. 481.

After consideration of the law and the evidence in the case at bar, we reach the conclusion that on the record the order of the trial court, entered February 8, 1945, at the February 1945 term thereof, directing that all parties be placed in statu quo and purchaser given a judgment against William A. Ehlers, is not warranted by the record, while a judicial sale of this real estate, held February 8, 1944, still stands of record to Teresa Cronin, the successful bidder, who had at once paid in the amount of her bid, and no successful attack has been made on such sale. The demand of the appellant that, this action being a continuation of a divorce action, he is entitled to a fee of $250 in this court, is denied.

The judgment appealed from is hereby set aside and the cause remanded for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

HELEN ALLOWAY, APPELLANT, V. WALTER AIKEN AND FRETTA AIKEN, APPELLEES.
21 N. W. 2d 495

FILED JANUARY 18, 1946. No. 32008.

1. **Trial.** Section 25-1111, R. S. 1943, requiring instructions to the jury to be in writing, has no application to a mandatory instruction to return a verdict in favor of one of the parties to the litigation.

2. **Landlord and Tenant.** A tenancy from month to month may be terminated at any time without notice, by agreement.
3. ———. Whether or not the tenant agreed to surrender and vacate the premises is a question for the jury.
4. ———. Whether or not certain oral covenants were agreed to between the landlord and tenant affecting the tenant's occupancy of the premises, and whether or not the same were violated by the tenant, are questions for the jury.
5. ———. Section 27-1404, R. S. 1943, does not require a 30-day written notice to vacate a tenancy from month to month, and in the absence of such a requirement, an oral notice is sufficient, provided it is absolute and states the time which is properly on the first day after the 30-day period ends.

APPEAL from the district court for Dawes County: EARL L. MEYER, JUDGE. *Reversed and remanded.*

Porter & Porter, for appellant.

Charles A. Fisher, for appellees.

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

MESSMORE, J.

This is an action for unlawful detention by the defendants of certain rooms in the residence property of the plaintiff located in Crawford, Nebraska. The complaint, in substance, is as follows: That on or about September 7, 1944, plaintiff leased certain rooms in her residence property to the defendants by a verbal lease from month to month, for the sum of $45 per month, subject, however, to the plaintiff's right to jointly occupy and have access to the rooms, and certain other covenants agreed upon orally by the parties governing the occupancy of the property which, it is charged, defendants violated; that more than 30 days prior to January 7, 1945, plaintiff exercised her legal right to end the verbal lease by giving notice to defendants that the lease would stand canceled and annulled from and after January 7, 1945, and that they should vacate the premises on or before that date; that the defendants refused to vacate the premises pursuant to the notice; that on January 9, 1945,

the plaintiff served upon the defendants a written notice to vacate the premises within three days after date of service thereof, which period fully elapsed and terminated, and the defendants still unlawfully and forcibly detained possession of the premises.

The case was tried before the jury in the justice court, and a verdict of guilty was returned. The defendants perfected their appeal to the district court where the case came on for trial upon the pleadings in the justice court, by agreement of the parties. After the introduction of evidence for plaintiff and defendants, the court instructed the jury to return a verdict finding the defendants not guilty in manner and form as alleged in the complaint, to which the plaintiff excepted. Motion for new trial was overruled. The plaintiff appeals.

For convenience, the plaintiff will hereinafter be referred to as the appellant and the defendants as the appellees.

The appellant contends the court erred in orally instructing the jury to return a verdict for defendants and against the plaintiff; that section 25-1111, R. S. 1943, provides in part: "It shall be the duty of the judges of the several district courts, in all cases, both civil and criminal, to reduce their charges or instructions to the jury to writing, before giving the same to the jury, unless the so giving of the same is waived * * * ."

The foregoing provision of the statute has no application to a mandatory instruction to return a verdict in favor of one of the parties to the litigation. See Salisbury v. Press Publishing Co., 76 Neb. 849, 108 N. W. 136, wherein the court discussed the statute which is now section 25-1111, R. S. 1943. The court, on page 854, said: "The plaintiff contends that the judgment must be reversed because the direction to return a verdict for the defendant was given orally, and in support of this contention, invokes the statute requiring all instructions to be in writing, unless such requirement be waived. The statute has reference to instructions proper, that is, instructions given to guide the jury in their deliberations when some issue of fact is submitted for

their determination. Where there is no such issue to submit, a mere mandatory direction, which is in no proper sense an instruction, is all that is required, and like other rulings of the court may be given orally." The appellant's contention is without merit.

The appellant further contends that the district court was in error in refusing to submit the case to the jury, for the reason that the evidence was sufficient to make a case for the jury.

The record discloses that prior to September 7, 1944, the appellees contacted the appellant with reference to renting a part of her residence property and using another part thereof jointly with her. The appellant informed them that she had been offered $55 per month for the rooms. The parties finally agreed that the appellees would occupy the premises for one month for $40, and after the appellee, Fretta Aiken, went to work, the rent would then be $45 per month. The appellant left the city for a while on business, and returned shortly after the appellees had moved into her premises. She noted certain damage which had been done during her absence. She left again and returned shortly, and lived in the house with the appellees, jointly sharing certain rooms. Difficulty developed between the parties, and the appellant informed the appellees that they had only 11 days lease, and the time would be up in 11 days, and she would see what she could do by law. The appellees informed her that they were there for the duration of the war, and she could not put them out. On October 24, 1944, the appellant told the appellee, Walter Aiken, she would like to have the house, and was again informed by them that they were there for the duration of the war, and she could not put them out. Thereafter, in November, there was still difficulty between the parties, and the appellant told the appellees they could get out if they did not like her style, and that they couldn't get out too soon. The appellees said they would move, and brought in packing boxes for such purpose, in the latter part of November or the fore part of December. The appellant claimed she relied upon their promise

to move. When the appellees left on furlough, on December 23, 1944, there was a controversy with reference to the rent, as to whether or not the appellant would accept it, and if it should be paid by the week or month. It was agreed that the month's rent would be paid, and a refund made by the appellant in the event all of the rent was not earned. Prior to the time of the appellees leaving on furlough, the appellant spoke to them about moving when they came back. They had taken a number of things from the premises and she asked them to take the rest, and Fretta Aiken said: "Well, yes, Walter has to see a man yet tonight before we leave town." The appellees returned January 8, 1945. The appellant took them in, and gave as her reason therefor that she thought they would go back to work and move that day. The appellant said to Walter Aiken: "I thought you were moving" and he said to her: "I came to pay you. I want to pay you your rent." She said: "I can't let you have the house any longer. I have to have it and don't want the rent," and did not accept it.

The appellee, Walter Aiken, testified that on December 7, 1944, he spoke to the appellant about getting a furlough for Christmas, and on December 16, 1944, she informed the appellees she had decided to rent her apartment in the back to another party—she was going to live with some relatives—and the new renters would take care of the premises; and when he was paying the rent, the appellant informed him that after the first of the year he would have to pay $50 per month and furnish the fuel for both stoves, or find some other place to live. He told her he could not afford it. When he returned from his furlough he was carrying some of his belongings into the house, and the appellant stopped him and told him there was no use to bring them in, she would let them stay that night, but in the morning they would have to find another place to live. He told her he did not know where to move, and she informed him the hotel was open.

Appellant's evidence in rebuttal, with reference to the payment of rent by appellees from December 7, 1944, to

January 7, 1945, is in effect that the appellees promised to move and she did not want to accept the rent, and finally it was the understanding that appellees would move, and pay the rent by the week, and the appellant would return the unearned rent when they surrendered the premises. She denied that she informed them they would have to pay $50 a month and furnish the fuel, or move.

The tenancy in the instant case is a month to month tenancy. The rent was paid on September 7, 1944, and on the same date each month, in advance.

Section 27-1401, R. S. 1943, provides a remedy in a case for repossession of premises lawfully taken but unlawfully detained. See Gregory v. Pribbeno, 143 Neb. 379, 9 N. W. 2d 485.

Section 27-1404, R. S. 1943, imposes a duty on a party desiring to commence an action for forcible entry and detention to notify the adverse party to leave the premises for the possession of which the action is about to be brought. This notice shall be served at least three days before commencing the action by leaving a written notice with such adverse party.

In the instant case the three-day written notice was served upon the appellees on the 9th day of January 1945, to vacate the premises within three days from such date. The action of forcible entry and detention was instituted in the justice court on January 13, 1945. It is noted, the three-day written notice properly fixed a definite date from and after which the tenants would be required to surrender possession of the premises. See Connell v. Chambers, 22 Neb. 302, 34 N. W. 636; Hawley v. Robeson, 14 Neb. 435, 16 N. W. 438.

This court held in Farley v. McKeegan, 48 Neb. 237, 67 N. W. 161, that a tenancy from year to year may be terminated only by agreement, express or implied, or by notice for the time and in the manner prescribed by law. See, also, Bailey v. Lund, 134 Neb. 319, 278 N. W. 506, wherein this court held: "A tenancy from year to year may be terminated at any time without notice by agreement." See,

also, Critchfield v. Remaley, 21 Neb. 178, 31 N. W. 687; Marshall v. Casteel, 143 Neb. 68, 11 N. W. 2d 818.

While the foregoing cases involve a tenancy from year to year, and an agreement made with reference to the termination of such tenancy, the rule would be no different with reference to a month to month tenancy.

In Dame, Nebraska Inferior Court Practice, (2d ed.) s. 543, p. 522, and Dame, Nebraska Inferior Court Practice, 1918, s. 529, p. 497, it is stated that, by agreement of the landlord and tenant, a tenancy from month to month may be terminated.

We believe in the instant case there are sufficient facts to submit to the jury on the question as to whether or not an agreement was made whereby appellees agreed to surrender and vacate the premises. In the event such an agreement was not made, then the question as to the sufficiency of notice to quit would be involved.

Section 27-1404, R. S. 1943, makes no specific requirement with reference to notice other than the three-day written notice as contained therein. In the absence of any further requirement, oral notice is sufficient, provided it is absolute and states the time which is properly on the first day after the 30-day period ends. Freed v. Collins, 169 Iowa 359, 151 N. W. 471; Landsberg v. Tivoli Brewing Co., 132 Mich. 651, 94 N. W. 197; Searle v. Powell, 89 Minn. 278, 94 N. W. 868; Dame, Nebraska Inferior Court Practice, (2d ed.) s. 778, p. 766.

Applying the 30-day notice as required by the foregoing authorities to the instant case, the evidence is in conflict as to whether or not such oral notice was given on or before December 7, 1944, to appellees to vacate the premises January 7, 1945.

There is likewise a controversy in the evidence as to whether or not certain other covenants of the oral lease were violated by the appellees during their tenancy. In this connection, "A failure of the lessee to keep and perform certain covenants and agreements therein contained, relating to the use and care of the property, and affecting the

value of the estate, authorize the lessor to bring such action when a breach of such covenant on the part of the lessee has procured, though the lease has not terminated by efflux of time, involving a covenant against waste." Dame, Nebraska Inferior Court Practice, (2d ed.) s. 544, p. 523.

For the reasons given in this opinion, the judgment of the district court is reversed and the case is remanded for further proceedings.

REVERSED AND REMANDED.

KENNETH J. CAMPBELL, APPELLANT, V. C & C MOTOR COMPANY ET AL., APPELLEES.
21 N. W. 2d 427

FILED JANUARY 18, 1946. No. 32019.

1. **Fraud.** To maintain an action for damages for false representation the plaintiff must allege and must prove what representation was made; that it was false and so known to be by the defendant charged with making it, or else was made without knowledge as a positive statement of known fact; that the plaintiff believed the representation to be true; and that he relied on and acted upon it, and was thereby injured.
2. ———. To recover damages in a law action for fraud, the plaintiff must prove he has suffered loss directly as a consequence of a fraud and to an extent that is definite and ascertainable.
3. **Trial.** Where the evidence is insufficient to sustain a verdict for the plaintiff, the dismissal of the action is not erroneous.

APPEAL from the district court for Sheridan County: EARL L. MEYER, JUDGE. *Affirmed.*

Lee Card, for appellant.

A. C. Plantz and *E. D. Crites,* for appellees.

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

MESSMORE, J.

This is an action at law. The plaintiff charges fraud and deceit practiced by the defendants in selling him a motor

truck, and in addition, the making of an oral agreement embracing an express warranty which he claims the defendants breached. The plaintiff's second amended petition, for the purposes of this appeal, alleges in substance as follows: That on or about August 1, 1940, the manager of the defendant, C & C Motor Company, falsely and fraudulently, with intent to deceive and defraud the plaintiff, represented to him that he would sell the plaintiff a heavy duty Chevrolet motor truck of 1940 pattern that would easily, safely, and expeditiously handle and haul single loads of merchandise and livestock of from four to six tons per single load over the usual western Nebraska highways at a speed of from 35 to 50 miles per hour; further, that such motor truck would not require new parts or repairs for a year from the date of the purchase; that plaintiff accepted the offer to purchase, wholly relying upon the statements and representations of the manager of the C & C Motor Company; that the representations so made were false in fact, and the motor truck delivered to the plaintiff was not a heavy duty Chevrolet motor truck of 1940 pattern, and failed to perform as represented and in the manner heretofore set forth; that the agreed price as shown by a conditional sales contract entered into by the plaintiff and defendant, C & C Motor Company and made a part of the petition, was $1,038.76, $400 payable upon delivery, this amount divided in $100 cash and $300 trade-in value for a 1936 Chevrolet truck, leaving a balance of $638.76 payable in two installments, February 1, 1941, and August 1, 1941; that by reason of the false and fraudulent representations made, the plaintiff has been deprived of the use and benefit of the heavy duty Chevrolet motor truck of 1940 pattern for approximately a year last past, and the loss of use of his 1936 Chevrolet motor truck for a year, and the loss of use of $100 cash expended in the purchase, and the plaintiff has been required to expend other money in his efforts to have the defendants make good their covenants, warranties, and promises to deliver to the plaintiff a heavy duty Chevrolet truck of 1940 pattern in the amount of $250 for gas, oil, and time away from his

ranch work, and prayed generally for damages in the amount of $1,500.

The defendant, C & C Motor Company, by separate answer alleged it was a partnership; admitted the sale of a 1940 model Chevrolet truck on a conditional sales contract as pleaded by the plaintiff; that the plaintiff did not complete the contract according to the terms thereof; and denied generally other allegations of the petition.

The defendant, General Motors Acceptance Corporation, filed an answer similar in all respects to that of the C & C Motor Company, except that it is a corporation, and the conditional sales contract was assigned to it, and its codefendant was not its agent; denied generally the other allegations of plaintiff's amended petition.

The plaintiff defaulted the conditional sales contract February 1, 1941. The truck was repossessed and apparently sold under foreclosure, the plaintiff having removed from the state.

The case proceeded for trial before a jury, and at the close of plaintiff's evidence the defendant, General Motors Acceptance Corporation, separately moved to dismiss the suit as to it for the reason that the petition states no cause of action against it, and the evidence establishes no liability against it. In addition thereto, the defendant, C & C Motor Company, moved the court to dismiss the action as against it for the same reasons. Other parts of the latter defendant's motion will be discussed subsequently in this opinion as occasion requires. The court sustained the motion and dismissed the plaintiff's suit as to both defendants. From the overruling of the motion for new trial, plaintiff appeals.

The record discloses that the evidence is insufficient to make a case for the jury against the defendant, General Motors Acceptance Corporation, and the trial judge properly sustained such defendant's motion to dismiss.

The remaining question is whether or not the trial court erred in dismissing the plaintiff's suit against the defendant C & C Motor Company. In this connection, the burden is on the plaintiff to prove by preponderance of the evidence,

the following essential elements constituting fraud and deceit: (1) That such defendant made a material representation; (2) that it was false; (3) that, when made, such defendant knew that it was false, or made it recklessly, without any knowledge of its truth and as a positive assertion; (4) that he made it with the intention that it should be acted on by plaintiff; (5) that plaintiff acted in reliance on it; and (6) that he thereby suffered injury. See 37 C. J. S., Fraud, s. 3, p. 217. See, also, Scovel v. Isham, 113 Neb. 238, 202 N. W. 869; Omaha Electric Light & Power Co. v. Union Fuel Co., 88 Neb. 423, 129 N. W. 989; Bowen v. Johnson, 129 Neb. 868, 263 N. W. 215; Welch v. Reeves, 142 Neb. 171, 5 N. W. 2d 275.

The plaintiff testified that he talked to the manager of the defendant C & C Motor Company several times, and was informed by him that the 1940 heavy duty truck would handle larger loads at a better rate of speed and that he would finance it for the plaintiff; also, that the truck would haul from four to six tons at from 40 to 50 miles per hour, and he took the manager at his word. He further testified that after he drove the truck a thousand miles and loaded it with three ton of hogs and started to Alliance, that it would not pull. He then drew a comparison between the 1936 Chevrolet truck which he turned in on the new truck as to its maneuverability, speed, and handling as against the 1940 truck in question. There is also evidence as to certain repairs which the defendant, C & C Motor Company, agreed to place on the truck and which were not furnished, also work performed thereon which resulted in no improvement. The evidence as to the faulty maneuverability and handling capabilities of the new truck, in comparison with the 1936 truck, is to some extent corroborated. It is apparently the plaintiff's contention that the manager of the C & C Motor Company made false representations as set forth in the plaintiff's amended petition, as an inducement to the plaintiff to execute the conditional sales contract.

It is true that parol testimony in a case of fraud and deceit is admissible to show that a representation made con-

stituted an inducement for the signing of a written agreement. See Bryant v. Thesing, 46 Neb. 244, 64 N. W. 967; Barnett v. Pratt, 37 Neb. 349, 55 N. W. 1050; 24 Am. Jur., Fraud and Deceit, s. 267, pp. 102, 103, and 104. See, also, Commercial Credit Co. v. Childs, 199 Ark. 1073, 137 S. W. 2d 260, 128 A. L. R. 726.

However, viewing the evidence in its most favorable light, it fails to show that the plaintiff relied upon any representations made by the manager of the defendant, C & C Motor Company, that constituted an inducement to the plaintiff to sign the conditional sales contract. The plaintiff testifies to no such fact.

It is obvious that the essential elements constituting the cause of action in fraud and deceit were not proven by competent evidence adduced by the plaintiff, and the court properly sustained the defendant C & C Motor Company's motion to dismiss in such respect.

It is further contended by the plaintiff that an oral agreement was made between the plaintiff and the defendant, C & C Motor Company, that embraced an express warranty, and that such warranty was breached by such defendant within the contemplation of the Uniform Sales Act, citing section 69-412, and subsections 69-415 (1) and 69-447 (2), R. S. 1943. The evidence fails to disclose the making of any such oral contract or any warranty made by the defendant, C & C Motor Company, either express or implied, upon which the plaintiff claimed he relied. The court properly dismissed the plaintiff's suit on this phase of the case.

The plaintiff would not be entitled to recover for prospective or uncertain profits which he might have made, had he not been deceived by and acted upon the defendant's false representations. The profits with reference to trucking of his livestock, unless arrived at with reasonable certainty, may not be recovered, even assuming that he had proved fraud and deceit on the part of the defendant. See 37 C. J. S., Fraud, s. 141 d, p. 467.

While expenses incurred by the defrauded party as a proximate result of the fraud may be recovered, there must

be some competent proof of the expenses. The mere conclusion by the plaintiff that he was required to spend a certain amount in an endeavor to compel the defendant to comply with the representations made, without further supporting evidence of any kind or nature, is insufficient to show any damage or injury suffered by the plaintiff.

To recover damages in a law action for fraud, the plaintiff must prove he has suffered loss directly as a consequence of a fraud and to an extent that is definite and ascertainable. See 24 Am. Jur., Fraud and Deceit, s. 265, p. 100.

"Where the evidence is insufficient to sustain a verdict for plaintiff, the dismissal of the action is not erroneous." Beber v. Beebe & Runyan Furniture Co., 97 Neb. 446, 150 N. W. 204.

The judgment of the trial court is affirmed.

AFFIRMED.

JOSEPHINE BEDNAR, APPELLANT, V. JOSEPH BEDNAR ET AL., APPELLEES.

21 N. W. 2d 438

FILED JANUARY 18, 1946. No. 32015.

1. **Appeal and Error.** This court will, on its own motion, refuse to consider a document appearing in the record and purporting to be a bill of exceptions when not allowed as such by the trial judge or authenticated by the certificate of the clerk of the trial court.
2. ———. Where, on appeal in equity from a judgment of the district court, the record contains no bill of exceptions and the pleadings are sufficient to support the judgment it will be affirmed.

APPEAL from the district court for Gage County: CLOYDE B. ELLIS, JUDGE. *Affirmed.*

Hubka & Hubka and *William Hein*, for appellant.

Vasey & Mattoon and *Rinaker, Hevelone & McCown*, for appellees.

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

WENKE, J.

Josephine Bednar brought this action in the district court for Gage County to have a certain deed from Fred Bednar, now deceased, to Joseph Bednar, his son, declared to be void and of no force and effect. The deed was dated March 1, 1922, and acknowledged on March 10, 1922. It conveyed the southeast quarter of section 27, township 2 north, range 6, east of the 6th P. M., in Gage County, Nebraska. She made Joseph Bednar, the grantee named in said deed, and his wife, Helen Bednar, parties defendant.

The basis of the plaintiff's action is that the deed in question was not delivered to the grantee prior to May 7, 1923; that on May 7, 1923, she was united in marriage to Fred Bednar, the grantor, and they moved on the premises and occupied it as their home and that it became their homestead; that she did not join in the execution of the deed and that because thereof the deed is void. She further claims that from the circumstances surrounding the conveyance from Fred Bednar to his son, Joseph Bednar, it indicates there was a secret scheme on their part to defraud her of any rights she had in said premises.

Defendants filed their answer denying the fraud and claiming that the deed in suit was executed and delivered by Fred Bednar, then a widower, to Joseph Bednar, his son, sometime in March of 1922. The defendants also claim the property by adverse possession.

The court found that the deed had been executed and delivered prior to May 7, 1923; that no fraud had been committed in connection therewith; and dismissed the plaintiff's action. It is from this judgment that the plaintiff appeals.

The record discloses that the bill of exceptions has neither been settled by the trial judge nor filed with and certified to by the clerk of the district court.

While the appellee has not moved to quash the bill of ex-

ceptions, however, we have often stated the rule in this court to be: " 'The rule is settled that this court will, on its own motion, refuse to consider a document appearing in the record and purporting to be a bill of exceptions when not authenticated as such by the certificate of the clerk of the trial court.' State Bank v. Bradstreet, 89 Neb. 186, 130 N. W. 1038; Union Stock Yards Nat. Bank v. Lamb, 92 Neb. 608, 139 N. W. 216; In re Estate of Abts, 122 Neb. 714, 241 N. W. 270." Essex v. Brown, 139 Neb. 435, 297 N. W. 659. See, also, Palmer v. Mizner, 70 Neb. 200, 97 N. W. 334.

In Essex v. Brown, *supra*, we stated with reference to authentication by the clerk of the district court as follows: "An examination discloses that the purported bill of exceptions does not bear on it the filing stamp of the clerk of the district court or any other evidence of filing, and further discloses that it has never been authenticated by the clerk. The only filing indicated is the filing with the clerk of this court.

"By the terms of the statute, when an original bill of exceptions is used, as distinguished from a bill of exceptions copied in the transcript, a certification or authentication by the clerk is necessary. Comp. St. 1929, sec. 20-1922 (now Sec. 25-1922, R. S. 1943).

"This court, in construing this section, has repeatedly held that a bill of exceptions, not authenticated by the clerk of the district court, will be disregarded when the case comes here for review. We quote from a few of the decisions:

" 'If a bill of exceptions is not authenticated by the certificate of the clerk of the trial court, it will not be examined in the supreme court.' Hazelet v. Holt County, 51 Neb. 724, 71 N. W. 719.

" 'A bill of exceptions will not be examined in this court if not authenticated by the certificate of the clerk of the trial district court.' Gay v. Reynolds, 57 Neb. 194, 77 N. W. 661." See, also, Martin v. Fillmore County, 44 Neb. 719, 62 N. W. 863, and Duncan v. State, 75 Neb. 764, 106 N. W. 1014.

In Cross v. Prohaska, 103 Neb. 146, 170 N. W. 665, we stated: "What purports to be a bill of exceptions was filed in this court, but it was not allowed as such by the trial judge or authenticated by the clerk of the district court. It must therefore be disregarded on appeal. Dugger v. Smith, 94 Neb. 552; Gay v. Reynolds, 57 Neb. 194." And in Adkisson v. Gamble, 143 Neb. 417, 9 N. W. 2d 711, we stated: "Without compliance with the statute this court is unable to tell whether the testimony and exhibits before us were considered by the district court, or if they constitute all of the evidence that was before the district court. Authentication by the proper officials of the district court is necessary to insure that all the evidence, and only that which was before the district court, is before this court on appeal." See, also, Romberg v. Fokken, 47 Neb. 198, 66 N. W. 282, and Denise v. City of Omaha, 49 Neb. 750, 69 N. W. 119.

Therefore, the purported bill of exceptions in this case cannot be considered.

"The rule is that when a bill of exceptions has been quashed, no question will be considered, a determination of which necessarily involves an examination of the evidence adduced in the trial court. (Sweeney v. Ramge, 46 Neb. 919; Reed v. Rice, 48 Neb. 586; McKenna v. Dietrich, 48 Neb. 433; Wood v. Gerhold, 47 Neb. 397.)" Home Fire Ins. Co. v. Weed, 55 Neb. 146, 75 N. W. 539. And as stated in In re Estate of Abts, 122 Neb. 714, 241 N. W. 270: " 'Assignments of error that require an examination of the evidence are unavailing on appeal in absence of a bill of exceptions.' Anthony Doll & Co. v. Strien, 121 Neb. 43." And as stated in Occidental Bldg. & Loan Assn. v. Carlson, 134 Neb. 574, 279 N. W. 162: "Where on appeal in equity from a judgment of the district court the record contains no bill of exceptions and the pleadings are sufficient to support the judgment it will be affirmed. It is hardly necessary to cite authorities in support of this proposition. Late cases reiterating the rule are Slosburg v. Hunter, 132 Neb. 529, 272 N. W. 571, and State v. Barney, 133 Neb. 676, 276 N. W. 676."

There being no errors assigned, except those requiring an examination of the evidence adduced on the trial, and the pleadings being sufficient to sustain the judgment, the judgment of the district court must be affirmed.

AFFIRMED.

MABEL C. HERMAN, APPELLEE, V. JOHN FIRESTINE, APPELLANT.
21 N. W. 2d 444

FILED JANUARY 25, 1946. No. 31994.

1. **Automobiles.** In a property damage case arising out of a collision between an automobile and a transport, where the evidence is in sharp conflict, it presents a question for a jury to determine, under proper instructions by the court.
2. **Trial.** If there is competent testimony before the jury by which a finding in favor of the plaintiff can be upheld, the court is not at liberty to disregard it and direct a verdict against him.

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

Richard O. Johnson and *Perry, Van Pelt & Marti*, for appellant.

Chambers, Holland & Locke, for appellee.

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

PAINE, J.

In an action for damages arising out of a collision between an automobile and a transport, a judgment was entered upon the verdict in the sum of $3,242.24. Motion for new trial being overruled, the defendant appealed to this court.

Among the errors relied upon for reversal, it is charged that the court erred in not sustaining the defendant's motion to dismiss the petition when the plaintiff had rested, and in overruling a similar motion at the conclusion of all

the testimony. It is charged that the verdict was contrary to law, not sustained by the evidence, and is contrary to the instructions given by the court. Reliance is placed by the defendant upon alleged error in the giving of each of the 19 instructions making up the court's charge to the jury, and also in the refusal to give ten instructions offered by the defendant.

The facts surrounding the collision may be briefly stated as follows: The plaintiff, Mrs. Mabel C. Herman, residing at Fremont, Nebraska, has operated the Herman Oil Transport Company of that city since her husband's death in 1936, and was the owner of a 1940 D-40 International tractor, pulling a 1940 Fruehauf trailer, the tractor being worth $1,438, and the trailer $2,179.48, for the destruction of which plaintiff prays judgment.

The trailer was carrying over 4,000 gallons of kerosene, and was driven by George Blazer, who had been driving for the plaintiff for about six months. He was driving south on Tenth Street in Lincoln on Sunday morning, April 2, 1944, about 9:30, following the defendant, John Firestine, who was driving a 1938 Plymouth coach, for the destruction of which defendant in his cross-petition prays judgment for $750.

The defendant's wife was sitting in the front seat with her husband, and he was driving at about 15 to 20 miles an hour, going to visit their daughter, whose husband was in the army. The daughter lived at 2441 South Tenth Street, which was located on the west side of Tenth Street. The defendant testified that there were no cars approaching him from the south, and when he got about opposite his daughter's home he turned slightly to the left in order to turn back to the right and go in the driveway at his daughter's residence. When he turned to the left a distance of about five feet, bringing him near to the center of the street, as testified to by Mrs. Frances Murphy, the driver of the tractor-trailer, following closely behind, attempted to go past him on the right-hand side, very close to the curb. At that moment the defendant, turning sharply to his right to

go into the driveway, drove into the side of the trailer, and a collision occurred.

The map, exhibit No. 1, shows that the dual wheels on the right rear of the trailer went up over the curb exactly at the north side of the driveway at 2441 South Tenth Street, and ran in the parking straight ahead at an angle to the street for 67.6 feet, and when it came to rest the Plymouth coach was jammed under the left side of, and about half way back in, the trailer. The door on the right-hand side of the Plymouth coach had been thrown open, and Mrs. Firestine was thrown out and was under the trailer.

Gail Curtin, who lives in the next house north of defendant's daughter's house, testified that he was the first person to reach the scene. He said that when he arrived Mrs. Firestine was getting out from under the trailer and Mr. Firestine was getting out of his Plymouth on the left-hand side. Curtin said he yelled to the driver of the transport to turn off his motor, and at about the same time Mr. Firestine got back into his Plymouth and shut off its motor, but in spite of these precautions the kerosene took fire within two or three minutes of the collision and burned for over an hour, with a fire so hot that people could not approach anywhere near the wreck. Both the Plymouth and the transport were entirely worthless after the fire.

From this brief statement it will be seen that no personal injury to anyone is involved in this action. Additional facts, for the better understanding of what occurred, might include the statement that Tenth Street carries a heavy traffic; that it is 42 feet wide between the curbs, but is not a four-lane road; that the curbing is 21.15 feet out from the sidewalk line; that the place where the right dual wheels of the transport stopped is some 15 feet north of where the north curb of Lake Street would be if it extended across Tenth Street. Lake Street is only 25 feet wide between the curbs, and comes into Tenth Street from the east, but ends in Tenth Street. There was a 50-foot lot, with another house located upon it, south of the driveway defendant intended to turn into, and the next 50-foot lot to the south,

through which Lake Street would go if it was extended, was a vacant lot.

Defendant charges that the refusal of the court to give defendant's requested instruction No. 4 was reversible error. By this instruction No. 4, the court was asked to tell the jury that the attempt of the driver of the transport to pass to the right of defendant's automobile when it had made a turn to the left was prima facie negligence on the part of plaintiff's driver.

The traffic ordinances of the city of Lincoln provide that large or heavily loaded vehicles shall be driven as near the right curb as possible, and shall pass another vehicle proceeding in the same direction on its left side, but "Nothing in this section shall be construed to prohibit a driver overtaking and passing upon the right of another vehicle which is making or about to make a left turn."

The court properly instructed the jury in instruction No. 7 that violation of traffic rules is not, in itself, negligence, but is evidence of negligence, which may be considered with all the other facts and circumstances to determine whether or not either of the parties was, in fact, negligent.

"The violation of an ordinance or statute requiring automobiles and other vehicles to drive to the right of the center of the highway does not constitute negligence *per se*, or as a matter of law; but whether or not such violation constituted negligence is a question for the jury under proper instructions." Burkamp v. Roberts Sanitary Dairy, 117 Neb. 60, 219 N. W. 805.

Considerable stress is laid by appellant on the fact that section 39-7,113, R. S. 1943, provides that when such a tractor and trailer and load weighs over 12,000 pounds it must be equipped with power or auxiliary brake equipment. The court, in its instruction No. 10, set out the substance of this law, and then said to the jury: "You are therefore instructed that if the violation of said law directly contributed to the collision and fire in the instant case, then it will be your duty to return a verdict in favor of the defendant and against the plaintiff, provided his negligence was more

than slight." We believe this properly covered the situation in regard to the absence of auxiliary brakes.

"We are not unmindful of the rule that a violation of a statute or ordinance enacted in the interest of public safety is evidence of negligence * * * , but the rule cannot be made applicable unless there is some causal relation between the violation and an accident." Crandall v. Ladd, 142 Neb. 736, 7 N. W. 2d 642.

We have carefully examined all of the instructions tendered by the defendant, as well as each of the nineteen given by the court, and in our opinion the court gave the jury instructions which covered adequately each and every point of law to which the defendant was entitled in the instructions offered.

"Instructions are to be considered together, to the end that they may be properly understood, and, when so construed, if as a whole they fairly state the law applicable to the evidence, error cannot be predicated on the giving of the same." Gallagher v. Law, 135 Neb. 381, 281 N. W. 806.

The defendant charges that the negligence of the plaintiff's driver was more than slight in the following particulars: That he drove his truck too closely behind defendant's car, and ignored defendant's warning signal; that he failed to have his truck under reasonable control, so he was unable to stop without colliding with defendant's car, and neglected to sound any horn or to slacken his speed; and that he attempted to overtake and pass defendant's automobile on the right side of a street which was not marked nor designated as a four-lane highway. Defendant therefore contends that he was entitled to a directed verdict.

The plaintiff, on the other hand, charges that the defendant was guilty of negligence, in that he operated his said automobile so as to change its course in said street without first ascertaining that such movement could be made in safety and without collision with other vehicles; that he failed and neglected to signal his intention to turn his vehicle either to the right or to the left; that he drove his said automobile into and upon the trailer of the plaintiff without

reasonable cause for so doing; and that defendant failed and neglected to apply his brakes after turning to the right when in the exercise of due care he could have observed the plaintiff's vehicle traveling along said street.

The two statements just set out show that there was a sharp conflict in the evidence. It is then necessary to determine the degree of negligence chargeable to each one. This is not a question to be determined by the court, but under the evidence in this case is clearly a jury question. The jury had before them, by the evidence of the witnesses, the two theories as to how the accident happened. It was for the jury to determine, under proper instructions, what their verdict should be in the case. Under the facts in this case, we believe the trial court was right in refusing to direct a verdict.

"Where evidence is in conflict and such that reasonable minds may draw different conclusions therefrom, the questions of negligence and comparative and contributory negligence are for the determination of the jury." Parks v. Metz, 140 Neb. 235, 299 N. W. 643. See, also, Grantham v. Watson Bros. Transportation Co., 142 Neb. 362, 6 N. W. 2d 372; Fairman v. Cook, 142 Neb. 893, 8 N. W. 2d 315; Burry v. Interstate Transit Lines, 136 Neb. 695, 287 N. W. 66.

"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." Bainter v. Appel, 124 Neb. 40, 245 N. W. 16. See, also, Komma v. Kreifels, 144 Neb. 745, 14 N. W. 2d 591; Brewer v. Fischer, 144 Neb. 712, 14 N. W. 2d 315.

Anderson v. Strack, (Iowa) 17 N. W. 2d 719, is a case very closely in point. The principal difference between the two cases is that the Iowa collision occurred out in the country as the automobile attempted to turn to the right to go into a cemetery and was closely followed by a large furniture van instead of by a transport carrying kerosene, as in the case at bar.

It appears from this decision that the sections of the Iowa

code are very similar to the ordinances of the city of Lincoln set out in our case. The Iowa court held that, whether the truck following was driven at too great a speed, or whether it was following more closely than was reasonable and prudent, were questions for the jury. The Iowa court affirmed the judgment, but required the verdict of $9,210 to be cut by a remittitur to $5,500.

In the case at bar, the evidence was in sharp conflict, but that is to be expected in damage cases. The case, having been well tried, involved questions of fact which required submission to a jury.

The only question left is as to the instructions given by the court, and a careful examination of the charge shows no prejudicial error. Therefore, the judgment of the trial court is affirmed.

AFFIRMED.

MARIE NYGAARD, APPELLANT, V. LUCILLE STULL, APPELLEE.
21 N. W. 2d 595

FILED JANUARY 25, 1946. No. 31982.

1. **Highways.** The rules of the road fixed by section 39-741, R. S. 1943, extend to all public highways, however created, and to all roads not public highways if used for travel by the public.
2. ———. A ramp constructed on railroad property for the general use of the public in carrying on its business with the railroad company, even though the license to the public to use it could be terminated at any time by the company, is a highway within the meaning of section 39-741, R. S. 1943.
3. **Streets.** The joinder of the ramp with a viaduct constituting a part of a public highway is an intersection within the meaning of section 39-741, R. S. 1943.
4. **Trial.** An instruction, defining such an intersection as being in the nature of a private way and fixing the degree of care required in turning across the main highway into the ramp as that required in turning into a private way, is prejudicially erroneous.
5. **Appeal and Error.** A failure of the trial court to instruct upon the effect of certain evidence in the record cannot be reviewed

here where no requested instruction was tendered and no assignment of such failure was made in the motion for a new trial.

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

Dressler & Neely, for appellant.

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

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. The jury returned a verdict for the defendant and the plaintiff appeals from the judgment entered in accordance therewith.

The assigned errors relate solely to the correctness of one instruction given by the trial court and its failure to give an additional instruction, which the plaintiff contends should have been given. In view of the nature of the errors assigned, a brief statement of the evidence will suffice.

On February 11, 1944, the plaintiff was riding in the rear seat of an automobile being driven by her husband from a point on Dodge Street to a restaurant located on South Sixth Street in Omaha. There were five occupants in the car, two in the front seat and three in the back seat. The evening of the accident was clear and cold. There was much snow on the ground, especially where it had been removed from the center of the street and piled along the curb. They pursued a route which took them south up the Tenth Street viaduct. Plaintiff and the witnesses called by her testify that they proceeded south on the viaduct at a speed of 15 to 20 miles an hour until they came to the ramp near the Union Pacific station at which time the speed was reduced to 10 or 12 miles an hour in order to make a left turn into the ramp. Plaintiff's witnesses testify that they saw the lights of defendant's car in the distance approaching from the south and that they would have had ample

time to clear the street on which defendant's car was traveling if it had been driven at a reasonable rate of speed. Plaintiff's witnesses state that as the front of the car in which plaintiff was riding arrived at the curb line it was struck near the right rear wheel by defendant's car, causing the injuries affording the basis of this suit.

Defendant's evidence is to the effect that defendant's car was being driven north on the viaduct at a speed of 18 to 20 miles an hour and that just before it arrived at the point of the collision the car in which plaintiff was riding suddenly and without warning darted into the path of defendant's car, causing the accident.

The case was presented to the jury on these two theories and no contention is made that the case was not one for the jury to determine under proper instructions.

In her first assignment of error the plaintiff contends that instruction No. 9 was erroneous and prejudicial to the rights of the plaintiff. The instruction was as follows: "The ramp is more in the nature of a private way and is not to be classified as an intersecting street and, therefore, the defendant would have the right-of-way over anyone entering such ramp, but this right is not an absolute one that may be exercised under all conditions, and if in the exercise of ordinary care the defendant could reasonably see that by insisting upon such right-of-way a collision would probably result it would be the duty of the defendant to exercise ordinary care to avoid an accident even to the extent of foregoing her right-of-way, and her failure to do so under those conditions would be evidence of negligence in that respect."

It is the contention of the plaintiff that the point, where the ramp entered the viaduct, was an intersection within the meaning of the statute, sec. 39-741, R. S. 1943, providing the rules of the road to be observed at intersecting streets and highways.

The applicable provisions of section 39-741, R. S. 1943, are: "(5) The term 'highway' includes every way or place of whatever nature open to the use of the public, as a mat-

ter of right, for the purposes of vehicular travel, but shall not be deemed to include a roadway or driveway upon grounds owned by private persons, colleges, universities or other institutions. (6) The term 'private road or driveway' includes every road or driveway not open to the use of the public for purposes of vehicular travel. (7) The term 'intersection' includes the area embraced within the prolongation of the lateral curb lines or, if none, then the lateral boundary lines of two or more highways which join one another at an angle, whether or not one such highway crosses the other."

It is clear from the evidence that the ramp in question was constructed by the Union Pacific Railroad Company for the use of the public in carrying on its business with the public. It is not disputed that the ramp was intended for the use of people with vehicles, especially those having business with the railroad company. It is not questioned that it was and had been in common use by the public. It was paved and had every appearance of a public street and the plaintiff was at the time of the collision about to make use of it as a public street. The public was entitled to use it as a matter of right for the purpose of vehicular travel. It was, therefore, a highway as defined by the statute. The evidence shows that it joined Tenth Street on the viaduct and, in our opinion, it thereby formed an intersection as defined in the statute. Crossler v. Safeway Stores, Inc., 51 Idaho 413, 6 P. 2d 151; Commonwealth v. Gammons, 23 Pick. 201; and Grulich v. Paine, 231 N. Y. 311, 132 N. E. 100. This being true, the trial court should have instructed the jury as in any other intersection accident, and its failure to do so constitutes reversible error. The instruction given places a greater degree of care upon the driver of the car in which plaintiff was riding than the law requires.

The plaintiff assigns as error the failure of the trial court to instruct that the failure of the defendant to have her automobile equipped with chains might be considered negligence in view of the undisputed evidence that the streets were covered with snow and ice on the evening of the acci-

dent. The record does not show that such an instruction was tendered and refused by the court, nor does it show that it was assigned as error in the motion for a new trial. Consequently, the assignment is not properly before us for review.

For the reasons given the judgment is reversed and the cause remanded for a new trial.

REVERSED.

DICK J. CASPERS ET AL., APPELLANTS, V. FANNIE FRERICHS ET AL., APPELLEES.
21 N. W. 2d 513

FILED JANUARY 25, 1946. No. 32001.

1. **Statute of Frauds.** In an action for specific performance of an oral contract within the statute of frauds, the evidence of the alleged contract and its terms must be clear, satisfactory, and unequivocal.
2. ———. Such contracts are on their face void as within the statute of frauds, because not in writing, and, even though proved by clear, satisfactory, and unequivocal evidence, they are unenforceable unless it is also proved by evidence of like character that there has been such performance as the law requires.
3. ———. The acts constituting performance must be such as are referable solely to the contract sought to be enforced, and not such as might be referable to some other and different contract or relation. They must be something that the claimant would not have done unless and on account of the contract and with the direct view to its performance so that nonperformance by the other party would amount to fraud upon him.
4. ———. Nothing will be considered as part performance which does not put the party into a situation which is a fraud upon him unless the contract is fully performed because equity interferes in such cases only to prevent fraud or unconscionable advantage.

APPEAL from the district court for Nemaha County: VIRGIL FALLOON, JUDGE. *Affirmed.*

Albert S. Johnston, for appellants.

Tyler & Frerichs and *Cline, Williams & Wright,* for appellees.

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

CHAPPELL, J.

This is a suit in equity wherein it is sought to obtain specific performance of an oral contract to devise real and personal property and establish a trust for the purpose of enforcing the same. At the conclusion of the plaintiff's evidence defendants moved to dismiss for want of sufficient evidence to sustain a judgment. The trial court thereupon sustained the motion and entered judgment dismissing the case at plaintiffs' costs. Motion for new trial was overruled and plaintiffs appealed to this court assigning that the trial court erred in sustaining the motion and in the refusal to receive in evidence certain described and enumerated exhibits offered by them. We find that these contentions cannot be sustained.

In arriving at the conclusions hereinafter set forth we are mindful of the rule that: "When a defendant moves for a dismissal at the close of plaintiff's evidence, he thereby admits plaintiff's evidence to be true, together with every conclusion which fairly and reasonably may be drawn therefrom." Lucas v. Lucas, 138 Neb. 252, 292 N. W. 729.

Plaintiffs are always confronted in similar cases with the necessity of removing their alleged oral contract from the operation of the statute of frauds, the applicable provisions of which will be found in sections 36-103 to and including 36-106, R. S. 1943.

Generally in a suit to enforce specific performance of an oral contract embraced within the statute of frauds, the burden is upon the plaintiff to establish two distinct elements by a preponderance of the evidence which must be clear, satisfactory, and unequivocal in character or quality. Those elements are acts of part performance of the contract and the terms of the contract itself. Theoretically, the acts of performance must be first proved in order to fulfill the

condition precedent to admission of parol evidence of the contract. This is not, however, a mere question of the order of proof but involves the very principle of equity jurisdiction itself. The rule is that nothing will be considered as part performance which does not put the party into a situation which is a fraud upon him unless the alleged contract is fully performed because equity interferes in such cases only to prevent fraud or unconscionable advantage. Overlander v. Ware, 102 Neb. 216, 166 N. W. 611.

In that connection plaintiffs contend that acts of performance adduced in evidence for that purpose need not be solely referable to the identical oral contract alleged if naturally referable to and not inconsistent with some contract, such as the one alleged. They argue that if such facts are shown and there is evidence supporting the existence of the contract alleged, then the evidence is sufficient to sustain a judgment. In cases similar to the one at bar that contention is not entirely correct as will be observed by an examination of recent authorities from this jurisdiction which are hereinafter cited.

It was said in Overlander v. Ware, *supra*: "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 non-performance by the other party would amount to fraud upon him."

That applicable statement of the law has either been adopted verbatim or reaffirmed by reference in five recent

cases decided by this court. See Taylor v. Clark, 143 Neb. 552, 563, 10 N. W. 2d 495, 13 N. W. 2d 621; Cahill v. Mockett, 143 Neb. 730, 10 N. W. 2d 679; Crnkovich v. Crnkovich, 144 Neb. 905, 15 N. W. 2d 66; Diez v. Rosicky, 145 Neb. 242, 16 N. W. 2d 155; and Lintz v. Apking, 145 Neb. 714, 18 N. W. 2d 55.

In the latter case above cited it was held: "In order to enforce an oral contract for the conveyance of the estate of a deceased person the evidence of the contract and its terms must be clear, satisfactory and unequivocal; the evidence of performance must be clear and satisfactory; and 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."

Other cases cited herein as positively state the rule but in different language. For example in Taylor v. Clark, *supra*, it was held: "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.

"An oral contract to convey real estate is void and unenforceable as within the statute of frauds unless there has been part performance by the promisee which is solely referable to the contract sought to be enforced and not such as might be referable to any other contract or hypothesis."

Also in Crnkovich v. Crnkovich, *supra*, it was held: "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.

"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."

Likewise in Diez v. Rosicky, *supra*, it was held: "In a suit to enforce an oral agreement within the statute of frauds on the ground of part performance, the part performance must refer to, result from, or be in pursuance of the oral contract sought to be enforced, and not from some other relation.

"To sustain such an oral agreement the evidence must be clear, satisfactory and unequivocal."

It is upon these well-established principles of law that we must measure plaintiffs' case. With that in view we will attempt to apply them to the undisputed facts.

The record discloses that plaintiffs are the surviving children of Habbe D. Caspers, deceased May 20, 1936. Defendants are the beneficiaries of the will of Thomas D. Caspers, deceased December 23, 1942. The spouse of one such beneficiary was also made a party defendant. The oral agreement involved is alleged to have been made by Habbe and Thomas who were brothers. Thomas was unmarried. They had two brothers, Jann D. Caspers and Ehme D. Caspers, who lived in Germany. Jann, unmarried, and in poor health, was the owner of property in Germany. He wrote to Habbe suggesting that upon his death Habbe give his share of Jann's property to their brother, Ehme. Before Jann's death Habbe and Thomas talked the matter over. Habbe then suggested to Thomas that he, Habbe, would give his share to Ehme if Thomas, who owned property here, would leave his property to Habbe or his children. To that suggestion Thomas replied that he thought it was a good idea and he would be willing to do it that way.

The theory of plaintiffs' case, as substantially pleaded in their petition, is that after the death of Jann in 1922, leaving surviving his three brothers as sole heirs at law, Habbe and Thomas orally agreed that if Habbe would assign all of his interest in Jann's property in Germany to Ehme, then Thomas would leave all of his property to Habbe or his children, the plaintiffs. It is alleged that although Habbe made such an assignment, relying upon the agreement, Thomas, after the death of Habbe, in violation thereof willed all his property to defendants.

We have examined the exhibits which plaintiffs complain were erroneously excluded by the trial court. They consist of letters from Ehme to Habbe and copies of documents involved in the settlement of Jann's estate in Germany. It is argued that they, together with the execution of some of them by Habbe and Thomas, contain and demonstrate the acts of performance necessary to remove plaintiffs' case from the statute of frauds. We find no reference in the exhibits, either directly or indirectly, to plaintiffs' alleged oral contract. Further they contain no evidence of any acts of performance solely referable to or unequivocally indicating the existence of the oral contract alleged or any other contract of similar character. Conclusively we believe that they are solely referable to and unequivocally indicate simply that Habbe and Thomas both severally agreed with Ehme to assign and that each of them did assign all of his respective interest in Jann's property in Germany to their brother, Ehme. It was only natural for them to do so, as suggested by both Jann and Ehme. Their brother, Ehme, whose wife was deceased, had a large family to support in Germany, which was at that time a war-torn, tax-burdened, and inflation-infected country. If we are to believe the exhibits their brother Jann's entire estate after payment of taxes was of little value.

We conclude that the record does not contain or demonstrate any act or acts of performance solely referable to the contract alleged which would place plaintiffs or their predecessors in a situation where any fraud would be perpetrated upon them unless the alleged contract was fully performed. Whether the trial court properly excluded the exhibits need not be decided for the reason that if admitted and considered by the court they could not change the result in any event.

Further, without reciting it at length, we believe that the evidence adduced by plaintiffs relating to the alleged contract and its terms was not clear, satisfactory, and unequivocal, as required in such cases. Concededly, however, there is some evidence by plaintiffs of equivocal character con-

cerning various conversations which they overheard between Habbe and Thomas some 20 years ago to the effect that Habbe told Thomas he would assign his interest in Jann's property to Ehme if Thomas would leave his property to Habbe, or his children, and that Thomas assented thereto.

Be that as it may, from what has been heretofore said it will be apparent at once that plaintiffs cannot prevail even if we assume that there was competent evidence of such an oral contract, as claimed by plaintiffs. Other propositions of law are ably presented by brief of counsel but we find it unnecessary to discuss them.

For the reasons heretofore stated the judgment of the trial court is affirmed.

AFFIRMED.

EDITH OERTLE, APPELLANT, V. CHARLES OERTLE, APPELLEE.

21 N. W. 2d 447

FILED JANUARY 25, 1946. No. 32048.

1. **Appeal and Error.** To review errors of law occurring upon the trial of an equity case, a motion for new trial is necessary.
2. **Divorce.** Whether accusations of infidelity made by one spouse against the other constitute extreme cruelty within the meaning of the statute must be determined by the facts of each particular case. In no case will they be given that effect unless they are shown to be either unfounded or malicious.
3. ———. A decree of divorce from the bonds of matrimony should only be granted when the evidence brings the case within the definition of the statute providing for such relief.
4. ———. Any unjustifiable conduct on the part of either the husband or wife which so grievously wounds the mental feelings of the other or so utterly destroys the peace of mind of the other as to seriously impair the bodily health and endanger the life of the other, or such as utterly destroys the legitimate ends and objects of matrimony, constitutes "extreme cruelty" as defined in section 42-302, R. S. 1943, although no physical or personal violence may be inflicted or even threatened.

APPEAL from the district court for Lincoln County: I. J. NISLEY, JUDGE. *Affirmed.*

Hoagland, Carr & Hoagland, for appellant.

Beatty, Clarke & Murphy, for appellee.

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

WENKE, J.

Edith Oertle brought this action for divorce in the district court for Lincoln County. She appeals from a decree finding generally for the defendant, denying her a divorce, and dismissing her petition.

Appellant contends the trial court erred in not permitting her to amend her petition during the trial of the case. This proposition likewise involves the trial court's ruling on her offer of testimony. She cites in support thereof our holding in Stratton v. Wood, 45 Neb. 629, 63 N. W. 917, as follows: "The right to allow amendments which do not materially change the original claim of plaintiff is expressly recognized in the provisions of section 144 of the Code of Civil Procedure. (Now section 25-852, R. S. 1943.)" See, also, Undeland v. Stanfield, 53 Neb. 120, 73 N. W. 459.

However, the appellant failed to file a motion for new trial and under our holdings these matters are not properly here for determination. As stated in Bowers v. Raitt, 96 Neb. 460, 148 N. W. 93: "It is contended that no motion for a new trial is necessary in equity causes, * * * but this court has held that a motion for a new trial is necessary in such cases, if it is desired to review alleged errors of law occurring at the trial. Farmers Loan & Trust Co. v. Joseph, 86 Neb. 256; Brady v. McGinley, 94 Neb. 761." And as stated in Pitman v. Henkens, 125 Neb. 621, 251 N. W. 282: "To review errors of law occurring upon the trial of an equity case, a motion for new trial is necessary. Farmers Loan & Trust Co. v. Joseph, 86 Neb. 256; Hall v. Bowers, 117 Neb. 619; State v. Banking House of A. Castetter, 118 Neb. 231."

See, also, State ex rel. Spillman v. Citizens State Bank, 115 Neb. 271, 212 N. W. 616.

The appellant calls attention to language used by the appellee on the occasion of an incident several years ago when a boarder was present. She was on that occasion assisting the boarder in his endeavors to return to their home from a dance. As stated in Sample v. Sample, 82 Neb. 37, 116 N. W. 953: "Whether accusations of infidelity made by one spouse against the other constitute extreme cruelty within the meaning of the statute must be determined by the facts of each particular case. In no case will they be given that effect unless they are shown to be either unfounded or malicious." We will not discuss the incident in detail but it cannot be said that under the circumstances that such remarks were either entirely unfounded or malicious. The appellee has apologized many times for having made them and under the circumstances we do not think they constitute any evidence of extreme cruelty.

The principal question involved is whether the evidence is sufficient to constitute extreme cruelty, for as stated in Brown v. Brown, 130 Neb. 487, 265 N. W. 556: "A decree of divorce from the bonds of matrimony should only be granted when the evidence bring the case within the definition of the statute providing for such relief."

We have held that: "Any unjustifiable conduct on the part of either the husband or wife, which so grievously wounds the mental feelings of the other, or so utterly destroys the peace of mind of the other, as to seriously impair the bodily health and endanger the life of the other, or such as utterly destroys the legitimate ends and objects of matrimony, constitutes 'extreme cruelty' as defined in section 7, chapter 25, Compiled Statutes, although no physical or personal violence may be inflicted, or even threatened." Ellison v. Ellison, 65 Neb. 412, 91 N. W. 403. See, also, McNamara v. McNamara, 93 Neb. 190, 139 N. W. 1045; Peckham v. Peckham, 111 Neb. 340, 196 N. W. 628; Schmidt v. Schmidt, 120 Neb. 596, 234 N. W. 402; Brown v. Brown, 130 Neb. 487, 265 N. W. 556.

The record discloses that the parties were married on January 3, 1933, and are living in North Platte, Nebraska. He is now 55 years of age and she is 40. Three children were born to the marriage. They are Charles, age 12; Bernard, age 11; and Mainard, age 3.

Appellant had previously been married. She has a son by her first marriage, Eugene Edward Carlston, who is 19 years of age and now in the Navy.

Both parties have always been hard-working people; she in the home, which she managed economically, and he in his work. Prior to 1941, he was on W. P. A. In 1941, he acquired a truck and materially increased his earnings. He has always properly supported his family within the limits of his earning ability.

While he seems to be a regular user of intoxicating liquors and has always done so it does not appear that he has ever used it to excess. Likewise, he seems to enjoy playing cards but it does not appear that he plays for any large stakes. It does not appear that either of these habits has ever caused him to fail to properly support his family.

While it appears that on occasions the appellee has refused to take the family or children to a show or elsewhere and that the home life has not always been too smooth it can be said that on the whole they got along fairly well. Without going into too much detail, which can serve no useful purpose, the apparent difficulty arises out of the fact that they fail to find their enjoyment in the same form of recreation. She likes to go to dances. Until shortly before Mainard was born he went with her. Because of her then condition he thought she ought not go and refused to go with her. Afterward he never again went with her but did not object to her going and she continued to go. He seems to enjoy going to places where he can play cards and be in the association of men.

Under this situation the family seemed to be getting along as usual when the appellee, as was his custom, left for the harvest fields of Oklahoma and Kansas on June 18, 1945, in order to get work. He left his family in good spirits and

during his absence called her on the phone and wrote to her and sent her money for the family support. Everything seemed to be all right until his return on July 26, 1945, when her attitude was entirely changed. Shortly thereafter she brought this action, the petition for which had been drawn during his absence. What caused her attitude to change can only be surmised from the record.

Marriage is a relationship that can only be severed by the courts on the grounds fixed by statute and in the manner as therein provided. Appellant has not established any of these grounds, particularly that of extreme cruelty. The trial court was correct in its holdings and we, on trial de novo, affirm its decision.

The costs of this appeal are taxed to the appellee but we do not allow appellant any attorney fees.

AFFIRMED.

STATE EX REL. RUFUS M. HOWARD, RELATOR, V. FRANK MARSH, SECRETARY OF STATE OF THE STATE OF NEBRASKA, RESPONDENT.

21 N. W. 2d 503

FILED JANUARY 29, 1946. No. 32060.

1. **Statutes.** The Legislature has power to create new executive state departments and executive state officers as heads thereof subject only to the limitation and restriction of section 27, article IV, and section 1, article III, of the Constitution.
2. **Officers.** An executive state department is one having executive powers and jurisdiction throughout the state.
3. **Statutes.** The Department of Agriculture and Inspection is a creature of statute created by authority of the Constitution.
4. **Officers.** An executive state officer is one whose duties are mainly to cause the laws to be executed, one whose duties pertain to the execution and enforcement of the laws by one charged with that particular duty.
5. ———. The heads of executive state departments designated as such by the legislative enactment bringing them into being are executive officers of the state.
6. ———. The Director of the Department of Agriculture and In-

spection is clothed with full power without restriction or limitation to execute and administer the laws pertaining to the duties and functions of the department.

7. ———. The functions of the Department of Agriculture and Inspection are executive in the main and while not designated in the act creating the department they are found in preexisting statutes and incorporated, by reference, from such statutes.

8. ———. The declaration of ineligibility to any other state office contained in section 2, article IV, of the Constitution, includes ineligibility to become a candidate for election to, as well as ineligibility to hold, office.

9. ———. The Director of the Department of Agriculture and Inspection is an officer mentioned in article IV of the Constitution and as such is ineligible to be or become a candidate for Governor during the term of his appointment.

Original proceeding by the state, on the relation of Rufus M. Howard against Frank Marsh. *Demurrer sustained; writ denied.*

Beatty & Clarke, for relator.

Walter R. Johnson, Attorney General, and *C. S. Beck,* for respondent.

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

YEAGER, J.

This is an original action in mandamus wherein Rufus M. Howard, relator, seeks the writ of this court requiring Frank Marsh, Secretary of State of the State of Nebraska, and respondent, to accept his filing as an eligible candidate for the office of Governor and to require the respondent to place his name upon the official Republican primary ballot to be voted on by the Republican electors at the regular primary election to be held in the state in the year 1946.

The action was instituted by petition. In brief but sufficient detail the petition in substance sets forth that in January 1945, the relator became and is by appointment of the Governor the duly appointed, qualified, and acting Director of the Department of Agriculture and Inspection of the State of Nebraska; that relator is a resident of the county

of McPherson, Nebraska, a native-born citizen of the United States, and has been a resident and citizen of the State of Nebraska for more than 36 years; that prior to November 3, 1945, he paid to the county treasurer of the said county of McPherson $10 as his filing fee as a candidate for nomination for the office of Governor on the Republican ticket; that the said county treasurer issued his receipt showing the payment of the filing fee; that on November 3, 1945, relator presented the receipt together with a written application in due form containing recitals as to his residence, qualifications as a citizen and elector, and his party affiliation to the respondent and requested that his name be placed on the official ballot of the Republican party for the primary election to be held in the year 1946 in the State of Nebraska as a candidate for the office of Governor.

The relator further alleged that the respondent refused to accept the application and receipt for filing fee offered and tendered on the ground that relator was and is ineligible to become a candidate for the office of Governor for the reason that he was and is the appointed, qualified, and acting Director of the Department of Agriculture and Inspection of the State of Nebraska and as such was and is ineligible to become a candidate for the office of Governor during the term of his appointment by reason of the prohibitions of article IV of the Constitution of the State of Nebraska.

Relator has further alleged that the prohibitions of article IV have no application to the Director of the Department of Agriculture and Inspection.

On the presentation of the petition an alternative writ of mandamus was issued commanding the respondent to accept the receipt and application tendered by relator and to place his name on the primary ballot or to appear and show cause for his refusal.

Thereafter the respondent appeared and by general demurrer challenged the sufficiency of the petition as a statement of a cause of action for the relief prayed by the relator.

The effect of the demurrer is to limit the consideration

here to the sole question of whether or not the relator is ineligible to become a candidate for Governor within the period and term of his appointment because of the provisions of article IV of the Constitution. The particular contention of the respondent in this respect is that the relator is an executive state officer within the meaning of section 1, article IV, over an executive state department created agreeable to section 27, article IV, and is therefore ineligible under the terms of section 2, article IV, of the Constitution, to become a candidate for Governor during his term of office as Director of the Department of Agriculture and Inspection.'

The determination depends upon a proper interpretation of the context of the following sections and parts of sections of article IV:

Section 1: "The executive officers of the state shall be the Governor, Lieutenant Governor, Secretary of the State, Auditor of Public Accounts, Treasurer, Attorney General, Superintendent of Public Instruction and the heads of such other executive departments as may be established by law. The Legislature may provide for the placing of the above named officers as heads over such departments of government as it may by law create. The Governor, Lieutenant Governor, Attorney General, Secretary of State, Auditor of Public Accounts, and Treasurer shall be chosen at the general election held in November, 1922, and in each even-numbered year thereafter, and their term of office shall be two years and until their successors shall be elected and qualified. * * * Officers in the executive department of the state shall perform such duties as may be provided by law. The heads of all executive departments established by law, other than those to be elected as provided herein, shall be appointed by the Governor, with the consent of a majority of all the members elected to the Legislature, but officers so appointed may be removed by the Governor. Subject to the provisions of this Constitution, the heads of the various executive or civil departments shall have power to appoint and remove all subordinate employees in their respective departments."

Section 2: "No person shall be eligible to the office of Governor, or Lieutenant Governor, who shall not have attained the age of thirty years, and who shall not have been for five years next preceding his election a resident and citizen of this state and a citizen of the United States. None of the officers mentioned in this article shall be eligible to any other state office during the period for which they have been elected or appointed."

Section 6: "The supreme executive power shall be vested in the Governor, who shall take care that the laws be faithfully executed and the affairs of the state efficiently and economically administered."

Section 10: "The governor shall nominate and by and with the advice and consent of the senate, (expressed by a majority of all senators elected, voting by yeas and nays,) appoint all officers whose offices are established by the constitution, or which may be created by law, and whose appointment, or election is not otherwise by law or herein provided for; and no such officer shall be appointed or elected by the legislature."

Section 12: "The governor shall have power to remove any officer, whom he may appoint, in case of incompetency, neglect of duty, or malfeasance in office, and he may declare his office vacant, and fill the same as herein provided in other cases of vacancy."

Section 27: "No executive state office other than herein provided shall be created except by a two-thirds majority of all members elected to the senate and house of representatives respectively."

This is the present language of the Constitution and it is the same as was contained in the Constitution of 1875 with the amendments thereto which were adopted by a vote of the electors of the state in 1920 except that there has been an amendment to section 1 which is of no importance in this controversy, hence it will not be pointed out here. The Constitution of 1875 with the amendments of 1920 became known as the Constitution of 1920.

In the tradition of the founders of our national govern-

ment, by the provisions of the Constitution of Nebraska, the powers of government are divided into three distinct departments, the legislative, the executive, and the judicial. Const., art. II, sec. 1. With the judicial we are not concerned at all and with the legislative only incidentally. Our chief and fundamental concern here is with the executive department the supreme power of which is vested in the Governor. Const., art. IV, sec. 6.

Approaching the determination of the issue which has been defined by the pleadings it will be observed that the executive state officers of the state are named in the Constitution as of the date of the adoption of the 1920 amendment to this section of the Constitution. It will be further observed that the Director of the Department of Agriculture and Inspection is not among those named. Const., art. IV, sec. 1. Examination also discloses that the Department of Agriculture and Inspection is not a creature of the Constitution.

Section 1, article IV, of the Constitution, however, does provide for the creation, by law, of other executive departments and by reasonable interpretation for heads thereof which heads may be, if designated as such by the legislative enactment, executive officers of the state. The alternative as to whether or not the new department shall have a created executive officer at its head or shall be attached to one of the constitutionally declared executives is a declared prerogative of the Legislature. The only restriction upon the right of the Legislature in creation of such new executive department with a new executive head or for attachment to an already constitutionally declared officer is that the act of creation prior to 1934 should be adopted by a two-thirds majority of all members elected to the Senate and House of Representatives respectively (Const., art. IV, sec. 27) and since 1934 by a two-thirds majority of all members elected to the Legislature of one chamber. Const., art. III, sec. 1.

It becomes apparent that relator is not ineligible to the office of Governor during the term of his appointment because he is constitutionally named as an executive or other officer of the state. Respondent does not so contend.

The respondent contends that the Department of Agriculture and Inspection is an executive department within the meaning of section 1, article IV, of the Constitution, created agreeable to section 27, article IV, and that relator as executive head thereof is, within the meaning of section 2, article IV, one of the officers mentioned in article IV. That it is a department of state government within the executive branch is not open to question. It has been legislatively so declared.

In the year 1933 by House Roll No. 63 appearing as chapter 149, Laws of 1933, page 571, the executive department of the state was reorganized. Executive and administrative powers were brought into groups and in some respects arranged differently from the previously existing order, the details of which need not be set out here. The functions of the departments were defined in part by entirely new legislation and in part by amendment and clarification of preexisting statutes. By the terms of the reorganization legislation and to the extent thereof, heads were established for the departments and provision made for the selection of such heads.

The reorganization was effected by section 1 of an act which now appears as section 81-101, R. S. 1943, and is the following: "The civil administration of the laws of the state is vested in the Governor. For the purpose of aiding the Governor in the execution and administration of the laws, the executive and administrative work shall be divided into the following departments: (1) Department of Agriculture and Inspection, (2) Department of Labor, (3) Department of Health, (4) Department of Roads and Irrigation, (5) Department of Banking, and (6) Department of Insurance."

It will be observed that by the act the civil administration of the laws is vested in the Governor and that for the purpose of aiding the Governor in the execution and administration of the laws six separate departments were created. The Department of Agriculture and Inspection is one of these departments.

Section 2 of the act names the head of the Department of Agriculture and Inspection as Director and provides for his appointment by the Governor. Laws 1933, ch. 149, s. 2, p. 571. This section, as amended by the laws of 1941, is section 81-102, R. S. 1943.

The act of 1933 without restriction or limitation places the affairs and functions of the Department of Agriculture and Inspection in the charge of the Director.

The functions of the department are not specifically or directly named or defined in the act. They are, however, by reference to preexisting statutes wherein certain executive and administrative functions were otherwise disposed, incorporated into the department and placed under the head thereof. The functions thus incorporated were those contained in the following sections of the then existing statutes: Sections 2-1001 to 2-1013 inclusive, 2-1015 to 2-1031 inclusive, 2-1034, 2-1037, 2-1040 to 2-1047 inclusive, 2-1301 to 2-1307 inclusive, 41-101 to 41-126 inclusive, 81-501, 81-901, 81-902, 81-904 to 81-1015 inclusive, 81-1021 to 81-1027 inclusive, 66-101 to 66-317 inclusive, 66-501 to 66-507 inclusive, 81-1201 to 81-1402 inclusive, 81-1404 to 81-1613 inclusive, 81-1801 to 81-2805 inclusive, 54-101 to 54-607 inclusive, 54-709 and 54-801 to 54-1106 inclusive, Comp. St. 1929, and sections 2-1014, 2-1032, 2-1033, 2-1035, 2-1036, 81-903, 81-1403, and 54-710, C. S. Supp. 1931.

The design of the foregoing cited sections from chapter 2, article 10, the provisions of which were incorporated, was to protect against plant diseases. By the article the department was empowered, within the provisions of the article and without any type of supervision or control by any other executive or administrative department or head, to establish and enforce the provisions thereof and to promulgate and enforce needful rules and regulations to that end likewise without outside control or supervision.

The design of the cited sections from chapter 2, article 13, was to protect against pests injurious to agriculture. Over this function the department was given full control.

By chapter 41, article 1, the duty to inspect hotels, room-

ing houses, boarding houses, apartment houses, and restaurants is imposed exclusively upon the Department of Agriculture and Inspection.

The design of chapter 81, article 5, was to incorporate in toto in the Department of Agriculture and Inspection and under the Director thereof all of the general powers of the previously existing Department of Agriculture. The article is the following: "The department of agriculture shall have power: 1. To encourage and promote, in every practicable manner, the interests of agriculture, including horticulture, the live stock industry, dairying, cheese making, poultry, bee keeping, forestry, fishing, the production of wool, and all other allied industries; 2. To promote methods of conducting these several industries with a view to increasing the production and facilitate the distribution thereof at the least cost; 3. To collect and publish statistics relating to crop production, marketing and farm economics, the production and marketing of beef, pork, poultry, fish, mutton, wool, butter, cheese and other agricultural products so far as such statistical information may be of value to the agricultural and allied interests of the state; to co-operate with the federal government in the matter of collecting such statistical information. Such department shall include in its publications the reports of agricultural, horticultural and like societies, and of live stock associations. Such published statistics shall be the official agricultural statistics of the state; 4. To encourage the planting of trees and shrubs and the improvement of farm homes generally; 5. To produce and manufacture biological products to be distributed to live stock producers at the actual cost thereof; 6. To inquire into causes of contagious, infectious and communicable diseases among domestic animals, and the means for the prevention and cure of the same; 7. To take all measures necessary for the preservation, distribution, introduction and restoration of fish, game birds and other wild birds; 8. To see that live stock and stock yards, and other like places where live stock is confined, housed or fed, are properly cared for; 9. To execute and enforce all laws relating

to the inspection of foods, drugs, dairy products, oils, commission merchants, cider and vinegar, oleomargarine and butterine, sanitation of premises used for manufacturing and preparation of foods, cold storage warehouses, paints, seeds, commercial feeding stuffs, live stock remedies, hotels and inns, weights and measures and commercial fertilizers, and from time to time promulgate such rules and regulations and adopt such standards of food products as are necessary and proper to enforce the provisions of this title."

It will be observed that by nothing contained in the provisions is any right of executive or administrative control or supervision reserved to anyone outside the department.

By chapter 81, articles 9, 10, 12, 13, 14, 15, 16, and 18, the control under the pure food law, the dairy, egg, and condensed milk law, the commission merchant law, the cider and vinegar law, the oleomargarine and butterine law, the law relating to the sanitation of premises used for manufacture and preparation of foods, the law relating to cold storage warehouses, and the law relating to agricultural seeds, is placed without restriction in the Department of Agriculture and Inspection. The same is true of the laws relating to commercial fertilizer, publicity, the bee industry, and soft drinks by chapter 81, articles 23, 25, 27, and 28. This is likewise true of the laws relating to explosive liquids and gases, sale of paints, petroleum products, and quality of paints, by chapter 66, articles 1, 2, 3, and 5. This is further true of the law relating to livestock brands, livestock liens, herding of livestock, estrays and trespassing by animals, stockyards, the destruction of animals by dogs, inspection of livestock shipments, state racing commission, the protection of the health of livestock, commercial feeding stuffs, and livestock remedies by chapter 54, articles 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, and 11.

For the most part the functions which were by the act of 1933 incorporated into the Department of Agriculture and Inspection remain today in that department. Some of the sections of the statute which by this act of reorganization became applicable to the department under reorganization

have been amended, some revised, and some repealed and in some respects new legislation has been enacted modifying the functions of the department but only in minor and inconsequential particulars insofar as this inquiry is concerned. In all substantial particulars the functions of the department remain the same as they became by the act of 1933. Likewise the functions of the head or Director of the Department of Agriculture and Inspection remain substantially the same.

It is from an examination of the act of 1933, the statutes referred to, the provisions of the Constitution, and the previous decisions of this court, that we must determine whether or not the Department of Agriculture and Inspection is an executive department of the state and whether or not the Director is the head of an executive department.

Without benefit of previous decisions of this court it would appear necessary to hold that the Department of Agriculture and Inspection is an executive department of state but we are not without such benefit.

The Legislature, by section 2, chapter 50, of the Laws of 1899, attempted to create a state brand and mark committee to have charge of livestock brand registrations. The court in State v. Porter, 69 Neb. 203, 95 N. W. 769, held that the act was unconstitutional on the ground that it was an attempt to create a committee with executive powers and jurisdiction throughout the state, a power which was denied on any terms by the then Constitution. It will be noted that the powers sought to be granted to the committee under the 1899 act are among those conferred on the Department of Agriculture and Inspection by the act of 1933.

The Legislature, by section 1, chapter 1, of the Laws of 1911, attempted to create a stallion registration board. It was held in Iams v. Mellor, 93 Neb. 438, 140 N. W. 784, that the act was unconstitutional on the ground that it was violative of the constitutional inhibition against the creation of executive state offices. The substantial powers of the board thus attempted to be created are powers of the present Department of Agriculture and Inspection.

In Iams v. Mellor, *supra,* in definition of executive state office it was said: "Paraphrasing the language of Judge Sullivan, the act of 1911 assumes to vest the stallion registration board with executive powers and jurisdiction throughout the state. This being so, the members of the committee would, if the act be valid, be executive state officers; * * * ."

In State v. Loechner, 65 Neb. 814, 91 N. W. 874, 59 L. R. A. 915, it was said: "An executive officer, in the proper sense of the term, is one whose duties are mainly to cause the laws to be executed; such as the president, the governor of a state, or the chief executive officer of a city. It pertains to the execution and enforcement of the laws by one charged with that particular duty."

In the recent case of Mekota v. State Board of Equalization and Assessment, *ante* p. 370, 19 N. W. 2d 633, the definition of an executive state department contained in the previous decisions was approved and on the basis of that approval an act to create a Department of Industrial Development was declared unconstitutional for the reason that the act was not adopted by a sufficient vote in the Legislature to meet the requirements of the 1920 Constitution for the creation of new executive state departments.

There are vast powers and functions which have been conferred upon the Department of Agriculture and Inspection in addition to those referred to in the cases of State v. Porter, *supra,* and Iams v. Mellor, *supra,* and as was said in Mekota v. State Board of Equalization and Assessment, *supra,* " * * * without anything the purport of which is to subject the department or any of its personnel to any type of control, supervision or direction in the accomplishment of its purposes or the performance of its powers and duties to any other department of the state or any official thereof. The only control outside the department is over the appointment * * * ." We should add here that in addition to the power of appointment of the Director the Governor has the power of removal in case of incompetency, neglect of duty, or malfeasance in office. Const., art. IV, sec. 12.

It is the holding therefore that the Department of Agriculture and Inspection is an executive department of the state within the meaning of section 1, article IV, of the Constitution, created agreeable to section 27, article IV, and that the relator as Director of the Department of Agriculture and Inspection is an executive officer also within the meaning of section 1, article IV, of the Constitution.

As such executive officer is he ineligible to the office of Governor under the prohibition contained in section 2, article IV, of the Constitution?

Under this head there are two points for consideration. The first is, does ineligibility to any state office during the period for which an executive state officer has been elected or appointed mean only ineligibility to hold office or does it include also ineligibility to become a candidate? The second, is the Director of the Department of Agriculture and Inspection, within the meaning of section 2, article IV, mentioned in article IV of the Constitution?

As to the first of these two questions if it had come at this time as a matter of first impression it may be that our conclusion would be in doubt but this is not the case. In 1914, which was before the adoption of our present Constitution, in the case of State ex rel. McKelvie v. Wait, 95 Neb. 806, 146 N. W. 1048, this court adopted an opinion which, if followed, is controlling here. The constitutional provision which was there interpreted was the following: "None of the officers of the executive department shall be eligible to any other state office during the period for which they shall have been elected." Const. 1875, art. V, sec. 2. It will be observed that the only substantial difference between this provision and the one under consideration in the Constitution in its present form is where there the words "officers of the executive department" are used the 1920 amendment to the Constitution uses the words "officers mentioned in this article" and where there the words "shall have been elected" are used the 1920 amendment uses the words "have been elected or appointed."

In sustaining the contention that the Lieutenant Governor

was ineligible to be a candidate for Governor during the period for which he was elected Lieutenant Governor the court said: "Without departing from this rule, it cannot be held that relator is eligible, or that he is entitled to a place on the primary ballot."

There is another and persuasive, while not controlling, reason for following the precedent of this court. The interpretation by the court of the provision of the Constitution of 1875 in State ex rel. McKelvie v. Wait, *supra,* antedated the amendment to the Constitution of 1920 by six years. The constitutional convention which promulgated the amendment to this section of the Constitution for submission in 1920 had for its use and benefit the interpretation. It appears a reasonable presumption that if the convention was not satisfied with the interpretation it would have made clear its dissatisfaction by such change as was necessary to that end. We think this reasoning is especially sound since the convention did make changes in the provisions to meet the exigencies created by other constitutional changes.

We conclude therefore that section 2, article IV, of the Constitution, prohibits the officers mentioned in article IV from becoming candidates for any other state office during the period for which they were elected or appointed.

On the question of whether or not the Director of the Department of Agriculture and Inspection is an officer mentioned in article IV of the Constitution we have been unable to find any authoritative statement in this state or controlling precedent in any other, therefore we are called upon to decide this as a matter of first impression.

If the convention had meant those named in the article it seems reasonable that it would have made clear its intention. If it had done so there would have been no necessity here for interpretation. The language would then have spoken for itself. This the convention did not do. This could have been oversight but we have no right to so assume. We must, we think, assume that a purpose lay in the use of the word "mentioned" instead of the word "named."

If there was a purpose in using the word "mentioned"

rather than "named" we are unable to account for it on any other basis than that the convention was cognizant of the power of the Legislature under section 27, article IV, to create new executive state offices and to create heads therefor and that it was the purpose to include these heads as executive state officers "mentioned" in the article along with those named at the time of promulgation and adoption of the Constitution.

Whatever the reasoning behind the action to prevent executive state officers from being eligible to other state office during the period for which appointed or elected, and whether or not it meets our views as to soundness, we cannot bring ourselves to the conclusion that by the reasoning employed and the wording used the convention intended to make one group of executive officers ineligible and another eligible, one in being and the other not, but both in contemplation in the same article of the Constitution.

We hold that by proper interpretation the Director of the Department of Agriculture and Inspection is an officer mentioned in article IV of the Constitution.

For the reasons stated herein the demurrer of the respondent is sustained and the writ of mandamus is denied.

WRIT OF MANDAMUS DENIED.

EVERETT MOHATT, APPELLANT, V. CARL OLSON, APPELLEE.
21 N. W. 2d 516

FILED FEBRUARY 1, 1946. No. 31976.

1. **Waters.** Where water appears upon the surface of the ground in a diffused state with no permanent source of supply or regular course, its flow is valuable to no one and it is regarded as surface water. But where such waters flow into and become a part of a stream, they cease to be surface waters and are then a part of the running water of the stream.
2. ———. A stream which is accustomed to extend itself beyond its banks in times of high water and to flow over the adjacent lands in its flood plane in a broader stream, retains its character as a live stream and the law relating to floodwaters applies.
3. ———. It is the duty of those who build structures across nat-

ural drainways to provide for the natural passage through such obstruction of all waters which may be reasonably anticipated to drain there. This is a continuing duty.

4. **Damages.** The rule as to allocation of damages is applicable where damage is caused by the several and independent negligent acts of two or more parties, so that it may be found that the act of each resulted in some injury and the consequences of their acts are separable.

5. **Waters.** Where a substantial amount of water from another source or sources has been added to the water for which defendant is liable, and the combined waters have caused the damage, then it is incumbent upon the plaintiff to establish either that his damages would have occurred from the waters for which defendant is liable, or to establish the amount of his damage that had been caused by the waters for which defendant is liable.

APPEAL from the district court for Cheyenne County: J. LEONARD TEWELL, JUDGE. *Reversed and remanded.*

P. J. Heaton and *Torgeson & Halcomb*, for appellant.

R. P. Kepler and *Beatty & Clarke*, for appellee.

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

SIMMONS, C. J.

Plaintiff sued to recover damages allegedly arising from the result of floodwaters being caused to back up on his land by an irrigation lateral constructed by defendant across a natural drainage that passed over plaintiff's and defendant's lands. So far as material here, defendant's answer was a general denial and a plea of affirmative defenses.

Trial was had. At the close of the plaintiff's case in chief, defendant moved for a directed verdict. The motion was sustained. Plaintiff appeals. We reverse and remand the case.

Plaintiff's contention here is that the waters involved in this action are floodwaters and not surface waters; that it is the duty of those who build structures across natural drainways to provide for the passage of waters which may be reasonably anticipated to drain there; that he who obstructs such a natural drain is liable if damages follow from the obstruction; and that the trial court erred in directing a verdict.

Defendant does not join issue on plaintiff's contentions save as to the direction of a verdict, but rather contends that the evidence establishes that a substantial amount of water from other sources had been added to the water for which it was claimed defendant was liable; that at most the combined water caused the damage; and that plaintiff failed to establish either that his damage would have occurred from waters for which it was claimed defendant was liable, or to allocate the damages caused by the waters for which it was claimed defendant was liable.

We summarize the evidence in the light of these contentions and weigh it in accord with the 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 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." Kline v. Metcalfe Construction Co., *ante* p. 389, 19 N. W. 2d 693.

Plaintiff is a tenant in possession of the north half of section 4, township 13 north, range 50, and defendant is the owner of section 3 immediately to the east and adjacent thereto, the lands being separated only by a county road running north and south.

Sidney Draw is a natural drainway or valley extending some one hundred miles and is approximately two miles in width at the land here involved. The lands of plaintiff and defendant lie in that valley. There is a well-defined channel in this valley or draw, which for convenience we will call the primary channel. It is what is known as a dry bed carrying water only in times of heavy rains. It meanders across the lands of plaintiff and defendant generally in a west to east direction. Plaintiff's tilled land in this valley was to the north of this primary channel. South of the channel the land rises abruptly to a hill, but to the north it is generally flat.

Plaintiff's land north of the primary channel slopes

toward it for a few hundred feet, then further north slopes away from it and then again toward it. There also is a general slope of the lands toward the east. This formation of the land creates a slight depression north of the primary channel and creates what plaintiff terms an overflow channel, which for convenience we will term a swale. This swale at the line between the lands of plaintiff and defendant is about two hundred feet wide and is a foot or more below the surrounding land. It goes generally east across plaintiff's land and then defendant's land. This swale begins some distance to the west on plaintiff's land so that high waters coming down and overflowing the primary channel find an escape down the swale.

In 1941, defendant built an irrigation lateral north and south across this swale at his west line. This lateral ran south to the primary channel where it was taken across that channel by a flume set in concrete structures at either end and supported by a framework. The top of the bank of the irrigation lateral was three feet or more high at the bottom of the swale and higher than the land to the west for its entire length. The evidence is that proper construction would have been to place a flume across the swale and thereby allow the natural drainage to pass waters through in its accustomed manner.

The north and south road was graded and crossed the primary channel where there was a bridge. The flume was east of and parallel with the bridge.

So, generally, the picture here is that of a primary channel and a swale running generally east and west, and a highway and bridge, a lateral and flume, running north and south.

At the bridge the primary channel is 150 to 200 feet wide at the top and its bed 7.3 feet below the floor of the bridge. The bed is generally about six feet below the land to the north. The bridge was 20 feet long, with earth embankment or fills being built partly across the channel at either end of the bridge. The height of the flume is not definitely fixed by the evidence. It may have been a few inches above

or below the bridge or equal to it. Its length is not shown, except that it was as long as, if not longer than, the bridge. Neither is the size of the flume shown. The roadbed was about equal to or possibly a little higher than the land through which it passed.

The land of plaintiff was practically level from the primary channel to the north line, with the exception of the elevation between the swale and the primary channel and the depression of the swale. Plaintiff's buildings were located in the northeast corner of his property and to the north of the swale.

That, generally, was the lay of the land when the flood occurred in 1941 that caused the damage resulting in this litigation. With the exception of the irrigation lateral and flume, the condition of the two pieces of land was the same in 1937 as in 1941.

In 1937, a flood occurred in this valley. The waters came down the primary channel, overflowed its banks, came down the swale and flooded plaintiff's property up to within six feet of his house but flooded none of his buildings. It flowed along the swale across the highway and onto and over defendant's land. It was high enough to flow over the bridge and over the highway, except at the high elevations, and covered all the land except the high elevations.

In the early hours of the morning of June 9, 1941, plaintiff was aroused and found that floodwaters had come down the valley, flooded his place and overflowed the porch of his house. At four o'clock that morning the water was in all his farm buildings except the barn, was high enough to flow into his cellar under the house and into his well. It was then across the roadway and his lands from his house to the bridge, except on the high places. It had been checked at the irrigation lateral. The bank of the lateral was opened at that time at the low point of the swale. The water began to flow down across defendant's land and began to recede in plaintiff's yard and around his buildings. By noon it had ceased to flow across the road. Water remained about plaintiff's yard and in the low places for several days. The

flume washed away during the flood; the bridge and abutments remained in place.

The floodwaters in 1937 spread out in plaintiff's pasture on the west side of his place almost twice as much as in 1941. It also is established that other floods had occurred in the valley, but the extent of those was not shown.

Plaintiff's evidence of property damage falls into two general classifications: (1) Growing crops damaged and destroyed on his farm lands; (2) Personal property damaged and destroyed in and around his buildings, pigs killed, and his well contaminated and the water rendered unfit for human consumption for several months.

We have recently stated the rules of law that are applicable here. "Where water appears upon the surface of the ground in a diffused state with no permanent source of supply or regular course, its flow is valuable to no one and it is regarded as surface water. But where such waters flow into and become a part of a stream, they cease to be surface waters and are then a part of the running water of the stream. Likewise, the running waters of a stream may at flood stage spill out upon low lands, become isolated and again be classified as surface waters. * * * Necessarily, floodwaters which have lost their identity with those of a living stream and returned to the classification of surface waters would be governed by the rules applicable to surface waters. But when the waters causing damage retain their identity with those of a stream, they cannot be properly treated as surface waters and must necessarily be treated as floodwaters when without the banks of the stream. This compels the holding that a stream which is accustomed to extend itself beyond its banks in times of high water and to flow over the adjacent lands in its flood plane in a broader stream, retains its character as a live stream and the law relating to floodwaters applies." Cooper v. Sanitary District No. 1, *ante* p. 412, 19 N. W. 2d 619.

Likewise, in the recent case of Faught v. Dawson County, *ante* p. 274, 19 N. W. 2d 358, we restated the rule long followed in this state that " * * * it is the duty of those who

build structures across natural drainways to provide for the natural passage through such obstruction of all waters which may be reasonably anticipated to drain there. This is a continuing duty." We further stated: "The rule as to allocation of damages is applicable where damage is caused by the several and independent negligent acts of two or more parties, so that it may be found that the act of each resulted in some injury and the consequences of their acts are separable. Each tort-feasor is then held liable only for so much of the injury as was caused by his act. * * * The rule requires that plaintiff establish that a negligent act of the defendant was the proximate cause of the damage which he suffered. Where a substantial amount of water from another source or sources has been added to the water for which defendant is liable, and the combined waters have caused the damage, then it is incumbent upon the plaintiff to establish either that his damages would have occurred from the waters for which defendant is liable, or to establish the amount of his damage that had been caused by the waters for which defendant is liable."

We think this evidence establishes that there was a commingling of waters from different sources on plaintiff's land. The sources of that water were those from the overflow of the primary channel, the elevation of which could have been raised in part by the obstruction of the bridge and the fill at that point. There is no evidence sufficient to show that the flume contributed to the obstruction at the bridge. There also were the waters which were backed up by the irrigation lateral. There is nothing in this record to show the location of the growing crops with certainty. The evidence indicates that some of them were within the swale and the area that would have been flooded by the high waters without regard to the obstruction of the irrigation lateral. As to that element of damage, we think the evidence fails to show that plaintiff's damages would have occurred from the waters for which defendant is liable or to establish the damage that had been caused by waters for which defendant is liable.

But the damage which plaintiff suffered to his property in and around his buildings and in his well presents a different situation. The irrigation lateral was the only physical condition materially different in the situation in 1937 and that in 1941. In 1937 and 1941, the water was high enough to go over plaintiff's lands, the bridge and the highway in substantially one body of water. There is some evidence, as pointed out herein, that the volume of water was greater in 1937 than in 1941. In 1937, the waters that came near plaintiff's buildings passed down the swale across defendant's lands without damage to the property therein. In 1941, those waters were not permitted to flow down the swale, the elevation of the water was higher and the buildings were flooded to plaintiff's damage. When the irrigation lateral was cut and those waters released, the flood level receded and the water drained away. We think that evidence sufficient to take the issue to the jury as to whether or not the damage occurred from the waters for which defendant is liable. Accordingly, we are of the opinion that the trial court erred in sustaining defendant's motion for a directed verdict. The judgment of the trial court is reversed and the cause remanded.

REVERSED.

KATHRYN DE LAIR, APPELLANT, V. CHARLES DE LAIR DEFENDANT, LEWIS W. DAVIES, APPELLEE.
21 N. W. 2d 498

FILED FEBRUARY 1, 1946. No. 31988.

1. **Appeal and Error.** Ordinarily, this court, in its appellate jurisdiction, will not pass upon an issue that is neither raised by the pleadings nor decided by the trial court.
2. ———. A point raised for the first time in the reply brief will not be considered by the appellate court.
3. ———. Under the provisions of section 25-1902, R. S. 1943, an order affecting a substantial right in an action upon a summary application after judgment is a final order from which an appeal may be taken.

4. Process. That an amendment may be made to the return of a process or other writ to conform to the facts is well recognized in this jurisdiction.
5. ———. The district court, on application of one of the parties, has power to amend a sheriff's return on a process to conform to the facts, upon proper showing and notice to the parties interested.
6. ———. The rule is well established in this state that a sheriff's return on a summons is prima facie proof of the service therein indicated.
7. ———. The return of an officer cannot be impeached except by clear and convincing evidence.

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

John C. Mullen, Gerald M. Mullen, and *Jean M. Johnson,* for appellant.

Russell S. Waite, J. L. Gagnon, and *Lee Kelliger,* for appellee.

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

WENKE, J.

This appeal is from an order of the district court for Richardson County denying several motions asking for an order to amend a sheriff's return on a summons.

The record discloses that on July 25, 1934, Kathryn De Lair, whose name is now Kathryn Simon, filed an action in the district court for Richardson County against Charles De Lair, her husband, for the purpose of obtaining a divorce.

The return of the sheriff on the summons issued therein is as follows:

"STATE OF NEBRASKA }
} ss.
COUNTY OF RICHARDSON }

Received this on the 25th day of July, 1934 I hereby certify that on the 26 day of July, 1934 I served the above Summons on the above-named Charles De Lair by

~~delivering~~ ~~to~~ leaving at his usual place of residence, a true and certified copy of this writ, All done in Richardson Co. Nebr. as required by law.

LEWIS W. DAVIES, Sheriff"

On September 12, 1934, a decree of divorce was entered therein in favor of the plaintiff, Kathryn De Lair.

On August 21, 1944, Kathryn De Lair, now Kathryn Simon, filed a motion in the divorce action setting forth that the return of the sheriff on the summons failed to correctly state the manner in which the service was made and asked the court for an order to amend the return to comply with the facts by causing it to read as follows: "Charles De Lair by delivering to him in person, a true and certified copy of this writ. All done in Richardson County, Nebraska."

She filed in support of her motion the affidavits of Charles De Lair, Gladys A. Foster, Grace C. De Lair, and Merna De Lair.

On the same day a like motion was filed by the defendant, Charles De Lair, and was supported by the same affidavits.

On September 9, 1944, Effie K. Young, who was the deputy sheriff of Richardson County at the time the original summons was served on July 26, 1934, and who typed the return thereon at the direction of the sheriff but who did not make the service thereof, filed her motion to like effect.

On September 13, 1944, Lee Kelligar, an attorney at law, after obtaining permission from the court, filed a motion in the form of an affidavit objecting to the allowance of the motions to amend the return of the sheriff.

On November 14, 1944, the appellee, Lewis W. Davies, who was the sheriff of Richardson County at the time the summons was served and the officer who served it, filed a motion, under oath, stating that the return was in all respects true and correct and asked that the motions to amend his return be denied.

Hearing was had on these several motions and on December 14, 1944, the court denied the motions of Kathryn De Lair, now Kathryn Simon, Charles De Lair, and Effie K. Young. It is from this order, after her motion for new trial

was overruled, that the appellant, Kathryn De Lair, now Kathryn Simon, has appealed.

As stated in the appellant's brief, the only issue submitted to and determined by the district court was whether or not the sheriff's return on the summons served should be amended.

However, there are several preliminary matters raised by appellee that should be disposed of prior to the determination of the main issue.

Appellant filed a reply brief. Appellee contends it presents issues neither presented to nor determined by the trial court; also, that it contains propositions of law neither raised nor discussed in appellant's original brief. Appellee's contentions are correct as to the greater part of appellant's reply brief and in our consideration thereof we will apply thereto the following rules:

"Ordinarily, this court, in its appellate jurisdiction, will not pass upon an issue that is neither raised by the pleadings nor decided by the trial court." Miles v. Miles, 120 Neb. 436, 233 N. W. 249.

"A point raised for the first time in the reply brief will not be considered by the appellate court." 4 C. J. S., Appeal and Error, s. 1333, p. 1914. See, also, Ames v. Board of Supervisors of Polk County, 234 Iowa 617, 12 N. W. 2d 567.

Appellee further contends that the order appealed from is not such a final order as is appealable. He cites in support of such contention our decisions wherein we have held that an order quashing service by publication or of a summons is not such a final order as is appealable until after the final disposition of the action. See Persinger v. Tinkel, 34 Neb. 5, 51 N. W. 299; Lewis v. Barker, 46 Neb. 662, 65 N. W. 778. However, those cases are not applicable for here a decree of divorce has been entered in the original action making a final disposition of the issues presented. This proceeding comes within the provisions of section 25-1902, R. S. 1943, and is a final order for the purpose of appeal. Section 25-1902, R. S. 1943, provides as follows: "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, or *upon a summary application in an action after judgment,* is a 'final order' which may be vacated, modified or reversed, as provided in this chapter." (Italics ours.)

The appellee, who was the sheriff of Richardson County at the time the original divorce action was brought and who served the summons issued in that action, objected to the admissibility of the testimony of witnesses taken in the form of depositions based on the rule stated in State v. Omaha Elevator Co., 75 Neb. 637, 110 N. W. 874, as follows: "Depositions cannot be used as evidence against parties who were not notified of the time and place of taking the same, and did not participate therein."

In taking the depositions above referred to, which were taken prior to the appellee's appearance herein by motion, notice was served on the original parties to the divorce action but not on the appellee whose return is sought to be amended.

We have held that in a proceeding to amend an officer's return that, "The district court has power to permit a sheriff to amend his return on a process to conform to the facts, upon proper showing and notice to the parties interested, * * * ." Phoenix Ins. Co. v. King, 52 Neb. 562, 72 N. W. 855. See, also, Shufeldt v. Barlass, 33 Neb. 785, 51 N. W. 134; Wittstruck v. Temple, 58 Neb. 16, 78 N. W. 456.

Section 25-852, R. S. 1943, provides in part as follows: "The court may, either before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process or proceeding, * * * by correcting * * * a mistake in any other respect * * * ."

We have said in O'Dea v. Washington County, 3 Neb. 118, that, " ' * * * the term *proceeding* is used in the section of the code referred to, to distinguish all other steps taken in an action, from those embraced in the word *pleading.*' " See Irwin v. Bank of Bellefontaine, 6 Ohio St. 81.

The Supreme Court of Ohio, under a statute substantially

the same as section 25-852, R. S. 1943, in the case of Paulin v. Sparrow, 91 Ohio St. 279, 110 N. E. 528, held: "A court has the authority to order the return of process amended in accordance with the facts relating to such service either before judgment or at any time after judgment that the evidence is available to establish the facts upon which the judgment of the court ordering the return amended is predicated." See Fowler v. Cooper, 81 Minn. 19, 83 N. W. 464.

Under the provisions of section 25-852, R. S. 1943, the district court, on application of one of the parties, has power to amend a sheriff's return on a process to conform to the facts, upon proper showing and notice to the parties interested. See Britton v. Larson, 23 Neb. 806, 37 N. W. 681; Barker Co. v. Central West Investment Co., 75 Neb. 43, 105 N. W. 985; Davis v. Jennings, 78 Neb. 462, 111 N. W. 128; Keil v. Farmers Irrigation District, 119 Neb. 503, 229 N. W. 898.

When the summons was filed with the return of the officer thereon it became a part of the record in the case. The officer making the return was not originally a party to the suit and did not become such by reason of his return. It would have been entirely proper for the trial court to have ordered notice of the application to be served upon the officer, where, as here, he neither asked to have his return amended nor by his conduct, in effect, consented thereto, however, the application to have the return amended being made by one of the parties to the action to which the officer was not a party, it was not necessary to have notice thereof served upon the officer. Likewise it was not necessary to serve him with notice to take the deposition. The objections were therefore properly overruled.

Coming to the issue determined by the district court we find the following holdings of this court applicable:

"That an amendment may be made to the return of a process or other writ to conform to the facts is well recognized in this jurisdiction. O'Brien v. Gaslin, 20 Neb. 347, 30 N. W. 274; Shufeldt v. Barlass, 33 Neb. 785, 51 N. W. 134; Wittstruck v. Temple, 58 Neb. 16, 78 N. W. 456;

Mudge v. Mudge, 111 Neb. 403, 196 N. W. 704." State Furniture Co. v. Abrams, *ante* p. 342, 19 N. W. 2d 627.

In Westman v. Carlson, 86 Neb. 847, 126 N. W. 515, where the principal question presented by the appeal was the same as here we said of the return of the officer as follows: "The return of the officer is part of the judicial record of the case. It appears to be regular on its face. * * * He performed his duties under an oath of office and the penalties of an official bond. As to serving the writ and making the return, the presumption is that the officer performed his duty. Parker v. Starr, 21 Neb. 680. The return of a sheriff that he served a summons on defendant can only be impeached by clear and convincing proof. Connell v. Galligher, 36 Neb. 749; Unangst v. Southwick, 80 Neb. 119. This doctrine is essential to the integrity and permanency of judicial records." As stated in Connell v. Galligher, 36 Neb. 749, 55 N. W. 229: " 'Upon grounds of public policy, the return of the officer, even though not regarded as conclusive, should be deemed strong evidence of the facts as to which the law requires him to certify, and should ordinarily be upheld, unless opposed by clear and satisfactory proof.' " See Wyland v. Frost, 75 Iowa 209, 39 N. W. 241. As therein quoted from Randall v. Collins, 58 Tex. 231: " 'But assuredly if equity will allow one who has been guilty of no fault or negligence to contradict the sheriff's return by parol evidence, for the purpose of having an unjust judgment by default set aside, we are of the opinion that it should require the evidence to be clear and satisfactory. It is not like an ordinary issue of fact to be determined by a mere preponderance of testimony.' " In Campbell v. Harvard State Bank, 103 Neb. 562, 173 N. W. 587, we said: "Where the return of a sheriff recites that he served the summons, upon which the return is indorsed, the presumption is that he has done so, and the burden of proof is upon one seeking to impeach the same to establish the falsity of the return by clear and convincing proof." These same rules are again stated in Ault v. Stewart, 113 Neb. 47, 201 N. W. 639, as follows: "The rule is well established in this state that a sheriff's

return on a summons is *prima facie* proof of the service therein indicated. Walker v. Stevens, 52 Neb. 653. It is also held in Connell v. Galligher, 36 Neb. 749: 'To impeach the return of an officer of the due service by him of a summons, the evidence must be clear and satisfactory.' And in Wilson v. Shipman, 34 Neb. 573, it is held: 'The return of an officer on a summons, that he had personally served a copy of the same on the defendants, may be contradicted and disproved by the defendant; but it must be clear from the evidence and circumstances that the return is untrue, otherwise it is the duty of the court to sustain it.' In Unangst v. Southwick, 80 Neb. 119, it is held: 'The return of an officer cannot be impeached except by clear and convincing evidence.' "

Appellant, to sustain her motion to amend the sheriff's return, offered the depositions of Charles De Lair, Grace C. De Lair, Gladys A. Foster, Merna De Lair, and Effie K. Young, together with the testimony of herself. For the purpose of identification Charles De Lair was the defendant in the original divorce action and is now married to Merna De Lair whom he married on January 1, 1942. Grace C. De Lair is the mother of Charles and Gladys A. Foster is a sister of Charles. Effie K. Young was the deputy sheriff at the time the service of summons here involved was served.

Charles De Lair testified by deposition and stated in his affidavit that he is now living in Riverside, California, but that in July 1934, he was living with his parents in Falls City, Nebraska; that Lewis W. Davies, who was then sheriff of Richardson County, served him in the divorce action by handing the summons to him in person while he was at the home of his parents; that his mother, Grace C. De Lair, and his sister, Gladys A. Foster, were both present. Grace C. De Lair, the mother, and Gladys A. Foster, the sister, both now of Riverside, California, testified in their depositions and stated in their affidavits to the same effect, that they were present at the home in Falls City when the summons was served on Charles in person.

Effie K. Young, who was deputy sheriff of Richardson

County at the time the service was made and who prepared the return but did not serve the summons, testified by deposition that she made a mistake in the return and, by her motion filed herein, asked to have the mistake corrected by showing the service to have been on Charles De Lair in person. She then went on to explain how the mistake could have happened. However, it is apparent from her testimony that she had no independent knowledge of how the service was made nor recollection of the facts but based her testimony on the affidavits of Charles De Lair, Grace C. De Lair, and Gladys A. Foster, which she read prior to giving her testimony.

Lewis W. Davies, the appellee and sheriff at the time the divorce proceedings were instituted and who actually made the service therein, did not testify but stated in his motion, which was made under oath, that the return is in all respects true and correct.

The burden of proof was upon the appellant to show the falsity of the officer's return by evidence that was clear and satisfactory. We think her evidence meets this requirement and that her motion should have been sustained. The action of the lower court is therefore reversed with directions to order the sheriff's return to be amended to show that service was had on Charles De Lair in person.

REVERSED.

ESTELLA C. MOOK, APPELLEE, V. CITY OF LINCOLN, NEBRASKA, APPELLANT.
21 N. W. 2d 743

FILED FEBRUARY 8, 1946. No. 31986.

Statutes. Where the words of a statute are plain, direct, and unambiguous, no interpretation is needed to ascertain their meaning.

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

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

Frederick J. Patz, for appellee.

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

SIMMONS, C. J.

Plaintiff is the widow of a member of the Lincoln paid fire department. She brought suit to recover pension benefits provided by statute. Issues were joined and trial had to a jury. At the close of all the evidence, defendant moved for a directed verdict. Its motion was overruled. Plaintiff then moved for a directed verdict. Her motion was sustained. Judgment was entered for plaintiff. Defendant appeals. We affirm the judgment of the trial court.

The only evidence offered by defendant was a part of plaintiff's pleading in the district court in an action brought by her to secure benefits under the Workmen's Compensation Act. The evidence here reviewed is accordingly that presented by plaintiff.

Plaintiff's husband, hereinafter called Mr. Mook, was on duty at the fire house on February 18, 1941, when about 7:00 p. m. or shortly thereafter a fire alarm came. Mr. Mook slid down the pole from an upstairs room to the floor where the fire equipment was located. He started the engine by cranking by hand. It required considerable effort. He then took his place on the truck and rode to the fire which was in a two-story dwelling. There he pulled the hose to the scene of the fire, attached the nozzle, climbed a ladder to the roof of the lean-to, and directed water on the building. A window was broken out to enable the firemen to get water on the fire. He was there subjected to gas and smoke. Mr. Mook climbed to the roof of the main portion of the house in order to direct water on the flames, and also tore shingles from the roof. While fighting the fire there he exclaimed, "Oh, God," fell from the roof, where he was, to the roof of a one-story portion of the house. He was unconscious when they reached him. The fire was then under control. He was taken down to the ground and into the

house, where a doctor was called; artificial respiration was used to no avail; and he died within an hour.

On February 20, 1941, an autopsy was had. It was found that Mr. Mook had a diseased heart. His death is described as being caused by angina pectoris. Two expert witnesses testified that his heart ability was limited by the disease and that the activities in which he engaged prior to his death contributed to and were instrumental in producing the attack of angina pectoris which caused his death.

The question presented is the sufficiency of this evidence to sustain a recovery.

The statute involved is: "In case of the death of any fireman in a paid fire department in any city of the metropolitan, or first class, while in the line of duty, or death is caused by or is the result of injuries received while in the line of duty, then the same rate of pension as herein provided for in the next preceding section shall be paid to the widow or minor children of such deceased fireman, as provided in such section." Sec. 2440, Comp. St. 1922.

Plaintiff's contention is that she is entitled to recover on either of two propositions: First, that death occurred "while in the line of duty," and second, that death was caused by or was the result of injuries received while in the line of duty.

Defendant's contention is that for plaintiff to recover she must prove not only that death was in the line of duty, but also that death was the result of the duty and not merely coincident with it.

We recently had occasion to construe the several provisions of the pension statute in Wessel v. City of Lincoln, 145 Neb. 357, 16 N. W. 2d 476. We there quoted from In re Estate of Robinson, 138 Neb. 101, 292 N. W. 48, the following: "'* * * where the words of a statute are plain, direct and unambiguous, no interpretation is needed to ascertain their meaning * * *.'" In the absence of anything to indicate the contrary, words must be given their ordinary meaning. It is not within the province of a court to read a meaning into a statute that is not warranted by the legislative

language. Neither is it within the province of a court to read plain, direct, and unambiguous language out of a statute. If possible, the entire statute is to be applied as written. We think this statute meets the test of being plain, direct, and unambiguous.

It provides: "In case of the death of any fireman * * * while in the line of duty," or where "death is caused by or is the result of injuries received while in the line of duty," then the pension provided in the act is to be paid. The disjunctive particle "or" is used. Plaintiff argues, and we think properly, that it is used to indicate an alternative. The alternatives are clear. The pension is to be paid if death occurs while in the line of duty. Likewise, if death is caused by or is the result of injuries received while in the line of duty, then the pension is to be paid. Obviously the second alternative is broad enough, as plaintiff argues, to cover cases where injuries are received while in the line of duty causing death subsequent thereto. The legislative condition that it must be shown that death is caused by or is the result of injuries received while in line of duty is found only in the second alternative provision. It is not a part of the first provision. To construe the statute as defendant would have us do would be to read the conditions of the second alternative provision into the first, or to read the first alternative provision out of the act. We are not permitted to do either.

Plaintiff was entitled to recover when she had proved that the death of Mr. Mook occurred while in the line of duty. Her proof met that test.

The judgment of the district court is affirmed.

AFFIRMED.

JOSEPH E. STRAWN AND CHRISTINE S. MARTH, EXECUTRIX OF THE LAST WILL AND TESTAMENT OF RALPH J. NICKERSON, DECEASED, APPELLANTS, V. THE COUNTY OF SARPY ET AL., APPELLEES.
21 N. W. 2d 597

FILED FEBRUARY 8, 1946. No. 31989.

1. **Actions.** The purpose of the Declaratory Judgments Act was to have a declaration of rights not theretofore determined, and not to determine whether rights theretofore adjudicated had been properly adjudicated. In other words, it was never intended as a substitute for a new trial, or other steps that the code requires to be taken in the same action, or for an appeal to this court.
2. ———. A declaratory judgment action will not be entertained if there is pending, at the time of the commencement of the declaratory judgment action, another action or proceeding to which the same persons are parties, and in which are involved, and may be adjudicated, the same identical issues that are involved in the declaratory judgment action.

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

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

Bernard A. Martin, W. R. Patrick, and *Guy E. Tate,* for appellees.

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

PAINE, J.

This is an equitable action, brought in the district court, for a declaratory judgment, to validate a contract entered into between Sarpy County and two independent attorneys to conduct county tax-foreclosure cases, for which they were to receive as attorney's fees the 10 percent provided by statute. To the third amended petition, objections to the jurisdiction of the court were filed by several defendants, and a demurrer by the defendant City of Bellevue. The trial court sustained all objections and the demurrer. Plaintiff refused to plead further, and the cause of action was dismissed at plaintiff's costs.

This suit in equity was instituted by Joseph E. Strawn, an attorney of Papillion, Sarpy County, Nebraska, and Christine S. Marth, executrix of the last will of Ralph J. Nickerson, deceased, as plaintiffs (Ralph J. Nickerson, prior to his death on January 27, 1942, was a duly authorized and licensed practitioner of law, practicing his profession at Papillion), against William Trent, Otto Timm, and Jacob Schram, the duly elected, qualified, and acting county commissioners of Sarpy County, and Herman W. Haeberlein, clerk of the district court in and for Sarpy County, Josephine K. Sorensen, acting county treasurer of Sarpy County, the City of Bellevue, Nebraska, within Sarpy County, and School District No. 1 of Sarpy County, as defendants.

The third amended petition identified the parties and the status of each with reference to the proceedings, and further alleged, in substance, that on May 28, 1940, more than ten freeholders of Sarpy County filed a petition with the county clerk of said county, requesting the board of county commissioners to employ Ralph J. Nickerson and Joseph E. Strawn as special attorneys to prepare, file, and prosecute to decree and final determination all actions to foreclose all certificates of tax sales now held by said county, and to foreclose all tax liens not covered by certificates in said county where the taxes are now delinquent for three years or more, the fee to be allowed said attorneys for their work to be the statutory fee of 10 percent, to be added to the judgment or decree.

Plaintiffs further alleged that thereafter the defendant county commissioners on May 28, 1940, acting under and pursuant to section 23-1203, R. S. 1943, unanimously passed two resolutions, employing Mr. Nickerson and Mr. Strawn and directing them to bring said tax-foreclosure actions on behalf of the county.

Plaintiffs further alleged that said special attorneys instituted and prosecuted to completion twelve separate county tax-foreclosure cases, in each of which the court awarded an attorney's fee equal to 10 percent of the amount found due, taxed as part of the costs in said actions, and by virtue

of section 77-2043, Comp. St. 1929, as preserved by Laws 1943, ch. 176, s. 19, p. 620, providing for said statutory attorney fees, they, as employed attorneys of record for the county, became entitled to such attorney fees as a matter of law, irrespective of the like provision in their contract of employment.

Plaintiffs alleged that certain of the said attorney fees were erroneously distributed by the clerk of the district court to the county treasurer, where they are now segregated and held in a separate identifiable fund; that plaintiffs have not received payment of any portion of the same.

The third amended petition further alleged that legal questions have been raised by certain defendants as to the legality of the appointment of the special attorneys; as to the disposition of certain funds originally held by the clerk of the district court and now held by the acting county treasurer; as to the right of the plaintiffs to said funds so held as between them and the defendants; and as to whom are legally entitled to said funds; and it is necessary to have an adjudication as to each and all of said matters in this proceeding for a declaratory judgment.

Plaintiffs also alleged that jurisdiction over said funds allowed as attorney fees and taxed as costs in the twelve separate causes of action is exclusively within this court, and the county board has no original nor any other jurisdiction thereof, by reason of which claims therefor are not subject to being filed or being considered by the board of county commissioners as claims against the county, and the county board has no jurisdiction over or right to determine the interest of plaintiffs in costs in judicial proceedings in either the actual or constructive possession of this court.

The petition then recites certain facts which the plaintiffs contend might require twelve separate appeals to this court, and therefore entitle them to a declaratory judgment, to save a multiplicity of legal proceedings, and that the purpose of the suit is to obtain a declaratory judgment as to the right, status, and legal relations of the plaintiffs and of the defendants in each and all of said matters. All of the

parties, both plaintiffs and defendants, claim to have a legal interest in the subject matter of this suit in the determination of affirmative or negative relief, and their respective rights, status, and other legal relations with reference thereto will be affected by the determination of the legal questions presented.

The twelve separate causes of action of tax-sale certificate foreclosures are each set out in the petition in detail, and it is alleged that the total amount of decrees entered in the twelve causes of action was $130,299.94, and the amount of attorneys' fees entered was $13,021.95.

Plaintiffs alleged that as special attorneys they have completed their employment and therefore pray "that the Court fix and determine by declaratory judgment that plaintiffs under their general contract of employment with the County and the statutes and law of Nebraska, or independently under the statutes and law of Nebraska, are * * * entitled to the funds decreed, collected and held as 10% statutory attorneys fees as a part of the costs in said twelve cases, * * * and having so determined that this Court further having jurisdiction of the subject matter and being the only Court which has jurisdiction of the subject matter, and * * * of all the parties, proceed further to give full relief based upon its declaratory judgment by directing the defendant, Clerk of the District Court of Sarpy County, Nebraska, and the defendant, Acting County Treasurer * * * to pay to the plaintiffs such funds respectively as are held in their hands, segregated and identifiable as such, * * * and for such other and further relief * * * ."

School District No. 1 filed objections and challenged the jurisdiction of the court over the subject matter of the action, or to determine or render any declaratory judgment therein, in that the jurisdiction of the district court to determine claims against the county is derivative and not original; that defendant has a constitutional right to a trial by jury. Defendant School District No. 1 especially relies on this proposition of law that "Proceedings for a declaratory judgment will not be entertained where another

equally serviceable remedy has been provided by law, or where the matter in issue can be as well and speedily determined in ordinary proceedings open to the parties or is within the exclusive original jurisdiction of another tribunal or board."

The county commissioners filed similar objections. The City of Bellevue demurred to the third amended petition for the reason that the allegations therein contained do not constitute a cause of action against the city.

The trial court sustained the demurrer of the City of Bellevue, the objections of the county of Sarpy and its commissioners, and the objections of School District No. 1, to the third amended petition, and plaintiffs having refused to plead further the court dismissed the plaintiffs' actions. Plaintiffs filed a motion for new trial, which was overruled. Thereupon, the plaintiffs' cause of action was dismissed at plaintiffs' costs, and the plaintiffs appeal.

Plaintiffs' assignments of error charge that the trial court erred in sustaining the objections of defendant school district, also in sustaining the objections of the county of Sarpy and of the county commissioners, as well as in sustaining the demurrer of defendant City of Bellevue, on the ground that plaintiffs' claims were within the exclusive jurisdiction of the board of county commissioners, the right of defendants to a jury trial would be denied, and that plaintiffs' claims could be as speedily and fully determined by other available remedies, without resort to a proceeding under the Uniform Declaratory Judgments Act; that the subject matter was not lawfully subject to a proceeding for a declaratory judgment; and that the court erred in overruling plaintiffs' motion for a new trial.

We find that section 77-2043, Comp. St. 1929, was repealed by chapter 106, Laws 1943, effective May 21, 1943. The repealing act carried the saving clause, as follows: "This act shall in no manner affect pending actions founded on or growing out of any statute repealed by this act." Laws 1943, ch. 176, secs. 19-21, p. 620.

Plaintiffs charge that to appeal each and all of the twelve

separate tax-foreclosure actions said attorneys instituted for Sarpy County would involve twelve separate proceedings and trials, together with added time and expense of the parties; that in this one declaratory judgment the court, having jurisdiction of the parties, should exercise its power to declare all the rights of the parties as to each and all of said funds in this single proceeding.

In England and the British Dominions, declaratory judgments have been in effect for a much longer time than in the United States. We find in British reports many guiding precedents for the exercise of court's discretion. In Russian Commercial & Industrial Bank v. British Bank, 90 L. J. K. B. n. s. 1089, it was said by the House of Lords: "The question in what cases the jurisdiction to give a declaratory judgment should be exercised has been considered in a number of cases which were called to our attention by counsel for the appellants. It should be exercised 'sparingly' * * * 'with care and Jealousy' * * * 'with extreme caution.'" See Law Notes, p. 48 (June, 1930).

"When, however, another action between the same parties, in which all issues could be determined, is actually pending at the time of the commencement of an action for a declaratory judgment, the court abuses its discretion when it entertains jurisdiction." Woollard v. Schaffer Stores Co., 272 N. Y. 304, 5 N. E. 2d 829, 109 A. L. R. 1262.

"Where an action or proceeding is already pending in another forum involving the same issues, it is manifestly unwise and unnecessary to permit a new petition for a declaration to be initiated by the defendant or the plaintiff in that suit. This rule embraces not only cases where the identical issues between the same parties are *sub judice*, but also possibly cases in which the issues only are identical but not the parties." Borchard, Declaratory Judgments (2d ed.), p. 350.

In an opinion by this court, it was unanimously held: "The declaratory judgment law is not substitute for new trial or appeal, nor does it operate to supersede former adjudications or proper proceedings already pending in a

court having jurisdiction of parties and subject-matter." Phelps County v. City of Holdrege, 133 Neb. 139, 274 N. W. 483. See, also, Smithberger v. Banning, 130 Neb. 354, 265 N. W. 10.

"Although there is apparently some conflict on the question, the rule which may be formulated from a reading of the cases as a whole, and under which most of the cases with apparently conflicting results may be reconciled, seems to be that jurisdiction of a declaratory judgment action will not be entertained if there is pending, at the time of the commencement of the declaratory action, another action or proceeding to which the same persons are parties, in which are involved and may be adjudicated the same identical issues that are involved in the declaratory action." Annotation, 135 A. L. R. 934.

Under the law herein set out in the case at bar, we believe that the district court was right in sustaining the demurrer of the City of Bellevue and in sustaining the objections of the county of Sarpy and of School District No. 1.

Finding no error in the decision rendered by the trial court, its judgment is affirmed.

AFFIRMED.

YEAGER, J., concurs in the result.

LOUIS UNICK, APPELLEE, V. SAINT JOSEPH LOAN AND TRUST COMPANY, A CORPORATION, ET AL., APPELLANTS.
21 N. W. 2d 752

FILED FEBRUARY 8, 1946. No. 32044.

1. **Adverse Possession.** The period for which adverse possession may be computed begins from the date when a right of entry and a right of possession exist, and not from the date when the remainderman has a right to bring an action to quiet title as to his future interest.
2. **Tenancy in Common.** An ouster, in the law of tenancy in common, is defined as the wrongful dispossession or exclusion by one tenant in common of his cotenant or cotenants from the common property of which they are entitled to possession.

3. ———. The possession of real property by a tenant in common is ordinarily the possession of all cotenants and before their ouster arises notice or knowledge of acts causing their ouster must be brought home to them in some plain and unequivocal manner.
4. ———. The notice or knowledge out of which ouster of cotenants arises need not be actual but may be constructively inferred from acts and circumstances attending adverse possession which are open, notorious, and unequivocal in their character and import, and where notice or knowledge, actual or constructive, is shown, the ignorance or mistake of cotenants as to their rights will not affect the operation of the statute of limitations in the absence of fraudulent concealment or misrepresentation.
5. ———. Where one tenant in common enters upon the whole estate, substantially improves it beyond that ordinarily proper for the full enjoyment or use of the estate as a tenant in common, takes all the rents and profits, pays all the taxes, makes it his home and openly claims the whole for more than the period of the statute of limitations, an ouster of his cotenants will be presumed although not otherwise proved.
6. **Limitations of Actions.** Statutes of limitations governing actions to recover land, as applied to ousted cotenants, begin to run from the time of such ouster, and, if action is not brought within the statutory period, operate both to bar recovery of the land and to vest title in the disseizor.
7. **Adverse Possession: TENANCY IN COMMON.** Possession by one claiming under a disseizing tenant in common, if there is privity between them and the possession of both are adverse, may be tacked to the disseizor's possession so as to perfect title as against the cotenants disseized.

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

Dryden & Jensen and *W. L. Minor,* for appellants.

O. A. Drake, for appellee.

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

CHAPPELL, J.

This is a suit in equity to quiet title to a quarter section of farm land in Buffalo County. The trial court found generally for plaintiff and quieted the title in him by reason of

adverse possession. Motion for new trial having been overruled, certain answering defendants appealed to this court. Assignments of error are that the decree is contrary to the evidence and the law. We find that these contentions cannot be sustained.

For purposes of clarity we will, insofar as it is necessary, first identify the parties and their legal relationship. Christian Schaub, deceased 1897, and Louisa Schaub, deceased 1914, were husband and wife. Defendants, Charles W. Schaub and Edward A. Schaub, and one Albert Schaub, who is not a party to this action, are their surviving children. Defendants, Ameal C. Meier and Henry Meier, are their grandsons, the surviving children of a daughter, deceased 1881. John P. Jensen and Kenneth H. Dryden were made defendants by reason of a quitclaim deed, dated April 18, 1945, from Edward and Charles, single, purportedly conveying one-half of their alleged one-half interest in the property involved.

Plaintiff, Louis Unick, received a warranty deed to the property from one John H. Feldman and wife on February 8, 1938, filed February 10, 1938. He bases his right to a decree quieting title in him by tacking his possession and ownership upon that of his grantor who went into possession and claim of ownership by virtue of a warranty deed, dated February 20, 1903, recorded April 13, 1903, whereby Louisa Schaub, widow, and Albert Schaub, single, conveyed all their respective rights to John H. Feldman.

It is conceded that on June 4, 1889, Christian received receipt from the United States Land Office showing final payment made upon the land, together with a promise that deed would be issued, which thereafter followed on February 6, 1891. Defendants contend that an agreement dated May 4, 1890, recorded July 15, 1892, whereby Christian, the father, conveyed the property to Albert in consideration of monthly maintenance payments, medical attention, and housing during the grantor's lifetime, and a warranty deed dated March 11, 1891, recorded March 23, 1891, whereby Christian conveyed an undivided two-thirds interest in the

property to Albert, were both void because the property was the homestead and grantor's wife, Louisa, did not join in the execution of either of the instruments. If that be true, it is apparent that a warranty deed dated March 6, 1895, recorded April 19, 1895, whereby Albert conveyed to his mother, Louisa, the undivided two-thirds interest previously conveyed to him by the father, accomplished nothing.

Upon these premises it is defendants' theory that at the death of Christian, intestate, in 1897, the property descended, by virtue of then existing statutes, to his wife, Louisa, for life with remainder to his heirs, the three sons who each took a one-fourth interest and the two grandsons who each took a one-eighth interest. They argue by analogy that the warranty deed to the property executed and delivered in 1903 to John H. Feldman, plaintiff's grantor, conveyed only the widow's life estate and Albert's one-fourth interest.

It is therefore confidently asserted by defendants: (1). That adverse possession could not be computed against them as remaindermen until after the death of Christian's widow in 1914; and (2) that plaintiff's grantor, Feldman, became thereafter only a tenant in common with defendants who were without any notice or knowledge of Feldman's claim of absolute ownership, thus title by adverse possession could not be obtained by him or by plaintiff through him.

For the purposes of this opinion we may assume, without discussing or deciding the legal propositions relating thereto, that defendants were remaindermen as claimed and apply the recently established rule that: "The period for which adverse possession may be computed begins from the date when a right of entry and a right of possession exist, and not from the date when the remainderman has a right to bring an action to quiet title as to his future interest." Maxwell v. Hamel, 138 Neb. 49, 292 N. W. 38.

Nevertheless, the application of that rule is not decisive of the case. In 1914, if defendants' position is correct as we have heretofore assumed, defendants had a right of entry and possession and Feldman and defendants were

thereafter tenants in common of all the property involved except Albert's one-fourth interest which it is conceded was always Feldman's absolutely by virtue of the warranty deed executed in 1903. In that situation Feldman was thereafter in actual, continuous possession of all the property claiming all of it as absolute owner for a period of 24 years and plaintiff, his grantee, was in actual possession under a like claim for seven years after that time, or a total of 31 years, before these defendants ever asserted any right or title to or any interest in the property. Therefore, the question presented is whether defendants, as cotenants, none of whom were under any disability, had notice or knowledge, actual or constructive, of the hostile claim of plaintiff and his predecessor causing their ouster and barring their present claims by virtue of section 25-202, R. S. 1943, the ten-year statute of limitations.

An ouster, in the law of tenancy in common, has been defined as the wrongful dispossession or exclusion by one tenant in common of his cotenant or cotenants from the common property of which they are entitled to possession. 62 C. J., Tenancy in Common, s. 32, p. 426.

In that connection it is the general rule that possession of real property by a tenant in common is ordinarily the possession of all cotenants and that before their ouster arises notice or knowledge of acts causing their ouster must be brought home to them in some plain and unequivocal manner. However, the notice or knowledge out of which ouster arises need not be actual but may be constructively inferred from acts and circumstances attending adverse possession which are open, notorious, and unequivocal in their character and import. In other words, notice of such hostile claim may be shown by acts of the cotenant in possession of such a notorious and hostile character as would put a man of ordinary prudence upon his guard, but, on the other hand, acts which are reasonably consistent with the existence of title in his cotenants would not be sufficient.

Thus, we have concluded in this jurisdiction that where one tenant in common enters upon the whole estate, sub-

stantially improves it beyond that ordinarily proper for the full enjoyment or use of the estate as a tenant in common, takes all the rents and profits, pays all the taxes, makes it his home and openly claims the whole for more than the period of the statute of limitations, an ouster of his cotenants will be presumed although not otherwise proved. See Severson v. McKenzie, 122 Neb. 827, 241 N. W. 774, which followed Lund v. Nelson, 89 Neb. 449, 131 N. W. 919, and distinguished Walter v. Walter, 117 Neb. 671, 222 N. W. 49, upon the facts. See, also, Aynes v. Bantz, 114 Neb. 226, 206 N. W. 754, and Craven v. Craven, 68 Neb. 459, 94 N. W. 604.

As authoratively stated in 62 C. J., Tenancy in Common, s. 48, p. 436: "In order to make good the claim of a tenant in common to title by adverse holding, the cotenants out of possession must have notice, or the possession must be so open, visible and notorious as to charge them with knowledge of the hostile claim; and where their knowledge, actual or constructive, is shown, their ignorance or mistake as to their rights will not affect the operation of the statute in the absence of fraudulent concealment or misrepresentation." There is no claim made in the case at bar that there was any fraudulent concealment or misrepresentation.

It is generally held that: "Statutes of limitations governing actions to recover the land, as applied to ousted cotenants, begin to run from the time of such ouster, and, if action is not brought within the statutory period, operate both to bar recovery of the land and to vest title in the disseizor." 62 C. J., Tenancy in Common, s. 43, p. 434. It follows also that possession by one claiming under a disseizing tenant in common, if there is privity between them and the possession of both are adverse, may be tacked to the disseizor's possession so as to perfect title as against the cotenants disseized. 62 C. J., Tenancy in Common, s. 53, p. 441; 2 C. J., Adverse Possession, s. 66, p. 82.

Bearing these rules in mind the evidence becomes of primary importance. We believe the record discloses substan-

tially that after Feldman received his warranty deed on February 20, 1903, he moved upon and took possession of all the property which he farmed and made his home as owner until 1938. For two years thereafter he was plaintiff's tenant. The widow, Louisa, together with Albert and Edward, lived on the property when Feldman moved there. Ameal C. and Henry Meier also lived there part of the time. They all moved off the property at the same time that Feldman moved on to give him possession of the property. In 1903, Charles lived on his own farm adjoining the property on the north. Thereafter he visited back and forth with Feldman in a neighborly way and exchanged farm work with him. Edward and the Meier boys also came on the property as visitors now and then for some time after Feldman took possession.

The fences on the property were in poor condition and Feldman improved them. When he moved upon the place the farm buildings were located near the center of the land. They were not in good condition. In 1917 or 1918, he moved the building site over nearer the section line but on the land involved. There he built a new $4,000 house and a new $2,000 barn. He also constructed a new granary and a new hoghouse, the cost of which are not shown. None of the lumber in the old buildings was used in constructing the new. During the entire period of 35 years, from 1903 to 1938, and 24 years from 1914 to 1938, Feldman took all the rents, income, and profits from and paid all taxes on the land, made the place his home and openly claimed the whole of it as owner. Further, for seven years after 1938, plaintiff was likewise in possession of the property claiming as absolute owner by warranty deed from Feldman before any claim was ever made in any manner to any person by defendants, or any of them, that they had any interest, right or title to the land or the income therefrom. During the period of 24 years, between 1914 and 1938, Feldman actually mortgaged the property, as owner thereof, five different times for sums varying from $3,000 to $9,000. He likewise mortgaged the property, as owner, four times between the

years 1903 and 1914, for sums varying from $800 to $4,800. As owner, he also entered into an oil lease therefor in 1931 upon a royalty basis which was changed in 1932 to an annual rental. All of these instruments were filed of record.

The plaintiff lived in that neighborhood all of his life. In 1903, he lived within a mile and a half of the property. He saw the improvements constructed and saw Feldman living upon and farming the land throughout the years. The plaintiff visited back and forth with the Schaubs. Edward worked just across the road from his place for some time after Feldman took over the property. In 1903, Edward and Charles both told plaintiff that they had sold the place to Feldman and were going to have a sale and move. Edward so admits in his testimony and says he told plaintiff also that he was going to have a new neighbor. Charles did not testify at the trial and plaintiff's evidence with regard to the conversation with him was not denied.

Edward was the only witness for defendants. He denied that he knew about the improvements and says that he was not told about the deeds. He admits, however, that he was on the place when the agent completed the transaction with Feldman and when Feldman took over the property in 1903. He testified that he and the other defendants always understood that Albert or his mother and Albert owned the property and it was all right for them to do with it as they wanted since they transacted all the business after their father's death. He did not think at the time that he had any interest in the property and never previously, until this controversy arose 42 years later, claimed any interest. It is interesting to note that he was asked the following questions and gave the following answers: "Q Did you know that Mr. Feldman claimed he owned it all the time, or not. A Why, yes, until he mortgaged it and gave it over to Mr. Unick. Q But you knew he claimed he owned it all that time. A Yes, sir. Q Well, do you know if your other brother understood it that same way? A I suppose he did. He never paid no attention to it. * * * Q Now, just a second, here. Now then, did Mr. Feldman ever tell you that he

owned the place? A He claimed he bought it. Q When. A 1903." It is apparent at once then that the witness, defendant, Edward A. Schaub, had actual notice and knowledge that Feldman was in possession at all times asserting that he owned the entire estate, and his claim is therefore barred by virtue of the holding in Keleher v. Kelly, 89 Neb. 127, 130 N. W. 1032, and authorities heretofore cited.

We believe also that Charles had such actual notice and knowledge but, be that as it may, we conclude that the acts and circumstances attending adverse possession were so open, notorious, and unequivocal that notice and knowledge with resulting ouster must be inferred therefrom, not only as to him but as to all other defendants, and that all of their claims were long since barred by the appropriate statute of limitations.

We conclude that the judgment of the trial court was correct and it is affirmed.

AFFIRMED.

LIBORIA TERESI, APPELLANT, V. ROSE FILLEY ET AL., APPELLEES.

21 N. W. 2d 699

FILED FEBRUARY 15, 1946. No. 32018.

1. Trial. Triers of fact are not compelled to accept as absolute verity every statement of a witness not contradicted by direct evidence. Circumstantial evidence is equally competent with direct testimony. The relative convincing powers of the two classes of evidence are for the determination of the triers of fact.
2. ———. Evidence not directly contradicted is not necessarily binding on the triers of fact, and may be given no weight where it is inherently improbable, unreasonable, self-contradictory, or inconsistent with facts or circumstances in evidence.
3. Witnesses. Triers of fact have the right to test the credibility of witnesses by their self-interest and to weigh undisputed parol testimony against facts and circumstances in evidence from which a conclusion may properly be drawn that the parol testimony is false.

4. **Trial.** A substantial conflict may arise even though all the evidence is produced by one party.

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

Joseph O. Burger, for appellant.

Beckman & Beckman, for appellees.

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

SIMMONS, C. J.

This, so far as the parties here are concerned, is a foreclosure action against the mortgagors and a judgment creditor of the mortgagors. The trial court held the mortgage to be without consideration and void and enforced the judgment. The plaintiff appeals. We affirm the judgment of the trial court.

The parties defendant originally were Edith Beckman, who was dismissed from the case on plaintiff's motion at the time of trial; Samuel Mancuso and Mary Mancuso, mortgagors; Rose Filley, a judgment creditor of the defendant, Samuel Mancuso; and Conservative Savings and Loan Association. This last named defendant does not appear in the case here and, so far as the record shows, did not appear in the case in the trial court.

The petition herein was filed June 22, 1939. The plaintiff sought the foreclosure of a real-estate mortgage bearing date of September 22, 1933, which was recorded April 17, 1939. The mortgage conveyed certain real estate to which for convenience we shall refer herein as Lot 36 and Lot 9. Plaintiff alleged that the mortgage was given to secure a note dated April 22, 1933, for $2,500 payable five years after date; that no interest had been paid on the note since September 22, 1938; that the defendants Mancuso on September 22, 1938, executed and delivered to her a quitclaim deed conveying this property to her; that said deed was recorded on September 24, 1938; that on or about January 22, 1938, the defendant, Rose Filley, in the district court

for Douglas County recovered a judgment for over $5,000 against the defendant, Samuel Mancuso, and others; that on or about September 27, 1938, defendant, Conservative Savings and Loan Association, recovered a judgment for over $3,000 against Samuel Mancuso in the district court for Douglas County; and that on June 21, 1939, under sheriff's sale to enforce the Rose Filley judgment, Lot 36 was sold to Edith Beckman. Edith Beckman was defendant Filley's attorney.

Plaintiff prayed for a decree that the liens of the defendants be declared to be inferior to that of the plaintiff; that the mortgage be foreclosed; that a receiver be appointed to collect the rents; and for equitable relief.

Defendant Filley answered on July 24, 1939, denying generally and alleging that on January 18, 1938, she recovered a judgment against the defendant, Samuel Mancuso, in the amount of $5,207.74 in the district court for Douglas County; that at that time defendant Mancuso held the legal title to said premises; that her judgment was a first lien upon the property of defendant Mancuso; and that the mortgage was junior and inferior to her judgment and a cloud on her title. She alleged that the execution of the "purported quit-claim" deed was an attempt to convey the two lots to the plaintiff; and that the quitclaim deed was executed for the sole purpose of placing the property beyond the reach of herself as a judgment creditor. She prayed that her judgment be decreed to be a first lien upon the property; that the quitclaim deed be canceled and annulled; that the mortgage be canceled and annulled, or in the alternative, be declared inferior to her judgment lien; that the title to Lot 36 be quieted in her free from all liens and claims of the plaintiff or other defendants; and for equitable relief. No other pleadings appear in the transcript.

Plaintiff did not appear at the trial. To sustain the allegations of her petition, other than as to documentary evidence, she offered the evidence of defendant Samuel Mancuso. Defendants' case, other than documentary, rests upon

Mancuso's examination and cross-examination. Whether or not plaintiff is to prevail depends upon the weight and the credibility of Mancuso's testimony. Here is the story he told, together with chronological reference to written instruments and other information appearing in the record.

Plaintiff and Mancuso were old acquaintances. In 1932, he, as plaintiff's agent, sold a piece of property for her from which she received some $3,000. Plaintiff wanted to invest the money; Mancuso "kept it." He gave no evidence of indebtedness at the time. In 1933, Mancuso and wife gave plaintiff the note and mortgage involved in this action to secure plaintiff's funds.

The note was for $2,500, dated April 22, 1933, and in the body contained only this language: "Five year after date we promise to pay to the order of Liboria Teresi Twenty five Hundred and 00/100 Dollars Payable at Omaha Value received." The mortgage bore date of September 22, 1933, conveyed the property involved here and recited that the Mancusos had executed and delivered to plaintiff one promissory note (and in typing) "of even date, for the sun (sic) of Two-Thousand Five Hundred (2500.00) Dollars, paybele (sic) on or before five years from date, bearing interest at the rate of Six per cent per annum payble (sic) annually." He said the date of the note, April 22, 1933, was correct and when asked how it happened that the mortgage was dated September 22, 1933, he didn't know—"maybe it was a mistake; I was supposed to give both at the same time." When asked when the mortgage was executed he answered: "Sometime in 1933." "Well, September—I don't remember the date" and he didn't remember the mortgage was given later than the note.

Mancuso testified that he paid interest on the note "To 1938" and owed interest from then to the time of trial. There are no interest payments endorsed on the note. Plaintiff in her petition fixed the interest as paid to September 22, 1938, which is also the date of the quitclaim deed to which we shall refer presently.

On January 18, 1938, defendant Filley secured a judg-

ment against Mancuso in the district court for Douglas County for $5,207.74. Reference is made in the record to an appeal of this case to this court. See Filley v. Mancuso, 135 Neb. 403, 281 N. W. 850, opinion filed October 28, 1938.

On September 22, 1938, the Mancusos by quitclaim deed conveyed the property involved here to plaintiff for a recited consideration of two dollars. This deed was recorded September 24, 1938. Mancuso testified that this deed " * * * was for additional security, whatever it was." When asked what consideration he got from the plaintiff for the deed, he said, "Well, I give a deed because not to put her to any expense for foreclosure, and I give it for additional security" and still later he said he did not want to put plaintiff "to any expense for foreclosure."

On December 22, 1938, execution was issued on the Filley judgment, the return showing that levy was made on Lot 36 on February 2, 1939, and returned February 10, 1939, and reciting insufficient time to advertise and sell within the life of the writ.

On April 17, 1939, the mortgage hereinbefore referred to was filed for record. Mancuso said he told the plaintiff to record it because he wanted to protect her. On July 28, 1939, the sheriff of Douglas County conveyed Lot 36 to defendant Filley by sheriff's deed, which recited an execution issued May 8, 1939, and sale had on June 20, 1939.

On June 22, 1939, plaintiff's petition was filed. It was verified by an attorney who recited that he had in his possession the instruments on which it was founded. The præcipe requested summons for all defendants "except the Mancusos."

The attorney who brought this foreclosure action was Mancuso's attorney in the foreclosure action resulting in the Filley judgment. Mancuso said he took plaintiff to his attorney because she wanted "legal counsel." The attorney died in 1940. Mancuso testified that the note and mortgage were delivered to the plaintiff and that he secured possession of the note from plaintiff and turned it to the attorney while the latter was living. He testified that he secured the

mortgage from the executor of the attorney's estate immediately after he died.

Sometime in 1939, one Thomas J. O'Neil was appointed receiver in the case. He officed with Mancuso. Thomas J. O'Neil is shown as the notary who took the attorney's acknowledgment on plaintiff's petition. Mr. O'Neil, as receiver, collected the rents up to the date of his death in July 1940. No report of his receivership was made to the court at the time of his death, nor was the court advised of his death. Thereafter until and including December 1944, Mancuso collected the rents, repaired the property, kept it insured and otherwise treated it as his own. The testimony is that the successor receiver was appointed in November or December 1944. Mancuso placed the rents in his own account and paid the bills. He did not secure permission of the court to take the place of the receiver. He made no accounting to plaintiff for the rents collected and she never asked him for the money. He paid her no interest after the deed was given and she never asked for it.

The transcript shows that this action was placed upon the dismissal docket in 1941 in the district court for Douglas County. Just when it was put back upon the trial docket is not disclosed. It appears that it finally came to trial February 15, 1945; and that defendant Filley's counsel was the moving cause in finally getting the action to trial. The record shows that Mancuso appeared personally and was granted a continuance to secure counsel, and then appeared at the trial without counsel. An attorney appeared and represented plaintiff at the trial. He had been Mancuso's attorney since the death of the attorney who started this action.

When it was called to the attention of the court that Mancuso had been collecting the rents, he was ordered to report to the court. He failed to do so. A continuance of the trial was necessary in order to secure the report. It consisted of sheets of paper showing a summary of rents received and expenditures made. Three items are of interest. Mancuso paid premiums on the "Thomas J. O'Neil" receiver's bond

for the years 1940 to 1944 and presented a receipt for payment dated March 1, 1945, the date of the second section of the trial. He also paid premiums on the plaintiff's "Bond of applicant for receiver" and presented a like dated receipt. He allowed the taxes to become delinquent during this period and paid them apparently just before the trial.

Plaintiff did not appear at the trial. Mancuso testified that he had talked with her; that he had told her "what was going on"; that he did not know why she was not in court but that "maybe she is in town," he did not know. Her absence was not explained.

The trial court found that any interest the plaintiff had in the property was junior and inferior to that of the defendant Filley under her judgment; that the quitclaim deed was void as to the judgment creditor Filley; that the mortgage was without consideration and void and should be canceled of record; that the title to Lot 36 had vested in the defendant Filley by virtue of the sheriff's deed; that Lot 9 should be subjected to sheriff's sale and the proceeds applied to the Filley judgment; that the defendant Mancuso should pay the rent received from Lot 9 (less certain charges) into court to be applied on the Filley judgment; and that defendant Filley was entitled to a judgment for the rents collected (less certain charges) from Lot 36.

The court decreed that defendant Filley have judgment against Mancuso for the net of the rents received on Lot 36; ordered that Lot 9 be sold as upon execution and the proceeds applied to the Filley judgment; ordered Mancuso to pay the net rentals from Lot 9 into court; and ordered the mortgage canceled and released of record.

From this judgment plaintiff appeals, assigning here as error that the decree is not sustained by evidence or law. Plaintiff urges that uncontroverted evidence ordinarily should be taken as true, and uncontradicted evidence which is not improbable or unreasonable cannot be disregarded; that the evidence shows there was a consideration for the note and the mortgage; that a preexisting debt is a sufficient consideration; that the mortgage lien is superior to

the lien of defendant Filley's judgment and superior to the sheriff's deed to Lot 36; and that the lien of the mortgage was not extinguished by the deed. Plaintiff states that she had elected to stand upon her mortgage, it being to her disadvantage to rely upon the deed.

Triers of fact are not compelled to accept as absolute verity every statement of a witness not contradicted by direct evidence. The persuasiveness of evidence may be destroyed even though uncontroverted by direct testimony. Circumstantial evidence is equally competent with direct testimony. The relative convincing powers of the two classes of evidence are for the determination of the triers of fact. Evidence not directly contradicted is not necessarily binding on the triers of fact, and may be given no weight where it is inherently improbable, unreasonable, self-contradictory, or inconsistent with facts or circumstances in evidence. Triers of fact have the right to test the credibility of witnesses by their self-interest and to weigh undisputed parol testimony against facts and circumstances in evidence from which a conclusion may properly be drawn that the parol testimony is false. A substantial conflict may arise even though all the evidence is produced by one party. See Morris v. Equitable Life Assurance Society, 109 Neb. 348, 191 N. W. 190; Leon v. Kitchen Bros. Hotel Co., 134 Neb. 137, 277 N. W. 823; Jennings v. Campbell, 142 Neb. 354, 6 N. W. 2d 376; 32 C. J. S., Evidence, s. 1038, p. 1089; 20 Am. Jur., Evidence, s. 1180, p. 1030.

It is to be remembered that the trial court had the advantage of hearing the witness Mancuso testify, and of observing his demeanor while testifying. But disregarding that, we have no difficulty from a study of the cold record in reaching a conclusion in accord with the judgment of the trial court that the mortgage was without consideration and void. Further, we are of the opinion that this case is saturated with evidence of fraud.

Mancuso was an interested witness. He testified that he took plaintiff's money in 1932 as an investment for her, yet he gave her no evidence of the debt until the following year.

The note, purporting to evidence the investment, on its face bears no interest for five years, a total of six years after Mancuso claims to have borrowed the money. Not only does the mortgage not bear the same date as the note, but obviously whoever drew the mortgage did not have the note before him, for it is not accurately described as to date or contents. The mortgage was not recorded for over five years after its purported date and then only after defendant Filley was undertaking to enforce payment of her judgment. Mancuso testified that he paid interest on this note for five years when by its terms no interest was payable, and then he turned it over to an attorney to foreclose against himself, and without any endorsement of interest paid on the note. After the note matured Mancuso paid no interest for five years. Mancuso offered no evidence other than his own statement of the payment of interest. He produced no documents or records evidencing the payments. And yet, when required by the court to make a report of his collections of rents and expenditures on the property, he produced copies of purported records showing a detailed itemization over a period of years. Incidentally, he was unable to produce receipts for large items of expenditure claimed.

Mancuso's attorney in other litigation brought the action for the plaintiff. After the attorney died Mancuso got the mortgage back from the executor of the attorney's estate. Mancuso's office associate was appointed the receiver, and after the death of the receiver Mancuso handled the property as his own, collecting and not reporting the rents to the court. He not only continued to pay premiums on the receiver's bond for years after the latter's death, but paid the premiums on the plaintiff's bond for a like period, and that in an action where there was an alleged adversary issue between them. Mancuso's attorney in other litigation appeared in court as plaintiff's attorney. Mancuso appeared without counsel.

The record as to the plaintiff is no more convincing of an honest transaction than is the testimony of Mancuso. It is

not unusual for an attorney in this state to verify a pleading where he has the documents, upon which it is based, in his possession. Authority to do so is conferred by statute. See sec. 25-831, R. S. 1943. Plaintiff's failure to verify the petition becomes important, however, in view of her complete absence from any connection, except for the use of her name, with this litigation. After the action was started Mancuso's (the debtor's) office associate became receiver. After the rents were channeled into the receiver's hands, and subsequently directly into Mancuso's hands, the litigation languished for five years. Plaintiff did not advise the court of the death of the receiver. The only evidence in the record indicates that the action was then brought to trial, not at plaintiff's insistence but at that of defendant Filley. From 1939 to 1945, plaintiff neither asked for an accounting of rents in the foreclosure nor for the payment of interest on or the principal of her alleged investment. During the long pendency of this litigation she took none of the procedural steps that were available and normally would have been used to secure an application of the rents to the debt which she claimed was due. Even at the trial she did not seek an accounting of rents nor to reach these funds. The accounting, such as it was, was forced by the defendant Filley. When the action, which involved the validity and recovery of her alleged investment, came to trial she knew of it and she remained away, not sufficiently concerned even to appear in the court room.

There was no showing that there was any consideration passing from the plaintiff to the defendants Mancuso for the quitclaim deed, nor is there evidence that plaintiff either asked for or knew that the deed was being made conveying this property to her. We find some difficulty in reconciling Mancuso's statement that the deed was given to save plaintiff the expense of foreclosure, which would ordinarily mean that title would pass, and his statement that it was given for additional security. Defendant Filley's judgment had been secured prior to that time. The deed did not serve Mancuso's purpose in getting the property out from under

the judgment, hence the production and use of the note and mortgage.

We need not further discuss the record. Standing alone some of these facts and circumstances would not create even a suspicion of fraud. Taken together they create a conviction that material parts of the parol testimony of the witness Mancuso are false and that the note, mortgage, and deed were prepared and used for the sole purpose of defeating the defendant Filley in her effort to satisfy a part of her judgment from the sale of the Mancuso property. To accomplish this purpose the jurisdiction of a court of equity was invoked and its procedure used for a time to assist in the perpetration of the fraud. The trial court refused to sanction the fraud and by its decree affirmatively denied its consummation.

The judgment of the trial court is affirmed.

AFFIRMED.

GEORGE E. LEE, APPELLEE, V. CITY OF HARVARD, CLAY COUNTY, NEBRASKA, APPELLANT.
21 N. W. 2d 696

FILED FEBRUARY 15, 1946. No. 32009.

1. **Municipal Corporations.** In an action to disconnect territory from a city, the burden is upon the petitioner to establish by sufficient evidence that justice and equity require that such territory be disconnected.
2. ———. When a small tract of land of 9.28 acres has been within a city for over 35 years, and the streets on all four sides of it have been improved, the one in front of the property being curbed and guttered, with three street lights, with city water available, as well as protection of the fire department, such property has not lost its character as city property, and justice and equity require that such tract should not be set apart from the city.

APPEAL from the district court for Clay County: EDMUND P. NUSS, JUDGE. *Reversed and dismissed.*

S. W. Moger, for appellant.

D. B. Massie, for appellee.

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

PAINE, J.

This is an equitable action to detach a tract of 9.28 acres from the City of Harvard. The city objected to its being detached, but the trial court found that the property received no special benefit from the city and that justice and equity required that it be detached, from which judgment the City of Harvard appealed.

The petition of George E. Lee sets out that he is the sole owner and in possession of a tract of land consisting of 9.28 acres, which was incorporated in the City of Harvard, but alleges that the land was not laid out in town lots or blocks, and is used exclusively for agricultural purposes, and there is no demand for its being used for municipal purposes; that plaintiff is the only resident of this tract of land; that his dwelling house is the only improvement upon the land; that plaintiff requested, but was denied, the use of city water; that there is inadequate fire protection furnished by the city; that there is no reasonable possibility that the city will ever extend to or require any of this land; and plaintiff prays that this land be detached from the defendant city.

The defendant filed answer, admitting that the plaintiff was the owner of the tract of land, which has been within the corporate limits of the City of Harvard for more than 35 years. Defendant alleges that the plaintiff purchased said real estate at a tax-sale foreclosure brought by the city for the sum of $330 on April 21, 1942; that at the time plaintiff purchased said real estate at tax sale there were unpaid taxes upon this tract of land for the year 1941, and the plaintiff has not yet paid said taxes for the year 1941, or any subsequent taxes levied against the real estate. Defendant denies that said property is used exclusively for

agricultural purposes, and alleges that the plaintiff has a highly improved residence and other buildings located on said land.

Defendant also alleges that said property is located at the extreme south part of the city, and is used exclusively as a residence at this time, and alleges that this property is bounded on the north, the east, and the west by property all within the corporate limits of the city. Defendant further alleges that along said property on the west is an asphalt road, and on the north is a graveled road, and on the south there is an oiled highway, and that the city has expended considerable sums of money to maintain said roads within its corporate limits and abutting said property, and that city funds were used in the payment of building intersections adjacent to the plaintiff's land, for which the plaintiff nor the former owners paid nothing.

Defendant city further alleges that the plaintiff's property, sought to be set out of the city, is within four blocks of the business district, and if an extension of building residences in said city was required this would be the logical property for that purpose, and would be most desirable for building locations for future development of the city; in fact, there is no location adjacent to the city as desirable for future development and expansion.

Defendant denies that plaintiff was refused the use of city water, and, on the other hand, alleges that the city council has at all times been, and is now, willing to grant the plaintiff such rights, providing request is made by him in compliance with the water ordinances of said city. The city denies that there is inadequate fire protection for the improvements on this tract, and alleges that the city maintains an excellent fire department and fire-fighting apparatus, sufficient to care for and protect the plaintiff's property in case of fire.

The defendant further alleges that the city maintains a sewerage system for the benefit of its citizens, and which is available to the plaintiff, subject to the provisions of the city ordinances; that should said property be vacated it

would make the boundary lines of said city jagged and irregular; that the valuation of said property for tax purposes and the mill levy made thereon are extremely low in comparison with the benefits received. The city denies each and every other allegation of the petition, and alleges that the facts and allegations contained in the petition are not sufficient to constitute a cause of action, and asks that the petition be dismissed.

As heretofore stated, the trial court found for the plaintiff and ordered the property detached from the city. Motion for new trial being overruled, the city appealed.

The city sets out as errors relied upon for reversal that the decree and judgment of the district court are contrary to the law and the evidence, as well as contrary to justice and equity, and that the court should have found that the real estate was not subject to be detached.

The evidence discloses that this tract of 9.28 acres is a rectangular tract of land, located just north of the southern boundary of the city, and is uniform in width, but slightly longer in length than the four blocks of platted ground lying immediately north of it; that it is not irregular in any way in its four boundary lines except for a little tract of 100 by 50 feet where a filling station was located on the south edge of the property.

The map, exhibit No. 1, also shows that Clay Avenue, immediately west of this property, is a hard-surfaced street, which is curbed and guttered and is the main north and south street in the city, with a large number of places of business located on it; that three blocks north of this property the main line of the Burlington runs through the town, which must be crossed in getting to the main business section, beginning in the next block north of the tracks.

This tract of land has been within the city limits for over 35 years, and lying east of this property is the cemetery, which is owned by, and is within, the city, and there is a cement sidewalk leading to the cemetery, with which sidewalk the plaintiff could easily make a connection. The street on the east side of this tract of land is called Kearney

Avenue, which the city maintains as a graveled road leading to the cemetery. The evidence discloses that on the west side of this property and on Clay Avenue there are three street lights, one being directly in front of the plaintiff's house, which lights up his driveway; that there are two filling stations across the road from this tract of land, although they were not being operated when the evidence was taken.

The nearest fire plug to this property is one block north, and the city fire equipment includes 1,100 feet of good hose, with ample facilities to protect the plaintiff's property in case of fire. The only improvements on this tract are the house, barn, and chicken house. The plaintiff lives in this eight-room dwelling house, and has painted the same inside and out, and made other repairs. It is a modern house in that the plaintiff has his own water system, his own cesspool and furnace, and for electricity is connected with a public power district. While the property is not laid out in lots, there is a public sidewalk across the street west of the house.

Plaintiff testified that he had never made formal application, as required by the city ordinances, to be connected with the city water system, or with the city sewer, and the evidence was not definite as to the depth of the sewer line adjacent to his home.

The mayor testified that the population of Harvard by the 1940 census was 742, and that in a census recently taken the population had increased to 1,503 people. The assessed valuation of plaintiff's property is $1,680, of which $1,010 is for the buildings and $670 for the 9.28-acre tract.

Plaintiff on cross-examination admitted that he knew that the city had just added a new well to the waterworks system and had also recently extended the sewer line, and that he imagined that bonds for these improvements had been issued; that, while he was asking to have his property set out from the city for the purpose of having his taxes reduced, this was not his sole reason for making the application.

We find in a number of the decisions in cases of detachment of property from a city that it is said that the trial court made a personal inspection of the property, as well as of adjoining lands, and therefore that the finding of the trial court is entitled to great weight. Witham v. City of Lincoln, 125 Neb. 366, 250 N. W. 247; Keim v. Village of Bloomington, 119 Neb. 474, 229 N. W. 769; Chapin v. Village of College View, 88 Neb. 229, 129 N. W. 297. However, in the case at bar the record shows that the city requested the court to view the tract of land at the close of the evidence, and that the ruling on this request was: "THE COURT:—I have a very good idea, from the evidence, as to the situation out there; and I cannot see where it would serve any good purpose for me to take the time to view the property. The request will, therefore, be denied." Therefore, in the case at bar this court has the same evidence before it that the trial court had.

An examination of opinions in this class of cases shows that in one case, where the land was a quarter of a mile distant from the platted portion of the village, and was cut off therefrom by a creek, and was rural in character and low and unsuitable for any kind of village purposes, and was included exclusively to enable corporate authorities to levy and collect municipal taxes, it was declared to be unjust and inequitable to include it in the village. Village of Osmond v. Smathers, 62 Neb. 509, 87 N. W. 310. See, also, Barber v. Village of Franklin, 77 Neb. 91, 108 N. W. 146.

Where large tracts of land, of 60 acres and 150 acres, were used exclusively for farming, it was proper to detach them. Bisenius v. City of Randolph, 82 Neb. 520, 118 N. W. 127. Again, where it was unoccupied agricultural land, it was detached. MacGowan v. Village of Gibbon, 94 Neb. 772, 144 N. W. 808; Sole v. City of Geneva, 106 Neb. 879, 184 N. W. 900. In Joerger v. Bethany Heights, 97 Neb. 675, 151 N. W. 236, there were no village improvements, such as waterworks, electric lights, or other village conveniences, situated on or near either of the tracts detached.

This action is governed by section 17-414, R. S. 1943,

which provides that, if justice and equity require that a tract be disconnected from a city or village, a decree to that effect shall be entered.

In Haney v. Village of Hyannis, 97 Neb. 220, 149 N. W. 405, this court said: "The law upon the question involved is well settled in this state. In Village of Wakefield v. Utecht, 90 Neb. 252, we held: 'In an action to annex additional territory to a village, the burden is upon the village to establish by sufficient averments and evidence that the territory sought to be annexed will be benefited by the annexation, or that justice and equity require that such territory be annexed.' By analogy the holding must necessarily be that, in an action to disconnect territory, the burden is upon the petitioner to establish by sufficient averments and evidence that justice and equity require that such territory be disconnected."

In Englewood v. Jones, 71 Colo. 181, 204 P. 607, where the city had maintained a street adjoining the lands in question, doing considerable work in scraping and graveling at city expense, and including street lights thereon, it was held that the owners were precluded from having the land detached. See exhaustive annotations on detachment of land from cities in 62 A. L. R. 1029 and 117 A. L. R. 267.

Now, in the case at bar, public utilities are located adjacent to this property and capable of being used for its benefit. The plaintiff has improved streets on four sides of this property, one of them being with gutters, and has street lights in the street near his property. By these and many other benefits, including that of adequate fire protection, his property has entirely lost its character as farm land, and is and has been for many years distinctively part of this city.

In our opinion, there is such a community of interest between the tract sought to be detached and the other parts of the city that justice and equity require that this tract should not be set apart from the city.

For the reasons herein set out, the action of the trial court is set aside and the petition is dismissed for want of equity.

REVERSED AND DISMISSED.

FAY E. WILLIAMS, APPELLANT, V. VINCENT BECKMARK, APPELLEE.
21 N. W. 2d 745

FILED FEBRUARY 21, 1946. No. 32006.

1. **Ejectment**: PLEADING. A party may properly set up by his answer in an ejectment action the facts showing him to have an equitable right to a conveyance from the plaintiff, and if he proves himself the equitable owner and entitled to the possession, he will not only defeat the action but entitle himself to a decree of specific performance.
2. **Statute of Frauds.** When the contract of sale is oral and there has been no part performance on the part of the owner of the land, the contract is void under the statute of frauds and no right, equitable or otherwise, accrues to the purported purchaser.
3. **Improvements.** A claimant to compensation for improvements under the Occupying Claimants Act must have held the property under color of title to warrant a recovery.
4. **Adverse Possession.** By the weight of authority, some writing which purports to give title to the premises is essential to give color of title to an adverse occupant, and oral transactions, however effective they may be as between the parties, do not constitute color of title.

APPEAL from the district court for Morrill County: CLAIBOURNE G. PERRY, JUDGE. *Affirmed in part and in part reversed and remanded.*

Mothersead & Wright and *Paul Rhodes*, for appellant.

Auburn H. Atkins, for appellee.

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

CARTER, J.

This is an ejectment action. The defendant denied generally the allegations of the petition and alleged further, if the prayer of plaintiff's petition should be granted, that he was entitled to the benefit of the Occupying Claimants Act. The trial court entered an order ejecting the defendant from the premises and fixing the damages for the wrongful possession at $191.66. The trial court further found that defendant had placed lasting and valuable im-

provements on the premises and was entitled to the benefit and protection of the Occupying Claimants Act. The plaintiff appeals from that part of the judgment granting relief under the latter act. The defendant cross-appeals from that part of the judgment ejecting him from the premises.

The evidence shows that on December 6, 1943, the property in question was sold at a referee's sale growing out of a partition suit. One Victor Anderson was the high bidder with a bid of $2,025. It appears that Anderson made the bid on behalf of Fay E. Williams, the attorney for the plaintiff in the partition suit, and that Williams paid the amount of the bid to the referee. Subsequently, Anderson conveyed his interest to Williams by quitclaim deed. On the day of the sale Williams informed Lawrence A. Fricke, the referee, that if any of the bidders at the sale wanted to take the property at the amount Anderson bid it in, they could have it by complying with the terms of the sale. Later in the same day, Williams directed a letter to Fricke with reference to the transaction, in which he said in part: "If I have to go through with the deal, I will want you to sell the property at the first opportunity for enough to return to me my investment, and your commission for selling it." On January 8, 1944, Fricke sold the property to Vincent Beckmark, the defendant, for $2,500 and agreed to give a warranty deed and to furnish an abstract showing good title. Defendant gave Fricke a check for $1,000 which was cashed by Fricke on March 23, 1944. Defendant took possession on March 5, 1944, at the direction of Fricke and proceeded immediately to make extensive alterations and repairs to the house located on the premises.

It is the contention of the defendant that a valid and binding contract of sale between Williams and Beckmark was made. It is the law that one may set up by his answer in an ejectment action the facts showing him to have an equitable right to a conveyance from the plaintiff, and if he prove himself equitably the owner, and entitled to the possession, he will not only defeat the action but entitle himself to affirmative relief in the form of a decree requiring the

plaintiff to specifically perform his contract. Dale v. Hunneman, 12 Neb. 221, 10 N. W. 711.

This phase of the case must turn on the question whether defendant had a valid contract giving him an equitable right to a conveyance enforceable in a court of equity. No written contract was ever executed. It is a well-known provision of our statutory law that a contract for the sale of real estate is void unless the contract or some note or memorandum thereof be in writing and signed by the party by whom the sale is to be made. Sec. 36-105, R. S. 1943. Defendant contends, however, that there was sufficient part performance to require specific performance of the oral contract. In this respect we are obliged to say that there was no meeting of the minds sufficient to make a contract, either oral or written. The transaction between Beckmark and Fricke was nothing more than an offer to purchase for $2,500 provided a warranty deed and a sufficient abstract showing good title was forthcoming. When the offer was transmitted to Williams he refused to give a warranty deed or to furnish an abstract showing good title. When he learned that Beckmark was in possession, he immediately objected thereto. At no time did Williams and Beckmark ever agree upon the terms of the transaction. The down payment of $1,000 was never accepted by Williams. He did nothing to ratify the transaction. He acquiesced in nothing that could be construed as a confirmation of the sale. The cases cited by defendant are not in point. The rule is that specific performance of a parol contract will be enforced by a court of equity where one party has wholly and the other partly performed it, and its nonfulfillment on the one hand would amount to a fraud on the party who has fully performed. The cases cited by defendant sustain this principle: Kofka v. Rosicky, 41 Neb. 328, 59 N. W. 788; Morrison v. Gosnell, 76 Neb. 539, 107 N. W. 753; Hanlon v. Wilson, 10 Neb. 138, 4 N. W. 1031.

The difficulty with defendant's theory is that Williams did not give nor authorize the giving of possession to the defendant. Plaintiff has made no binding contract nor has

he performed or partially performed any purported agreement. Clearly, the defendant cannot by his own unilateral action put himself in a position to invoke the powers of a court of equity when the defendant has made no binding agreement and has so asserted at every stage of the proceedings.

The only oral contract made was between the defendant and Fricke. The latter had no authority to sell the property and agree to warrant the title and contract to furnish a good title. The letter of December 6, 1943, hereinbefore quoted in part, could be nothing more than an authorization to find a buyer. The case is very similar in its facts and the application of the law as Horn v. Stuckey, *ante* p. 625, 20 N. W. 2d 692.

We think the trial court acted correctly in denying the specific performance of the alleged parol agreement and in holding that plaintiff was entitled to possession for the reason that defendant could show no facts entitling him to an equitable conveyance of the property.

The plaintiff claims that the trial court erred in granting relief to the defendant under the Occupying Claimants Act. Sec. 76-301, R. S. 1943. That act provides in part: "Any person claiming title to real estate, whether in actual possession or not, for which he can show a plain and connected title, in law or equity, derived from the records of some public office, from the United States, or from this state, or anyone who has derived title from any such person by devise, descent, deed, contract or bond, shall not be evicted or turned out of possession of such real estate. His claim or title shall not be set aside or canceled by any court in any proceedings brought or commenced by any person setting up and proving an adverse and better title or claim to such real estate, until he shall be fully paid the value of all lasting and valuable improvements made upon such real estate by him or by those under whom he claims, * * * ."

We think it is fundamental that a claimant to compensation for improvements under this act must have held the property under color of title. An authoritative text defines the words "color of title" as follows:

"The words 'color of title' mean that which is appearance of title, but which in reality is not title. Color of title may be said to be a writing, upon its face professing to pass title, but which does not do it, either from a want of title in the person making it, or from the defective conveyance that is used—a title that is imperfect, but not so obviously imperfect that it would be apparent to one not skilled in the law. It has been declared that any instrument having a grantor and grantee, and containing a description of the lands intended to be conveyed, and apt words for their conveyance, gives color of title. Thus, one entering into possession of land under a deed which is afterward adjudged to be void and set aside for want of delivery by the grantor may, nevertheless, be regarded as holding adversely by color of title founded on a written instrument.

"There can be no color of title in an occupant who does not hold under any instrument, proceeding, or law purporting to transfer to him the title or to give him the right of possession. One who mistakes the location of his own lot and erects improvements on the adjoining property on the strength of his own survey, and notwithstanding warnings as to the true ownership, does not have color of title. Apart from a few jurisdictions in which it is recognized that color of title may exist in the absence of a writing, the rule supported by the authorities is that a writing of some sort purporting to give title is an essential of color of title." 27 Am. Jur., Improvements, s. 11, p. 267.

In Carter v. Brown, 35 Neb. 670, 53 N. W. 580, this court said: "But there is still a more serious objection to his recovery and one which goes not only to the claim for taxes paid by Lantry and his grantors, but to the claim for improvements, and taxes paid by the plaintiff in error, viz., that he is not shown to have any such title to or interest in the premises in controversy as will entitle him to the benefits of occupying claimants act. That law was intended for the protection of those occupants of real estate only who have improved the same or expended money for taxes thereon, while relying in good faith upon such title as is

mentioned in the act, and its provisions will not be extended to cases which cannot by a reasonable construction be held to be within their terms. (King v. Harrington, 18 Mich. 213; R. Co. v. Hardenbrook, 21 Kan., 440.) In the last named case it is said by Judge Valentine that 'In order to get the benefits of the occupying claimants act the records must show *prima facie* at least that at the time he made the improvements on the land he had an interest therein, and that such interest was of that high character which may properly and rightfully be denominated in law or equity a title. No interest less than an apparent title would be sufficient.' The provision of our statute is: 'That in all cases where any person claiming title to real estate, whether in actual possession or not, for which such person can show a plain and connected title in law or equity derived from the records of some public office or from the United States or from this state, or derived from any such person by devise, descent, deed, contract, or bond, such person or persons claiming or holding as aforesaid shall not be evicted or turned out of possession,' etc. What plaintiff in error was required to show was a plain and connected title in law or equity derived from the records of some public office or from another so claiming or holding by contract or bond."

In Flanagan v. Mathisen, 78 Neb. 412, 110 N. W. 1012, this court said: "The so-called 'Occupying Claimant's Act' (laws 1883, ch. 59), affording protection to persons not in the possession of disputed lands who have paid taxes and made lasting improvements thereon in good faith, claiming title to the same, and having an apparent title thereto derived connectedly by the public records from the United States or this state, is valid, and is applicable to lands of which adverse claimants had actual title at the time of its enactment."

In Sandoval v. Perez, 26 N. M. 280, 191 P. 467, a case where the defendant claimed to have entered the land under a parol contract of sale, the court said: "It is appellant's contention that a writing is not essential to color of title, and that actual adverse possession by virtue of which the

occupant claims ownership is under color of title. The statute (section 3365, Code 1915) requires the adverse possession to be under 'color of title.' An extended note will be found to the case of Brooks-Scanlon Co. v. Childs, 2 A. L. R. 1453, in which the author of the note states the prevailing rule in the United States as follows:

'By the weight of authority, same writing which purports to give title to the premises is essential to give title to an adverse occupant; and oral transactions, however effective they may be as between the parties, do not constitute color of title.' "

Other cases supporting this view are: Schimpf v. Rhodewald, 62 Neb. 105, 86 N. W. 908; Ohme v. Thomas, 134 Neb. 727, 279 N. W. 480; Marshall v. MacGregor, 314 Pa. St. 454, 171 A. 598.

It is plain to us that as defendant can produce no writing which purports to give title to the premises, he has no color of title sufficient to bring him within the terms of the Occupying Claimants Act. Generally stated, oral agreements, however effective they may be between the parties, do not constitute color of title.

Consequently, the trial court was in error in applying the Occupying Claimants Act in the present case. In our opinion that part of the decree of the trial court from which appellant appealed should be reversed. The decree in all other respects is affirmed.

AFFIRMED IN PART AND REVERSED IN PART.

IN THE MATTER OF THE ESTATE OF CHESTER J. LIENHART, DECEASED.

C. LOYD LIENHART, APPELLEE, V. JAMES D. CONWAY ET AL., EXECUTORS, EMMA J. LIENHART ET AL., LEGATEES, APPELLANTS.

21 N. W. 2d 749

FILED FEBRUARY 21, 1946. No. 31995.

1. Wills. By statute, if a testator makes provision in his will for the payment of his debts, expenses of administration, or family expenses, they shall be paid according to the provisions of the will, and out of the estate thus appropriated, or so far as the same may be sufficient.
2. ———. Courts will give effect to the true intent of a testator so far as it can be collected from the whole instrument, if such intent is consistent with established rules of law.
3. ———. Where encumbered real estate is devised in a will without expression of any intent with regard to an encumbrance thereon it will be presumed that the devisee shall take the real estate freed from the encumbrance by payment out of the personal estate if the personal estate shall be sufficient for that purpose.
4. Wills: EXECUTORS AND ADMINISTRATORS. The personal estate of a deceased person is primarily liable for all debts created or personally assumed by him, whether secured by mortgage on real estate or not, and heirs and devisees have the right to require the payment of any such debts out of the personal estate.
5. ———: ———. A mortgage indebtedness against devised real estate contracted or assumed by a testator is a debt within the meaning of section 30-230, R. S. 1943, and is payable out of the personal estate.
6. ———: ———. The devisee of real estate against which there is a mortgage indebtedness properly payable out of the personal estate of a testator may in equity require payment out of such estate and the action is not controlled by the statute of limitations relating to the filing of claims against estates.

APPEAL from the district court for Adams County: EDMUND P. NUSS, JUDGE. *Affirmed.*

Blackledge & Conway, for appellants.

James E. Addie, for appellee.

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

YEAGER, J.

Chester J. Lienhart of Adams County, Nebraska, died testate in the county of his residence on November 11, 1943. His estate was probated in the county court of Adams County. He died seized of a quarter section of land in Hall County, Nebraska, which by the will was devised to C. Loyd Lienhart, his brother. At the date of his death there was a note outstanding signed by the decedent and his wife for $5,000 secured by mortgage on the land devised. It appears from the briefs but not from the record here that there were also unpaid taxes against the land. The note and taxes were not paid out of the personal estate. On November 9, 1944, C. Loyd Lienhart filed an application in the county court in the probate proceeding the purpose of which was to require that the indebtedness secured by the mortgage and the taxes be paid out of the personal estate so as to permit him to receive the devise free from the encumbrance and the taxes. No claim was ever filed by the payee of the note.

The application was sustained and judgment was rendered accordingly. From that proceeding appeal was taken to the district court. The district court sustained the judgment of the county court. From the judgment of the district court Emma J. Lienhart, residuary legatee and devisee, and the executors and the administrator with the will annexed have appealed. However in the appeal they abandon the contention that the taxes, if any, against the land were not a proper charge against the personal estate. They limit their presentation here to the sole question of whether or not the payment of the note should be required out of the personal estate.

The facts upon which the decision must depend are not in dispute. The pertinent facts in addition to those already related are the following: Chester J. Lienhart was a man of considerable means. At the time of his death he was pos-

sessed of real estate the value of which was in excess of $100,000. He owned personal property of the approximate value of $44,000. Personal obligations charged against his estate approximated $34,000.

Some time prior to July 3, 1943, in his own handwriting, he prepared a last will and testament in which he made a disposition of his entire estate. The will was dated July 3, 1943, and on that day signed. It is referred to as a holographic will, being entirely in the handwriting of the deceased. No question is raised as to its validity. In the will the southwest quarter of section 35, township 11, range 12, in Hall County, Nebraska, was devised to C. Loyd Lienhart, his brother. No reference was made to the $5,000 note or the mortgage given for its security.

In December 1936, the deceased purchased the quarter section of land. At the time there was a $6,000 mortgage against it in favor of the Mutual Benefit Life Insurance Company which deceased did not assume. During the existence of the mortgage he paid $1,000 thereon. On February 1, 1937, a loan was obtained in the amount of $5,000 from the Prudential Insurance Company. A note in that amount and a mortgage on the land in question to secure its payment were executed by deceased and his wife and delivered to the Prudential Insurance Company. The previous mortgage was liquidated with the $5,000.

At the time of the death of Chester J. Lienhart the debt was unpaid and the note and mortgage were in full force and effect.

Two contentions are presented by the appeal. The first is that in no event may the indebtedness represented by this note and mortgage be a proper charge against the personal estate but the mortgagee must look for payment to the security of his mortgage. The second is that assuming that in the proper time payment out of the personal estate could have been enforced, enforcement is barred for failure to file claim therefor against the estate of the decedent.

As to the first contention section 30-230, R. S. 1943, which is a part of the article on wills, provides: "If the testator

shall make provision by his will, or designate the estate to be appropriated for the payment of his debts, the expenses of administration, or family expenses, they shall be paid according to the provisions of the will, and out of the estate thus appropriated, or so far as the same may be sufficient."

The will provides that all stocks and bonds except government bonds, all farms except those specifically devised including farms held in partnership, and all valuable personal property except that disposed of by bequest, shall be sold within a year.

The will further provides that from proceeds of such sales the personal indebtedness, if any, taxes due, funeral expenses, a reasonable sum for marking the grave of deceased, and special cash bequests should be paid.

There is no question that the value of the property thus required to be converted into cash was sufficient for the purposes declared including the note and mortgage of $5,000 against the quarter section of land devised to C. Loyd Lienhart.

If this note and mortgage is not a "debt" within the meaning of section 30-230, R. S. 1943, and was not "personal indebtedness" within the meaning of the will then it never became a charge against the personal estate. Otherwise it would, subject however to the result of our later observations on the statute of limitations pertaining to the filing of claims in probate proceedings.

A well-recognized rule in the interpretation of wills is that the court will give effect to the true intent of the testator so far as it can be collected from the whole instrument, if such intent is consistent with established rules of law. Lehman v. Wagner, 136 Neb. 131, 285 N. W. 124; Martens v. Sachs, 138 Neb. 678, 294 N. W. 426, 134 A. L. R. 356.

The rule of law obtaining in this court is that where encumbered real estate is devised in a will without the expression of any intent with regard to the encumbrance it will be presumed that the devisee shall take the real estate freed from encumbrance by payment out of the personal

estate if the personal estate shall be sufficient for that purpose. Patrick v. Patrick, 72 Neb. 454, 100 N. W. 939.

Another statement of legal rule applicable here is that the personal estate of a deceased person is primarily liable for all debts created or personally assumed by him, whether secured by mortgage on real estate or not, and heirs and devisees have the right to require the payment of any such debts out of the personal estate. Schade v. Connor, 84 Neb. 51, 120 N. W. 1012.

These rules have never been departed from in the later decisions of this court, and no sufficient reason has been advanced for a departure in this case.

The appellants contend that the case at bar is not governed by the rules announced in the cited cases. Their theory in this connection is that the debt secured by the mortgage was not the debt of the decedent and that it had not, within the meaning of Schade v. Connor, *supra,* been assumed by him.

It is true that the debt against the land at the time of purchase was never assumed, but that debt was entirely liquidated, the mortgage was released, and a new debt secured by mortgage was created which was a primary obligation of the deceased. Under no reasoning or authority can it be said that the note for $5,000 payable to the Prudential Insurance Company was not a debt of the deceased who was maker thereof. It became, on his death, payable out of his personal estate.

The question of whether or not the appellee is entitled to have the indebtedness paid out of the personal estate, no claim having been filed therein, has been previously determined in Schade v. Connor, *supra,* adversely to appellants. In addressing itself to this question this court said: "It is true that the mortgage debt was, in a way, a claim which might have been filed against the estate, but the mortgagee was not required to pursue that remedy. * * * The claim was not so presented, and the filing of the cross-petition herein is not the presentation of the claim against the estate. It constitutes a proceeding in equity to enforce the

liability incurred by the executor and residuary legatee by his failure and neglect to pay off and discharge the mortgage in question. Having by his conduct made the claim his personal debt, equity will require the executor and residuary legatee to pay off and discharge the mortgage for the benefit of the owner of the fee of the real estate, and the action is not barred by the statute of limitations."

We therefore hold that the mortgage indebtedness in question here is a "debt" within the meaning of section 30-230, R. S. 1943, and "personal indebtedness" within the meaning of the will and is payable out of the personal estate of the decedent. We further hold that enforcement of payment out of the personal estate is not barred by the statute of limitations.

The judgment of the district court is accordingly affirmed.

AFFIRMED.

ELIZABETH FRANCES BOX, APPELLEE, V. WALTER G. BOX ET AL., APPELLEES, AND STELLA MAE MCLAUGHLIN ET AL., APPELLANTS.

21 N. W. 2d 868

FILED FEBRUARY 21, 1946. No. 31973.

1. Trusts. A constructive trust is a relationship with respect to property subjecting the person by whom the title to the property is held to an equitable duty to convey it to another on the ground that his acquisition or retention of the property is wrongful and that he would be unjustly enriched if he were permitted to retain the property.
2. ———. If a party obtains the legal title to property by virtue of a confidential relation, under such circumstances that he ought not, according to the rules of equity and good conscience as administered in chancery, hold and enjoy the benefits, out of such circumstances or relations, a court of equity will raise a trust by construction and fasten it upon the conscience of the offending party and convert him into a trustee of the legal title.
3. Statute of Frauds: TRUSTS. Where the owner of an interest in land transfers it inter vivos to another upon an oral trust in

favor of the transferor or upon an oral agreement to reconvey the land to the transferor, and the trust or agreement is unenforceable because of the Statute of Frauds, and the transferee refuses to perform the trust or agreement, he holds the interest upon a constructive trust for the transferor, if the transferee at the time of the transfer was in a confidential relation to the transferor.

4. Trusts. In such cases the promise need not be express in order to raise a constructive trust, actual cooperation and silent acquiescence on the part of the grantee being sufficient where he has knowledge of the grantor's intention and understanding of the transaction.

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

Sterling F. Mutz, for appellants.

A. L. Tidd, Perry, Van Pelt & Marti, and *Walter H. Smith,* for appellees.

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

CHAPPELL, J.

The issues in this action arose out of a suit in equity to partition 240 acres of farm land in Cass County. Plaintiff therein claimed to own an undivided two-fifths interest in the land. Three brothers of plaintiff and the respective wives of two of them were made defendants. It is conceded that the brothers each owned an undivided one-fifth interest. A sister, who was not made a party defendant, intervened alleging that she was the owner of an undivided one-fifth interest claimed by plaintiff. The trial court found generally for plaintiff and against intervener who, after her motion for new trial was overruled, appealed to this court.

Her assignments of error are substantially: (1) That the trial court erred in holding that a deed made, executed, and delivered to plaintiff by a trustee in bankruptcy on October 14, 1940, conveyed an absolute fee simple title of an undivided two-fifteenths interest to plaintiff; (2) that the trial court erred in holding that a quitclaim deed made, executed,

and delivered to plaintiff by intervener and her husband on September 27, 1940, conveyed an absolute fee simple title to an undivided one-fifteenth interest to plaintiff; and (3) that the trial court erred in its refusal to grant a new trial upon the ground of newly discovered evidence concerning the value of the one-fifth interest involved. We sustain intervener's second contention for the reason that under the circumstances plaintiff holds a one-fifteenth interest for the benefit of intervener under a constructive trust. We find, however, that intervener's first and third assignments are without merit.

For convenience and clarity, we will first discuss the third assignment. There was no contest between the parties upon the question of the right to partition the land and, after entry of the decree here involved, the trial court ordered it sold. In conformity therewith it was sold on March 17, 1945, for a price netting each one-fifth interest approximately $8,000. Upon the basis of that surprising result intervener now claims the right to a new trial because of newly discovered evidence of value. The transaction involved occurred in 1940. At the trial the parties each introduced evidence of value in 1940, showing that the one-fifth interest was then worth from $2,700 to $4,800. Without discussing the proposition at length, we conclude that the third assignment is without merit because intervener failed to make a sufficient showing of reasonable diligence and the proposed evidence, whether material or not, would be merely cumulative without changing the result in any event. Smith v. Goodman, 100 Neb. 284, 159 N. W. 418.

We turn then to the principal questions presented by the first two assignments. Decision involves primarily a determination of facts and the application of well-established rules of law. There is not much dispute in the evidence as it affects the material issues. We are concerned primarily then with the application of principles of equity to undisputed facts.

Substantially the evidence is as follows: Upon the death of their father, November 4, 1925, each of five brothers and

sisters inherited an undivided two-fifteenths interest in the old family home farm. Thereafter, upon the death of their mother, July 14, 1940, each inherited the remaining undivided one-fifteenth interest. There are two sets of improvements on the land. For many years plaintiff, single, together with her mother and a single brother, lived on the improved 160 acres and a married son lived as a tenant on the improved 80 acres. After the mother's death they continued to so occupy the property except that plaintiff lived with the single brother who was thereafter a tenant on the improved 160 acres. The intervener and her husband were tenants on a farm not far distant.

During their lifetime and until early in 1941, when the present controversy culminated, plaintiff and intervener, sisters, had a friendly and confidential relationship. Extending over a period of years plaintiff had loaned intervener money with which to surmount financial difficulties without either of them keeping close account of the amounts or disputing them.

In the early summer of 1939, intervener was having financial difficulties and became involved in litigation with creditors. On June 7, 1939, she made, executed, and delivered to plaintiff a real-estate mortgage upon her two-fifteenths interest to secure the payment of a preexisting debt for loans of money represented by two antecedently executed promissory notes in the total amount of $1,550. One note was for $700 at 5 percent, dated May 12, 1937, due in one year, upon which was endorsed: "Insterest Paid by cash 35 00 May 1-1939." The other was for $850 at 6 percent, dated May 1, 1939, due in five years. It was given as renewal of a note for like amount, dated June 8, 1934, due in one year, upon which was endorsed: "Insterest Paid by cash $51 00 May 1st. 1939." Intervener's husband did not join in the execution of the mortgage but it was duly filed of record June 8, 1939.

There appears in the evidence a release of that mortgage purportedly executed by plaintiff on June 17, 1939. Intervener testifies that it was executed and delivered to her by

plaintiff. However, it was never filed of record and without dispute the notes and mortgage were at all times retained by plaintiff. Concededly the debt represented thereby was not paid by intervener and we are unable to find in the record any plausible or satisfactory reason for the execution of the release. Be that as it may, we conclude that subsequent events set in motion by acts of intervener herself make it unnecessary to decide that question.

We have reference to the fact that on August 10, 1939, intervener filed voluntary proceedings in bankruptcy and was accordingly adjudged a bankrupt. Her entire assets at that time consisted of the undivided two-fifteenths interest inherited from her father. Her sworn schedule of unsecured indebtedness included $538 for rent and medical services and an unpaid judgment, dated June 12, 1939, for $1,354.34, together with $60 court costs.

Her sworn schedule of secured indebtedness included her debt to plaintiff in the amount of $1,550, represented by the two notes secured by the mortgage upon her undivided two-fifteenths interest. On September 6, 1939, plaintiff filed her claim thereon in the bankruptcy court to which the trustee, who was also counsel for the judgment creditor, filed objections, substantially denying validity of both the debt and the mortgage. It is conceded that the attorney who represented intervener in the bankruptcy proceedings also, without objection, represented plaintiff in filing her claim and thereafter until such proceedings were concluded.

In 1940, their attorney and plaintiff entered into negotiations with the trustee for a settlement with all the creditors and as a result the trustee offered to accept $1,200 upon condition that plaintiff withdraw her claim. This offer was communicated to the parties. Intervener being bankrupt and without funds was unable to make the payment or borrow any money for that purpose. Naturally the sisters conferred with each other and with their attorney concerning the situation, after which plaintiff made application to her banker for a loan of $1,200 with which to buy intervener's two-fifteenths interest from the trustee, obtain the

title thereto, and close the bankruptcy proceedings. It will be observed that only the two-fifteenths interest was ever involved in the bankruptcy but in the meantime intervener had inherited the other one-fifteenth interest. The title to the one-fifteenth interest never vested in the trustee because it was inherited by intervener more than six months after bankruptcy. See 4 Collier on Bankruptcy (14th ed.), sec. 70, p. 911.

The banker informed plaintiff in effect that he would lend her that amount of money only upon the entire two-fifths interest as security. He suggested that plaintiff acquire a quitclaim deed from intervener for that purpose and insisted that before he would make the loan, title to the entire two-fifths interest must be placed in plaintiff, clear of encumbrances.

Plaintiff so informed intervener and asked if she would give a quitclaim deed for that purpose. Intervener and plaintiff both consulted with their attorney who understood that the quitclaim deed was to be used only for temporary purposes and he advised intervener to execute the instrument. Thereafter, reposing confidence in plaintiff, she consented to do so. There is no competent evidence that intervener intended thereby to make a gift to plaintiff of her one-fifteenth interest. On the other hand there is no direct evidence of an express promise by plaintiff to hold it in trust for intervener or reconvey it to her after the $1,200 obligation was paid. Nevertheless, the parties were in a confidential relation involving a matter of common property. A two-fifteenths interest in the old farm home, upon which plaintiff then lived, was about to be sold for the benefit of creditors in the bankruptcy proceedings. Without doubt all of the parties understood clearly that the quitclaim deed was executed solely for the purpose of assisting plaintiff in obtaining a loan with which to save the two-fifteenths interest for herself, thereby satisfying her hazardous claim, as a preferred creditor of intervener, and preventing strangers to the family from obtaining an interest in the family property.

Plaintiff argues that at the time the quitclaim deed was executed intervener indicated she would rather have plaintiff get the property than her creditors. It would only be natural for intervener to make such a statement. However, we must remember in appraising it that only her two-fifteenths interest was ever involved in the bankruptcy proceedings as distinguished from the one-fifteenth interest thereafter acquired which her creditors could not take in any event. If the statement was made, we are convinced that intervener had reference solely to her two-fifteenths interest which was then at the disposal of her creditors all of which plaintiff subsequently acquired.

By prearrangement plaintiff, the intervener and her husband met in Plattsmouth on September 27, 1940, where plaintiff executed a release of the $1,550 mortgage. The release was duly filed of record December 21, 1940, but not until after the Nebraska State Bank, Weeping Water, Nebraska, had made the loan of $1,200 to plaintiff and the bankruptcy proceedings had been closed. On September 27, 1940, the intervener and her husband executed and delivered to plaintiff a quitclaim deed to all intervener's interest in the property. It is conceded that no consideration was given for the one-fifteenth interest included therein. It should be stated also that the quitclaim deed was never filed of record and, strange as it may seem, although admittedly executed and delivered to plaintiff and later given by her to the bank making the loan, it is now lost. There is no evidence pretending to quote any of its provisions but intervener says it was claimed and given as a mortgage to get the money. On September 27, 1940, plaintiff executed and delivered to the Nebraska State Bank at Weeping Water, her promissory note for $1,200, at 7 percent, due in one year, secured by a real-estate mortgage upon all the two-fifths interest and thereby obtained the loan. However, that mortgage was never filed of record.

On October 2, 1940, the trustee in bankruptcy gave plaintiff a receipt for $1,200 as purchase price of the two-fifteenths interest involved in the bankruptcy proceedings,

subject to the withdrawal of plaintiff's $1,550 secured claim and subsequent confirmation by the court. On that date the trustee filed application for authority to sell intervener's two-fifteenths interest to plaintiff upon those terms and plaintiff filed a withdrawal and release of her claim. On the same date the referee in bankruptcy mailed notices of the proposed sale and its terms to all creditors. No objections were filed and on October 14, 1940, the court entered an order authorizing and confirming the sale to plaintiff as proposed, subject to taxes, liens and encumbrances. On the same date the trustee executed and delivered his deed to plaintiff as authorized which was duly filed of record October 18, 1940. Thereafter, on October 30, 1940, an order was entered by the bankruptcy court allowing the trustee's final report, declaring first and final dividend to creditors, discharging the trustee, and closing the proceedings.

Thereafter, on November 1, 1940, plaintiff, in lieu of the note and mortgage dated September 27, 1940, made, executed, and delivered to the bank a new note for $1,200 at 7 percent, due September 27, 1942, and a new real-estate mortgage upon an undivided two-fifths interest in the property involved which was duly filed of record December 21, 1940.

On January 2, 1941, all five of the children met in the office of an attorney in Plattsmouth. There they jointly and severally made, signed, executed, and delivered two annual crop-sharing farm leases upon the property to the two brothers. There was no claim or suggestion by anyone at that time that intervener did not have an interest in the property.

It appears from the record that plaintiff paid all the interest and principal of the $1,200 note except the sum of $100 which was paid by intervener on April 14, 1941, out of her share of the personal property received from her mother's estate. Plaintiff admits such payment but contends that it represented attorney's fees and costs advanced by her to intervener in the bankruptcy proceedings. The trial court so found and we sustain that contention.

At the time this payment was made at the bank, however, intervener, in the presence of the banker, asked plaintiff to enter into a written contract of some sort demonstrating their true relationship with reference to the property. This the plaintiff refused to do and the confidential and friendly association between them became strained and subsequently severed. Shortly thereafter intervener offered to pay plaintiff the balance of the $1,200 note, claiming thereby to be entitled to all the one-fifth interest which plaintiff refused to concede or accept.

In the fall of 1941, plaintiff informed intervener's attorney that she would sell all of the one-fifth interest back to intervener for $3,000 but the offer was not given serious consideration.

Plaintiff has received all the rentals from the two-fifths interest less that proportionate share of taxes paid for the years 1941, 1942, and 1943. The net rentals for 1944 at the time of trial had not yet been divided and the amount thereof does not appear in the record. On June 3, 1943, the $1,200 note having been paid in full by plaintiff the mortgage given to secure its payment was released by the bank.

In the meantime during 1941 intervener having employed counsel was attempting to force a settlement of the controversy and on December 20, 1941, the partition action was filed by plaintiff. Intervener thereafter on January 17, 1942, filed her petition in intervention but the issues were not tried on the merits until January 3 and 5, 1945. The decree awarding judgment thereon was entered February 1, 1945.

Under the circumstances above recited we conclude that title to intervener's two-fifteenths undivided interest, involved in the bankruptcy proceedings, became vested in plaintiff absolutely by virtue of the deed from the trustee in bankruptcy and to that extent the decree of the trial court was correct. However, by reason of a constructive trust we must arrive at a different conclusion with regard to intervener's one-fifteenth undivided interest in the property which was not involved in the bankruptcy proceedings.

In that connection it is well established that: "A constructive trust is a relationship with respect to property subjecting the person by whom the title to the property is held to an equitable duty to convey it to another on the ground that his acquisition or retention of the property is wrongful and that he would be unjustly enriched if he were permitted to retain the property." Restatement of the Law, Trusts, ch. 1, s. 1, comment e, p. 5. See, also, Restatement of the Law, Restitution, ch. 9, s. 160, p. 640; 65 C. J., Trusts, s. 215, p. 454; Nelson v. Seevers, 143 Neb. 522, 10 N. W. 2d 349; O'Shea v. O'Shea, 143 Neb. 843, 11 N. W. 2d 540.

In Pollard v. McKenney, 69 Neb. 742, affirmed on rehearing at p. 753, 96 N. W. 679, 101 N. W. 9, this court said in part: "Thus if one person procures the legal title to property from another by fraud or misrepresentation, or by an abuse of some influential or confidential relation which he holds toward the owner of the legal title, obtains such title from him upon more advantageous terms than he could otherwise have obtained it, the law constructs a trust in favor of the party upon whom the fraud or imposition has been practiced. Again, if a party obtains the legal title to property by virtue of a confidential relation, under such circumstances that he ought not, according to the rules of equity and good conscience as administered in chancery, hold and enjoy the benefits; out of such circumstances or relations, a court of equity will raise a trust by construction and fasten it upon the conscience of the offending party and convert him into a trustee of the legal title." That statement was approved by this court as recently as O'Shea v. O'Shea, *supra*.

In Restatement of the Law, Restitution, s. 182, p. 730, it is said: "Where the owner of an interest in land transfers it inter vivos to another upon an oral trust in favor of the transferor or upon an oral agreement to reconvey the land to the transferor, and the trust or agreement is unenforceable because of the Statute of Frauds, and the transferee refuses to perform the trust or agreement, he holds the interest upon a constructive trust for the transferor, if * * *

(b) the transferee at the time of the transfer was in a confidential relation to the transferor, * * * ." See, also, Restatement of the Law, Trusts, s. 44, p. 135.

Lest it be argued therefrom that intervener cannot prevail because there is no direct evidence of an express promise or agreement by plaintiff to reconvey or hold the one-fifteenth interest in trust for intervener, we call attention to Wiseman v. Guernsey, 107 Neb. 647, 187 N. W. 55, wherein it was held: "Where a trust ex maleficio is based on a promise, the promise need not be expressly made, for actual cooperation or silent acquiescence may have the same effect."

In Restatement of the Law, Restitution, s. 160, comment a, p. 641, it is said: "On the other hand, a quasi-contractual obligation and a constructive trust closely resemble each other, the chief difference being that the plaintiff in bringing an action to enforce a quasi-contractual obligation seeks to obtain a judgment imposing a merely personal liability upon the defendant to pay a sum of money, whereas the plaintiff in bringing a suit to enforce a constructive trust seeks to recover specific property."

Referring to a constructive trust arising out of an oral promise to hold land in trust, or for a specified purpose, or to reconvey, it is stated in 65 C. J., Trusts, s. 223, p. 471: "Such a trust will arise, however, out of such a promise made in connection with the receipt of the legal title to property, provided the grantor's purpose is an honest one, * * * where confidential relations exist between the parties and there is no other consideration for the conveyance except the promise, or where the promise is the inducing cause of the conveyance, no other consideration being given, and is relied upon by the grantor, or where the conveyance is made as security for a debt and the value of the land exceeds the amount of the debt. The promise need not be express in order to raise a trust, silent acquiescence on the part of the grantee being sufficient where he has knowledge of the grantor's intention and understanding of the transaction." See, also, 65 C. J., Trusts, s. 215, p. 456.

As stated in 54 Am. Jur., Trusts, s. 225, p. 173: "While a confidential or fiduciary relationship does not in itself give rise to a constructive trust, an abuse of confidence rendering the acquisition or retention of property by one person unconscionable against another suffices generally to ground equitable relief in the form of the declaration and enforcement of a constructive trust, and the courts are careful not to limit the rule or the scope of its application by a narrow definition of fiduciary or confidential relationships protected by it. An abuse of confidence within the rule may be an abuse of either a technical fiduciary relationship or of an informal relationship where one person trusts in and relies upon another, whether the relation is a moral, social, domestic, or merely personal one. The origin of the confidence reposed is immaterial. A confidential relationship within the rule need involve neither a promise for the benefit of another nor an express fiduciary relationship."

We must conclude, as equity and justice require, that plaintiff at all times here involved held and now holds title to an undivided one-fifteenth interest in the property as a constructive trustee for intervener and the title thereto should be quieted in intervener without any liability to plaintiff upon the $1,200 note and mortgage paid by plaintiff. It follows as a matter of course that intervener is entitled to a one-fifteenth interest in the proceeds which resulted from the sale of the property by partition, plus her one-fifteenth share of the net rentals, being one-sixth of the amount actually received by plaintiff, from the property for each and all of the years, 1941, 1942, 1943, and 1944 with interest at 4 percent respectively from the dates of the receipt thereof.

For the reasons heretofore stated the cause is reversed and remanded with directions that the trial court take an accounting as to rents between plaintiff and intervener, upon the basis above set forth, and enter a judgment in favor of intervener and against plaintiff for such sum as thereafter may be found due her, all of which shall be due

and payable out of the plaintiff's share of the proceeds resulting from the partition sale. Further the trial court shall also enter an order awarding and distributing to intervener her one-fifteenth interest in the proceeds resulting from the partition sale. The costs of the proceedings in intervention and appeal therefrom are taxed equally between plaintiff and intervener. Other legal propositions are ably presented by counsel for the parties but upon our view of the case we find it unnecessary to discuss them.

REVERSED AND REMANDED WITH DIRECTIONS.

CARTER, J., dissenting.

Plaintiff and intervener were sisters. Intervener became financially involved. On August 10, 1939, she was adjudged a bankrupt. Among the assets listed in the bankruptcy proceedings was a two-fifteenths interest in the real estate involved in this suit. Plaintiff filed a secured claim in the form of a mortgage in the amount of $1,550 against the aforesaid two-fifteenths interest. Plaintiff admits that no consideration passed on the date the notes were given. She admitted she had no checks or other records showing that any indebtedness existed. She merely states that her sister had borrowed money from her at various times. Intervener for obvious reasons made no attempt to deny the validity of the notes. While the transaction has every appearance of having been carried out for the purpose of delaying and defrauding creditors, there is no issue tendered on this subject. It may be considered, therefore, as a circumstance only bearing upon the nature of the transaction.

The mortgage in question was executed on June 7, 1939, and recorded on June 8, 1939. The record shows that an action was pending in the district court for Cass County against the intervener when this mortgage was executed upon which a judgment for $1,354.34 was entered on June 12, 1939. On June 17, 1939, plaintiff executed a satisfaction of the mortgage dated June 7, 1939, in which it was stated that said mortgage was "fully paid, satisfied and discharged." In questioning plaintiff concerning this satisfaction of mortgage she made the following inconsistent

and incredible replies: "Q. Showing the witness Exhibit 11, a purported release of mortgage, I will ask you if you have ever seen that before? A. I don't ever remember of seeing it. Q. Was there ever anything said to you about releasing this mortgage, Exhibit 6, being the mortgage with the notes? A. No. Q. Do you recall Jack Hayward going over to Attorney Kile's office with you? A. I don't remember of it. Q. Do you recall at Kile's office, being told that there was a notary over in the Land Bank? A. I don't remember of it. Q. Do you recall Miss Dougan? Do you recall meeting her? A. No, I can't ever remember of meeting her. * * * Q. Now, I hand you Exhibit No. 11 and will ask you if that is your signature in the middle of the page? A. It looks like it. Q. Is that all the answer you care to give? A. That is all you asked me. * * * Q. Isn't this Exhibit 11 the one that was wiping out that prior transaction because it didn't go through? A. No, Sir. Q. What were you doing? A. That is what I would like to know. Q. You don't even know how you happened to give a release? A. I don't." I submit that the foregoing evidence shows beyond the peradventure of doubt that the mortgage was given to delay and defraud the creditor about to obtain a judgment in Cass County, and, after it failed to deter the entry of judgment, plaintiff executed a satisfaction of the mortgage. The satisfaction of mortgage not having been recorded, plaintiff filed the mortgage and notes in the bankruptcy proceeding as a secured claim for the evident purpose of aiding the intervener as against her creditors. The attorney for the intervener confirms the statement that the mortgage was not given in good faith when he testifies that it was included in the list of assets and liabilities filed in the bankruptcy estate by mistake. It is noteworthy that the trustee in bankruptcy filed objections to the allowance of the mortgage as a valid claim and that plaintiff, when summoned to testify by deposition concerning its validity, refused to appear and so do.

At this stage of the proceedings intervener's attorney negotiated a compromise settlement with the trustee in bankruptcy whereby the trustee would sell intervener's in-

terest for $1,200, provided the withdrawal of the mortgage filed as a secured claim could be secured. Here again it was evident that plaintiff preferred to settle the controversy with the trustee rather than testify concerning the validity of the mortgage and the purpose for which it was given. In any event, the attorney advised intervener of the offer and she immediately contacted the plaintiff with reference to it. Plaintiff went to her banker, who agreed to loan the $1,200 if the title could be cleared to intervener's interest in the property by a quitclaim deed from intervener to plaintiff. The deed was executed, delivered to the banker, never recorded and is alleged to be lost. On the same day the quitclaim deed was executed, a second release of the mortgage dated June 7, 1939, was executed and recorded on December 21, 1940. On September 27, 1940, plaintiff executed a note and mortgage for $1,200 to the bank, secured by the two-fifths interest. This mortgage was never recorded. Plaintiff took the $1,200 and paid it to the trustee in bankruptcy, who in turn executed and delivered a trustee's deed to plaintiff. On November 1, 1940, a new note and mortgage for $1,200 was executed and delivered to the bank and recorded on December 21, 1940. It is clearly apparent that the quitclaim deed and the mortgage of September 27, 1940, were temporary expedients and never treated as having any permanent effect. The mortgage of November 1, 1940, covering a two-fifths interest in the real estate necessarily covered the two-fifteenths interest the intervener acquired by inheritance from her father and the one-fifteenth interest she subsequently acquired upon the death of her mother after she had received her discharge in bankruptcy. The trustee's deed covered "All of Stella Mae McLaughlin's undivided interest" in the property involved. It is evident, therefore, that plaintiff claims the one-fifteenth interest which plaintiff acquired subsequent to the bankruptcy proceeding. While the additional one-fifteenth interest may have been inadvertently included in the mortgage, it is evident that plaintiff claims it as her own and thereby indicates an intent to get all she can from her helpless sister.

There is further evidence in the record that plaintiff took the title in her own name for the purpose of negotiating a loan to protect her sister's interest. On January 2, 1941, the property in question was leased to a brother of these two sisters. Intervener was named as one entitled to receive a share of the rents. She signed the leases along with the others having an interest in the property. If plaintiff was, as she now claims, the owner of intervener's one-fifth interest, why was intervener requested or permitted to sign the leases as one of the lessors? The answer is self-evident and in line with the intent and purpose of the parties at that time—that plaintiff was holding the title for intervener for the sole purpose of obtaining the $1,200 which the banker was willing to make to her if she held the title but which he was unwilling to make to the intervener because of her financial circumstances.

The record shows that when the mother's estate was probated the intervener received $105.35 as her share of the personal estate. She went to the bank and applied $100 on the $1,200 note. No protest appears in the record on the part of the plaintiff. She now attempts to avoid the unfavorable inference growing out of this act by asserting that it was a repayment of attorney's fees, costs, and expenses. The difficulty with this statement is that there were no attorney's fees, costs, or expenses included in the $1,200 note, as both parties well knew. The money was paid in at the bank by the intervener for credit on the note given to obtain the money for the redemption of intervener's property from the trustee in bankruptcy. In this, plaintiff acquiesced until the necessity for a more favorable explanation became pressing. In any event, plaintiff's evidence is self-discrediting for another reason. She claims the $100 payment includes mileage, recording costs, and the expense of drawing papers. If plaintiff's story is true, these are expenses she should have paid herself. The fact that she charges them to intervener indicates the intervener and not the plaintiff was the real purchaser of the interest of the trustee in bankruptcy.

Nowhere in this record does plaintiff claim that she owned this property from the date she received this trustee's deed. Intervener testifies that she talked with plaintiff about reconveying the title and that plaintiff made no claim of title in herself. The record shows that the two sisters went to the bank for the evident purpose of making out a contract showing the true relations of the parties. There the plaintiff changed her mind and said: "I have signed all the papers I am going to sign." That the foregoing statement is true is borne out by other testimony in the record on the part of the plaintiff herself. On cross-examination plaintiff gave the following evidence: "Q. When she came to the house, will you, as nearly as you can reconstruct, tell the Court what she said to you with reference to paying off the indebtedness? A. She came and wanted to buy her share back. Q. What did she say about that? A. She said she could borrow the money to buy her share back and I wanted to know where she could get her money from and she said she wouldn't tell me, that was all right. Q. What did you say? A. I wanted to know who was going to be in partnership with me." At this stage of the proceedings plaintiff was not asserting title in herself but was putting off the intervener on the theory that she did not have to convey the property on repayment of the money due her if it might result in a partner of whom she disapproved. On cross-examination the plaintiff also testified to the following: "Q. After you said you would not do so, or did you tell her you wouldn't do that at all? A. Do what? Q. Redeed the property back to her if she paid the money you advanced? A. I just didn't tell her right out that I would or wouldn't, as I remember." I submit that this is not the testimony of an owner claiming title from the time she obtained the deed. She further testified on cross-examination: "Q. At that time did you hear Mrs. McLaughlin say to you as a sister, 'I want you to be reimbursed for every item of money that you have spent, including 7% interest on the amount I borrowed,' didn't she tell you that? * * * A. She might have. Q.What was said in response to that? A. I probably said—

I just don't remember the exact words of what I did say." I submit, also, that this is the faltering testimony of one who was not then claiming title in herself but who has now changed position in that respect.

To me, this is a clear case of fraud, amply demonstrated from the record. The intervener, because of financial difficulties, went to her sister for aid. The plaintiff was then willing to help her save the inheritance she obtained from her father. After intervener trusted the plaintiff to the extent of conveying title to her for the purpose of raising the money necessary to save it, the plaintiff, seeing an opportunity to take advantage of the position of her sister, seized upon it as a means of acquiring a large profit at the expense of her sister. At the time of the origin of the transaction, the intervener's interest in the property was worth from $2,700 to $4,800. It actually sold for $8,249 at partition sale. Under the majority opinion the plaintiff obtains two-thirds of this interest for $1,200 and the release of a mortgage for $1,550, which had already been solemnly "paid, satisfied and discharged" by an instrument acknowledged to be such before a notary public. The record shows also that the $1,200 was largely paid off by rentals obtained from the property. The transaction reeks with fraud and imposes a duty upon a court of equity to assert its powers in compelling the plaintiff to remain faithful to her trust by reconveying the property and accounting for the rents. The intervener should likewise be required, as she offers to do, to repay all moneys owing to the plaintiff with interest. Such is my conception of equity when one attempts to disavow a trust relation in response to a selfish urge by mulcting the beneficiary who had reposed confidence in the honesty and integrity of the trustee. I submit that the opinion of the majority has the effect of condoning a grievous fraud when its duty requires that it protect a person who finds himself in a precarious position because he trusted one whom subsequent events demonstrate he should not have trusted.

SIMMONS, C. J., concurs in this dissent.

MAE MCINTOSH, APPELLANT, V. UNION PACIFIC RAILROAD COMPANY, APPELLEE.

22 N. W. 2d 179

FILED MARCH 1, 1946. No. 31987.

1. **Trial.** A motion for a directed verdict must for the purpose of decision thereon be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor, and to have the benefit of every inference that can reasonably be deduced from the evidence.
2. ———. Where the facts adduced to sustain an issue are such that reasonable minds can draw but one conclusion therefrom, it is the duty of the court to decide the question, as a matter of law, rather than submit it to a jury for determination.
3. **Evidence.** The testimony of a plaintiff that in proceeding to cross a railroad crossing she did not hear the bell or whistle of an approaching train prior to the time of the collision between the train and her automobile, without further explanation, is not sufficient to overcome positive evidence of reliable and competent witnesses that the bell was ringing and the whistle blowing.
4. **Railroads: NEGLIGENCE.** It is the duty of a traveler on a highway, when approaching a railroad crossing, to look and listen for the approach of trains. He must look, where, by looking, he could see, and listen, where, by listening, he could hear, and if he fails without reasonable excuse to exercise such precautions, then he is guilty of contributory negligence more than slight, as a matter of law, and no recovery can be had for damages resulting from a collision with a passing train.
5. ———: ———. A traveler upon a public highway, who attempts to cross a railroad track in front of an approaching train, if he knew, or ought to have known, of its approach, is guilty of contributory negligence as a matter of law which will prevent a recovery for resulting injuries, if the approaching train was in such close proximity to the crossing that a reasonably prudent person could not fairly expect to cross in safety ahead of it.
6. ———: ———. If a railroad company, in the ordinary conduct of its business, leaves freight cars on yard tracks which partially obstruct the view of persons passing over the crossing, it does not of itself render the railroad company liable for accidents occurring there, but merely imposes the duty of greater care both upon the company and upon those who use the highway.

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

Bolus J. Bolus, for appellant.

T. F. Hamer, G. C. Holdrege, and *R. B. Hamer,* for appellee.

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

MESSMORE, J.

This is an action at law to recover damages to plaintiff's automobile, and for personal injuries sustained by her in a collision between such automobile and a train owned and operated by defendant.

The plaintiff's petition, for the purpose of determining this appeal, alleged substantially that the collision and damages proximately resulted from the negligence of the defendant, caused by: (1) Placing and maintaining on yard tracks, composing a part of the crossing, box cars and coal cars obstructing the view of this plaintiff and other motorists from seeing trains coming from the west, and by failing to remove the box cars and coal cars so stationed on the yard tracks prior to the arrival of a passenger train coming from the west and proceeding east, so that plaintiff's view of the oncoming passenger train would not be obscured; (2) failing to warn the plaintiff, and negligently failing to blow a whistle or ring a bell continuously at 80 rods west of the intersection of the crossing and its tracks to warn the plaintiff of the approach of its train coming from the west, contrary to section 74-573, R. S. 1943; and (3) failing to stop the train coming from the west before it collided with plaintiff's automobile, and in time to avoid striking the plaintiff.

The amended answer of the defendant contained a general denial; admitted a collision occurred, but denied that the collision was due to any negligence on the part of the defendant; and alleged that the collision was caused by the negligence of the plaintiff.

The case proceeded to trial before a jury. At the conclu-

sion of all the evidence the defendant moved for a directed verdict, for the reason the evidence is insufficient on which to base a cause of action in favor of the plaintiff and against the defendant, and for the further reason that the undisputed evidence shows plaintiff to be guilty of such contributory negligence as to bar any recovery against the defendant as a matter of law. The court sustained the motion. From the overruling of the motion for new trial, the plaintiff appeals, and predicates error on sustaining defendant's motion for a directed verdict as being contrary to the evidence and the law.

The established rule is that: "A motion for a directed verdict must for the purpose of decision thereon be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor, and to have the benefit of every inference that can reasonably be deduced from the evidence." Roberts v. Carlson, 142 Neb. 851, 8 N. W. 2d 175; Parks v. Metz, 140 Neb. 235, 299 N. W. 643; Loudy v. Union P. R. R. Co., *ante* p. 676, 21 N. W. 2d 431.

In addition to the foregoing rule, it is necessary to bear in mind that: "Where the facts adduced to sustain an issue are such that reasonable minds can draw but one conclusion therefrom, it is the duty of the court to decide the question, as a matter of law, rather than submit it to a jury for determination." Loudy v. Union P. R. R. Co., *supra*. See, also, Witthauer v. Paxton-Mitchell Co., *ante* p. 436, 19 N. W. 2d 865.

The record discloses, by exhibit number seven received in evidence, that the crossing involved is what might be called the Willow Street crossing in North Platte, Nebraska. To the north of the crossing is Seventh Street, and south of the crossing is Front Street. The scale of the map is, one inch thereon equals 20 feet on the ground. Starting from the north, the crossing is constructed of concrete to within three feet of the standard wooden crossing, then the crossings across the rails are standard wooden crossings, and ly-

ing in between are asphalt blocks. This construction extends approximately 200 feet south to the C. & I. tracks. From the C. & I. tracks south to the industry tracks, and before completing the crossing to Front Street, is concrete paving of an approximate distance of 120 feet, where it connects with brick paving. The street is 36 feet in width, and there is a sidewalk about 13 feet to the west of the west edge of the street pavement. The sidewalk is approximately five feet wide, extending north and south nearly the length of the crossing. Willow Street is intersected by 13 tracks of the defendant.

Exhibit number seven shows the distance from the center of the most northerly track, which is called the west belt track, south to the center of the eastbound main line to be 184 feet 8 inches. Proceeding south from the west belt track to the eastbound main line there are the following tracks: east belt track, east yard track number six, east yard track number five, east yard track number four, east yard track number three, east yard track number two, westbound main line, eastbound main line. South of the eastbound main line is the old coach track and the C. & I. track. Exhibit number seven gives the respective distances between these tracks, which need not be set out in this opinion.

The record further discloses that on September 15, 1943, the plaintiff, at about 6:00 or 6:10 p. m., on a clear day and after visiting her son, was proceeding south across the Willow Street crossing, driving her 1936 model LaFayette sedan. Before entering the crossing she looked both to the left and to the right. To her right, which would be to the west, there were cars stationary on the yard tracks. From the point where she entered the crossing south to yard track number six, where some cars were stationed, is approximately 70 feet, which gave her a clear vision to the west, the terrain being practically level and there being no obstructions, at least until she arrived at yard track number six. She was driving at a rate of speed of 10 or 12 miles an hour. The box cars and coal cars to the west were in close proximity to the sidewalk, and were north of the main line

tracks which run east and west, the main line tracks being south of the center of the crossing. It is not clear by the evidence whether cars were stationed on all the yard tracks, that is, on east yard track number six and the three yard tracks south thereof, numbers five, four, and three. The fireman testified he believed cars were stationed on all of such tracks. The distance from east yard track number six south to east yard track number three is approximately 50 feet. From the point where she would pass the cars stationed on yard track number three, to the place of the collision, which is the eastbound main line, is a distance of 54 feet or more, where her vision to the west was uninterrupted. She did not see the train until it was upon her.

The train struck her car at the rear of the front seat, moved it across the crossing and in between the tracks, and turned it around so that it faced west. The engine of the train proceeding from west to east on the eastbound main line, before it was stopped after the impact, was across the crossing to the east, with the first car blocking the street, and the engine and tender of the train approximately 90 feet east of the east line of the crossing. At the time of the impact she had nearly cleared the eastbound main line. The right window of her car was down; her hearing and eyesight were not impaired; and she heard no whistle or bell giving her warning from the train approaching from the west and proceeding east. She was extricated from the left door of her car and taken to the hospital, and was the only occupant of the car at the time of the accident; she was well acquainted with the crossing, having crossed over it approximately every day for 13 years, and had driven automobiles for 16 or 17 years, and could have stopped her car within eight or nine feet, or the length of the car.

The yardmaster testified that his duties consisted of instructing switchmen with reference to making up trains, and the general movement of trains and cars through the yards. On September 15, 1943, he was on duty from 3:00 p. m. until 11:00 p. m. Upon assuming his duties at 3:00 p. m. that day, there were no cars on yard track number

two, nor were any placed thereon subsequent to such time. Exhibit number seven shows yard track number two to be the second track north of the eastbound main line upon which the collision occurred. Likewise, there were no cars on the westbound main line, which is the first track north of the eastbound main line, upon which the collision occurred. Cars are stored on the storage tracks so as to clear the sidewalk west of the crossing proper. He did not know how many cars were parked on the tracks north of yard track number two on that date.

The yard clerk checks the entire yard, starting at 6:30 in the morning. This he did on the 15th and 16th of September 1943. There were no cars stored on yard track number two west of the Willow Street crossing on September 15th or 16th. On yard track number three there were 13 low-sided coal cars. One car was removed from this yard track on the 15th. Yard track number four was not checked because it was not a storage track, and on yard track number five there were 11 cars on September 15th, and 14 cars on September 16th. These cars were what are known as low and high-sided coal cars. The number of each type of car was not testified to, and the plaintiff's evidence is insufficient to show that the height of these cars obstructed her view to the west.

The car distributor designated the number of trains westbound and eastbound, passenger and freight, running out of North Platte, and the time that they left. There were no trains, either eastbound or westbound, passenger or freight, at this time, except the train involved in this collision, which carried deadhead equipment of 20 cars and was "extra 2265" due to arrive at the station, which was approximately four blocks east of the east side of the Willow Street crossing, at 6:30 p. m.

The callboy testified the accident happened at approximately 6:00 p. m., and he noticed the deadhead equipment at the block signal which was about two blocks west of the yard office, making the distance seven or eight blocks west of the Willow Street crossing. While riding his bicycle

from the yard office to Willow Street, he noticed two cars going south on Willow Street, which he stopped for, and saw another car proceeding south behind the first two. At that time he was about halfway across the Willow Street crossing, and when he started on across he heard this train whistling and looked back to see what was going on, but his view was obstructed by a building and he could not see the crash. At that time he was five or six feet east of the east line of the intersection of Willow and Front Streets, and the last time he heard the train whistle he was about in the middle of the intersection of Willow and Front Streets. He had heard the train whistle three or four times from the time he left the yard office; it was whistling for crossings, footpaths, and in to the station. There were no other trains using the tracks at that time. He went to the scene of the accident and observed that the train had caught the back end of the plaintiff's car and placed it in approximately the position as testified to by her.

The engineer testified that the deadhead equipment was being hauled by a regular road engine; that before entering the North Platte yards the train was going about 25 miles an hour; that coming into the yards the train whistled for a crossing at the yard limits, approximately three miles west of the Willow Street crossing, and for a crossing a half mile east of that, and for a crossing at the yard office, and the Willow Street crossing; that he likewise made a six-pound reduction in air before getting to the yard office, which partially set the brakes as the train passed the yard office; that he started to whistle for the Willow Street crossing where there was a whistling board to notify him of such fact, 500 feet west of the Willow Street crossing. He was on the right side of the engine and was blowing the whistle with his left hand on the whistle cord when the fireman "hollered" to him: "Hold her, an automobile." He dropped his hand and threw the air brake into emergency. At that time the engine was from 50 to 60 feet west of the Willow Street crossing, and the brakes took hold suddenly. The engine, after it struck the automobile, proceeded approx-

imately a car length from the point of impact. It pushed the car off the track, did not take it all the way down on the nose of the locomotive.

The fireman testified that in coming into North Platte the engineer whistled at all the crossings and turned the automatic bell, operated by air, on at a distance of approximately three miles west of the crossing, and the bell rang continuously; that some distance west of the Willow Street crossing he saw two cars just ahead of the train, which crossed the eastbound main line; he first saw the car with which the train collided about the time it came on the tracks farthest north, when the engine was approximately 200 feet from the west end of the Willow Street crossing. Obviously the train and the car were practically an equal distance from the point of the impact. The speed of the car was between 15 and 20 miles an hour, and the train 15 miles an hour. After noticing the two automobiles, he noticed the plaintiff's car coming from the north. She never stopped or slowed down, just kept on coming, and as the train got closer to the crossing he realized she could not stop, so he called to the engineer. At that time the engine was between 50 and 60 feet from the crosswalk on Willow Street, and the automobile was at a distance of 50 or 60 feet from the point of impact. The engineer, at the time, was whistling for the crossing. There were no cars on track number two, and he could see from his seat on the left side of the engine, which was about 12 feet in height from the ground the engine being at least 15 feet in height, the progress of the plaintiff's car as it proceeded south.

The evidence further discloses that the plaintiff could not tell with any degree of certainty the number, kind, or location of the cars stationary on the separate yard tracks of the defendant.

The foregoing constitutes the material evidence upon which the trial court directed a verdict against the plaintiff.

The plaintiff contends that the defendant violated section 74-573, R. S. 1943, which provides in substance, as follows: "A bell of at least thirty pounds weight, or a whistle, shall

be placed on each locomotive engine, and shall be rung or whistled at the distance of at least eighty rods from the place where the railroad shall cross any road or street, and be kept ringing or whistling until it shall have crossed such road or street, * * *."

Considering the positive testimony of the defendant's witnesses on this question, the rule in the case of Nanfito v. Chicago, B. & Q. R. Co., 103 Neb. 577, 173 N. W. 575 governs: "The testimony of witnesses, who were near the place of the accident at the time, that they did not hear the bell, without further explanation, is not sufficient to overcome positive evidence of reliable and competent witnesses that the bell was ringing." See, also, Tsiampras v. Union P. R. Co., 104 Neb. 205, 176 N. W. 366.

Even assuming, for the purposes of argument only, that the plaintiff adduced competent evidence that the engineer did not blow the whistle on the train for the crossing or that the bell was not ringing as required by statute, the cases of Askey v. Chicago, B. & Q. R. Co., 101 Neb. 266, 162 N. W. 647; Moreland v. Chicago & N. W. R. Co., 117 Neb. 456, 220 N. W. 692; Mundt v. Chicago, R. I. & P. R. Co., 136 Neb. 478, 286 N. W. 691; and Loudy v. Union P. R. R. Co., *supra*, are authority for the rule that where it is undisputed that a traveler on a highway failed to exercise reasonable precautions by looking and listening at a reasonable point where he could have seen an approaching train in time to stop before reaching the tracks, his negligence, as a matter of law, will defeat a recovery for damages resulting from a collision with a train at a crossing, even though no signal by the locomotive bell or whistle was given as required by law.

The plaintiff, under the evidence and the circumstances, could unquestionably have stopped her automobile if she had exercised even the slightest care for her own safety. In this connection, it is well settled in this jurisdiction that it is the duty of a traveler on a highway, when approaching a railroad crossing, to look and listen for the approach of trains. He must look, where, by looking, he could see, and listen, where, by listening, he could hear, and if he fails

without reasonable excuse to exercise such precautions then he is guilty of contributory negligence more than slight, as a matter of law, and no recovery can be had for damages as the result of a collision with a passing train.

In Rickert v. Union P. R. Co., 100 Neb. 304, 160 N. W. 86, it was held: "A traveler upon a public highway, who attempts to cross a railroad track in front of an approaching train, if he knew, or ought to have known, of its approach, is guilty of contributory negligence which will prevent a recovery for resulting injuries, if the approaching train was in such close proximity to the crossing that a reasonably prudent person could not fairly expect to cross in safety ahead of it." Cases adhering to this principle are, Eggeling v. Chicago, R. I. & P. R. Co., 119 Neb. 229, 228 N. W. 361; Lewis v. Union P. R. Co., 118 Neb. 705, 226 N. W. 318; Haffke v. Missouri P. R. Corporation, 110 Neb. 125, 193 N. W. 257; Askey v. Chicago, B. & Q. R. Co., *supra;* Moreland v. Chicago & N. W. R. Co., *supra;* Mundt v. Chicago, R. I. & P. R. Co., *supra;* and Loudy v. Union P. R. R. Co., *supra.*

Clearly, under the evidence and circumstances as presented by this record, the plaintiff's negligence, as a matter of law, would bar her recovery.

The plaintiff contends that the defendant was negligent in permitting cars to be in a stationary position on certain of its yard tracks. The evidence shows that the cars were left upon the tracks in the ordinary course of the defendant's business. The fact that cars partially obstructed the view of persons passing over the crossing does not, of itself, render the defendant liable for accidents occurring there, but merely imposes a duty of greater care both upon the company and upon those who use the highway. See, Chicago, B. & Q. R. Co. v. Roberts, 3 Neb. (Unof.) 425, 91 N. W. 707; note to 47 A. L. R. 287; Bannister v. Illinois Cent. R. Co., 199 Iowa 657, 202 N. W. 766.

We conclude the trial court did not err in sustaining the defendant's motion for a directed verdict.

AFFIRMED.

KATHERINE SURRATT, APPELLANT, V. OTOE FOOD PRODUCTS COMPANY, APPELLEE.
21 N. W. 2d 862

FILED MARCH 1, 1946. No. 32050.

Workmen's Compensation. Where an employee, with full knowledge of his injury, fails to make a claim for compensation within six months after the injury, and fails to file a petition therefor within a year from the date of the accident, his claim is barred by the statute.

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

Dwight Elliott and *Frank Glebe,* for appellant.

Davis, Stubbs & Healy, for appellee.

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

MESSMORE, J.

The plaintiff, Katherine Surratt, filed her petition in the workmen's compensation court July 6, 1943, alleging in substance that on September 11, 1939, she received personal injuries arising out of and in the course of her employment with the defendant as an attendant on a sorting machine; that the nature and extent of the injury received was a herniated intervertebral disc on the left side of her back resulting in permanent disability; that the employer had knowledge of the injury on March 12, 1943; and prayed for such relief as the workmen's compensation law afforded her. The answer was a general denial. The case was heard before a judge of the workmen's compensation court on October 13, 1943, and plaintiff's cause of action was dismissed November 22, 1943, as being barred by the statute of limitations. Upon request, a rehearing was granted before the full compensation court. The rehearing was had on January 6, 1944, and the plaintiff's cause of action was dismissed as being barred by the statute of limitations. Appeal was taken to the district court for Scotts Bluff County where the

cause was heard on March 30, 1945, and on September 4, 1945, the district court entered a decree dismissing the plaintiff's cause of action for the reasons that the plaintiff had failed to prove her case as required by the workmen's compensation law, and that the cause of action was barred by the statute of limitations. From this decree of dismissal the plaintiff appeals to this court.

The plaintiff first contends that the district court erred in dismissing her cause of action on the ground that the same was barred by the statute of limitations.

The record discloses that prior to September 14, 1939, the date of the accident, the plaintiff's health was good. She was able to do housework, washings, and to assist her husband in picking potatoes, and at intervals to work for the defendant for short periods of time. On the day of the accident she was sorting corn which was brought down to her on a conveyor, and she was required to take the bad ears of corn off of the conveyor and place them in heavy galvanized tubs. The corn was proceeding down the conveyor at a rapid rate of speed, and the plaintiff was compelled to work fast to remove the bad ears of corn from the conveyor, and in attempting to keep up, she felt required to push the corn against the conveyor belt, which was hard to do, and in so doing, placed her right hip against the four galvanized tubs which were practically filled with the bad ears of corn. Her left foot slipped, and she caught herself to keep from falling. In so doing, she moved her right hip from the tubs and they started falling. She turned quickly and, as the tubs tipped, attempted to grab one of them, and as she did so the full force of one of the tubs struck her. She then felt a sharp pain in her back. A Mrs. Wood, working across from the plaintiff, saw what was happening and called to have the machinery stopped. The plaintiff stood by the conveyor for ten or fifteen minutes, and said at that time she felt numb, and ached. In the meantime the corn was picked up, and in fifteen minutes the conveyor belt was started and she resumed her duties. She did little work the rest of the afternoon and quit early. In leaving her place

of work, she had difficulty in walking. She did not return to work after the injury, and was unable to do her own housework.

The accident occurred on September 14, 1939. On Monday, September 18, 1939, the plaintiff called Dr. Williamson who diagnosed the case as several misplaced vertebrae, and thought that the plaintiff had taken cold in her back. The plaintiff saw Dr. Williamson the following Tuesday and Wednesday.

Defendant's counsel asked the plaintiff if she remembered making a statement to him on March 25, 1943, at her home, the substance of which was to the effect that she had informed Dr. Williamson that the strain she received at the defendant's place of business was what caused her back to hurt, and at that time did she say, "I believe I told him the first or second time I saw him." She answered that she might have made such statement, and was further asked by defendant's counsel what the fact was, as to whether she did or did not tell Dr. Williamson she had strained her back at the defendant's place of business. She answered: "It might be possible that I did and again I may not have, that I can not remember now."

The record establishes that prior to the accident plaintiff had no trouble with her back, but since the accident she has suffered with a backache continuously. She was under Dr. Williamson's care for about a year. Not getting any better, she consulted with, and was treated by, several physicians who varied in their diagnosis of her trouble. In February 1943, she consulted Dr. Bluemel of Denver, Colorado. He told her she had a twisted sacroiliac. He demonstrated to her in what manner she would have to twist her body to receive such an injury. It then occurred to her mind that she received just such an injury while in the employment of the defendant, and told the doctor about the accident. Subsequent thereto, about the 13th of July, 1943, she consulted with Dr. Hyndman of Denver, Colorado. He diagnosed her case as a herniated intervertebral disc on the left side of her back.

It is apparent from the record that the only instances in which she informed the numerous doctors she employed about the accident was as indicated previously in this opinion, by telling Dr. Williamson, and also at the time she consulted Dr. Bluemel.

In analyzing this assignment of error we consider the following: Section 48-133, Comp. St. 1929, as amended by Laws 1935, ch. 57, s. 21, p. 198, now section 48-133, R. S. 1943, contains the following provision with regard to notice of injury and the filing of claim for compensation: "No proceedings for compensation for an injury under this act shall be maintained unless a notice of the injury shall have been given to the employer as soon as practicable after the happening thereof, and unless the claim for compensation with respect to such injury shall have been made within six months after the occurrence of the same, or in case of death of the employee, or in event of his physical or mental incapacity, within six months after death or the removal of such physical or mental incapacity; * * * ."

Section 48-138, Comp. St. 1929, now section 48-137, R. S. 1943, setting forth the time within which action may be instituted, is as follows: "In case of personal injury, all claim for compensation shall be forever barred unless, within one year after the accident, the parties shall have agreed upon the compensation payable under this act, or unless, within one year after the accident, one of the parties shall have filed a petition as provided in section 48-172. In case of death, all claims for compensation shall be forever barred unless, within one year after the death, the parties shall have agreed upon the compensation under this act, or unless within one year after the death, one of the parties shall have filed a petition as provided in section 48-172. Where, however, payments of compensation have been made in any case, such limitation shall not take effect until the expiration of one year from the time of the making of the last payment. In the event of legal disability of an injured employee such limitation shall not take effect until the expiration of one year from the time of removal of such legal disability."

It will be observed from an examination of the quoted provisions of the statute that there are two specific limitations upon the right of recovery by action under the workmen's compensation law. The first is the filing of a claim by the employee within six months of the injury. The second is the filing of a petition with the workmen's compensation court within one year.

This court in cases where the substantial character of the injury was known at the time has uniformly upheld the literal terms of these two limitations. See, Kurtz v. Sunderland Bros. Co., 124 Neb. 776, 248 N. W. 84; Welton v. Swift & Co., 125 Neb. 455, 250 N. W. 661; Park v. School District, 127 Neb. 767, 257 N. W. 219; Dunlap v. City of Omaha, 131 Neb. 632, 269 N. W. 422; Price v. Burlington Refrigerator Express Co., 131 Neb. 657, 269 N. W. 425; Lind v. Nebraska National Guard, 144 Neb. 122, 12 N. W. 2d 652.

However, this court has held that where it was found that the true character of the injuries was not known at the time and that they were progressive the limitations above recited did not literally apply. See, Selders v. Cornhusker Oil Co., 111 Neb. 300, 196 N. W. 316; McGuire v. Phelan-Shirley Co., 111 Neb. 609, 197 N. W. 615; City of Hastings v. Saunders, 114 Neb. 475, 208 N. W. 122; Travelers Ins. Co. v. Ohler, 119 Neb. 121, 227 N. W. 449; Astuto v. V. Ray Gould Co., 123 Neb. 138, 242 N. W. 375; Flesch v. Phillips Petroleum Co., 124 Neb. 1, 244 N. W. 925; Montgomery v. Milldale Farm & Live Stock Improvement Co., 124 Neb. 347, 246 N. W. 734. It is clear however that under such conditions the limitations of these sections apply to the date of discovery of the true character of the injury.

The controlling fact and circumstances as disclosed by the record in the instant case is that the injury of the plaintiff, Katherine Surratt, suffered on September 14, 1939, immediately culminated in total disability which has continued without interruption almost down to the present time. The injury thus sustained was in its nature indisputably compensable from the date of its inception, if compensable at

all. The plaintiff knew her condition from day to day, and knew that she had a present total disability. She did not comply with section 48-133, Comp. St. 1929, as amended by Laws 1935, ch. 57, s. 21, p. 198, now section 48-133, R. S. 1943, and file a claim as required therein. Neither did she file a petition as required by section 48-138, Comp. St. 1929, now section 48-137, R. S. 1943. It is clear that, under the circumstances and the evidence as disclosed by the record in the instant case, the plaintiff's cause of action is barred by the statute of limitations, and she comes within the conception of the cases heretofore cited that where the substantial character of the injury was known at the time, this court has uniformly upheld the two limitations as provided for by sections of the statute hereinbefore quoted.

We conclude the trial court did not err in dismissing the plaintiff's cause of action as being barred by the statute of limitations. Having so found, other assignments of error need not be determined, and the judgment of the trial court is affirmed.

AFFIRMED.

PAINE, J., participating on briefs.

OMAHA LOAN AND BUILDING ASSOCIATION, A CORPORATION, APPELLEE, V. FRANK O. TURK ET AL., APPELLEES, HAROLD C. CREW, APPELLANT.
21 N. W. 2d 865

FILED MARCH 1, 1946. No. 32026.

1. **Registration of Land Titles.** By section 76-238, R. S. 1943, all deeds, mortgages, and other instruments of writing required to be recorded or which under the laws of the state may be recorded take effect and are in force from and after delivery thereof to the register of deeds for recording, as to creditors and subsequent purchasers without notice; and such instruments shall be void as to creditors and subsequent purchasers without notice whose deeds, mortgages, or other instruments shall be first recorded.

2. Judgments: MORTGAGES. The lien of a judgment does not take priority over a prior unrecorded mortgage made and delivered in good faith for a valuable consideration under the terms of section 76-238, R. S. 1943.
3. ———: ———. A prior unrecorded deed or mortgage, made and delivered in good faith for a valuable consideration, will take precedence over a judgment, provided such deed or mortgage is recorded before any deed to the real estate be recorded which is based on the judgment.
4. Judgments. The filing of a transcript of a judgment of the municipal court in the office of the clerk of the district court is not a recording within the meaning of the recording act.
5. Mortgages. A purchase-money mortgage takes precedence over prior judgments and all other existing and subsequent claims and liens against the mortgagor to the extent of the land sold.

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

William A. Ehlers, for appellant.

Penelope H. Anderson and *Fitzgerald, Tesar & Welch*, for appellees.

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

YEAGER, J.

The action here as originally instituted was by plaintiff to foreclose a second mortgage on certain real estate in Douglas County, Nebraska, the title to which was held by the defendants Frank O. Turk and Ellen G. Turk. Harold C. Crew was made a party defendant for the reason that he was a judgment creditor of the defendant Frank O. Turk holding a valid judgment which at the time of the commencement of the action was a lien against the real estate of the said Frank O. Turk.

The defendants Turk defaulted. The defendant Crew filed an answer and cross-petition wherein he alleged that the lien of his judgment was prior to the lien of the mortgage of the plaintiff.

A trial was had and a decree entered foreclosing the mortgage. The court decreed that the lien of plaintiff's

mortgage was superior to the lien of the judgment of the defendant Crew.

From the portion of the decree declaring the priority of plaintiff's lien the defendant Crew has appealed. No question except the propriety of the holding of the trial court in this respect is presented for determination here.

The material facts as disclosed by the record are that on April 15, 1933, the plaintiff leased to the defendants Turk the real estate in question for a term of two years. By the terms of the lease the Turks were given an option to purchase for the price of $2,100. The rental was $30 per month. Only $60 of the rental was ever paid.

In December 1933, negotiations began whereby the Turks were finally able, in April 1934, to exercise their option and to purchase the property. Title passed to the Turks by deed from plaintiff dated April 10, 1934, which was recorded April 11, 1934. In order to effect the purchase the Turks gave the Home Owners Loan Corporation a first mortgage of $1,920 and the plaintiff a second mortgage of $270.98. The first mortgage was dated March 15, 1934, and recorded April 10, 1934. The second mortgage was dated December 13, 1933, and recorded April 24, 1934.

On April 17, 1934, defendant Crew filed in the office of the clerk of the district court for Douglas County, Nebraska, the transcript of a judgment from the municipal court of the city of Omaha, Douglas County, Nebraska, for $258.50, interest, and costs, against the defendant Frank O. Turk. The judgment was then in full force and effect and by appropriate proceedings it has been kept alive.

This judgment with its accumulations became and at all times herein mentioned was a lien upon the real estate in question. Plaintiff does not contend otherwise. Appellant contends that his lien has priority over the mortgage lien of plaintiff on account of the fact of its priority in recording.

The plaintiff contends that its lien has priority as a preexisting purchase-money mortgage the priority of which was not affected by failure to record before the attachment of the lien of the judgment.

The appellant claims his priority by virtue of the terms of section 76-238, R. S. 1943, which is as follows: "All deeds, mortgages and other instruments of writing which are required to be or which under the laws of this state may be recorded, shall take effect and be in force from and after the time of delivering the same to the register of deeds for recording, and not before, as to all creditors and subsequent purchasers in good faith without notice; and all such deeds, mortgages and other instruments shall be adjudged void as to all such creditors and subsequent purchasers without notice whose deeds, mortgages or other instruments shall be first recorded; *Provided,* that such deeds, mortgages and other instruments shall be valid between the parties."

Plaintiff contends that under the terms of this section as interpreted by the decisions of this court the filing of the transcript of the judgment in the district court gave appellant's judgment lien no priority over the mortgage.

In the case of Harral v. Gray, 10 Neb. 186, 4 N. W. 1040, decided in 1880, it was held that the lien of a judgment was inferior to a prior but unrecorded deed. A section of the recording act at that time was in all substantial particulars the same as the one on which appellant relies in this case. R. S. 1866, ch. 43, s. 16, p. 283.

In the opinion it was said, referring to and adopting a holding in Mansfield v. Gregory, 8 Neb. 432: "Under that decision it may be considered settled—if, indeed, the courts of the country had not long since settled it—that a prior unrecorded deed, made and delivered in good faith for a valuable consideration, so as to pass title in law, will take precedence of an attachment or judgment, provided such first-mentioned deed be recorded before any deed to the premises be recorded, which is based upon such attachment or judgment."

In Mansfield v. Gregory, 11 Neb. 297, 9 N. W. 87, a like holding was made. In the opinion it was said: "And to defeat the interest of one holding in good faith under an unrecorded deed, it is not enough for one to show merely that he is a judgment creditor of the grantor in the deed, or even

that he is a purchaser under such judgment, but in addition to this it must appear that his lien is evidenced by some instrument, a sheriff's deed for instance, 'required to be recorded,' which must be entered of record before such prior conveyance."

In Mahoney v. Salsbury, 83 Neb. 488, 120 N. W. 144, the rule stated in Harral v. Gray, *supra,* was specifically approved.

In Minor Lumber Co. v. Thompson, 91 Neb. 93, 135 N. W. 429, in the following language, a like rule was declared as to mortgages: "A prior unrecorded mortgage on real estate, made in good faith and for a valuable consideration, will take precedence of a title derived by virtue of a sale under attachment or execution, if such mortgage is placed on record before the sheriff's deed based upon such proceedings is recorded."

The rules stated in Harral v. Gray, *supra,* and Minor Lumber Co. v. Thompson, *supra,* were approved in Stocker v. Church, 113 Neb. 639, 204 N. W. 398. From these rules there has been no departure in the decisions of this court.

The interpretations contained in these cases are not inconsistent with but conform to the language of the quoted section of the recording act and the clear intent of the Legislature in its enactment.

It will be observed from an examination of the section that the design of the enactment was not to protect the liens of all creditors and subsequent purchasers in good faith without notice but only such as had deeds, mortgages, or other instruments subject to recording and which shall be first recorded.

The filing of transcript of a judgment of the municipal court of the city of Omaha in the office of the clerk of the district court creates a lien upon all of the real estate of the judgment debtor in the county (section 26-1,170, R. S. 1943) but the filing of the transcript is not a recording within the meaning of the recording act.

On this ground it becomes necessary to hold that the lien of plaintiff's mortgage was superior to the judgment lien of the appellant.

There is another reason why the contention of the appellant may not be upheld. From the record it sufficiently appears that the mortgage of plaintiff is a purchase-money mortgage and as such takes priority over a judgment against the mortgagor. In Prout v. Burke, 51 Neb. 24, 70 N. W. 512, as a statement of principle on which to base a related holding it was said: "It has been held that a mortgage given to secure the unpaid purchase money of land executed simultaneously with the deed takes precedence of a judgment against the mortgagor."

With regard to a Nebraska purchase-money mortgage it was said in Troyer v. Mundy, 60 F. 2d 818: "Defendant contends, however, that her mortgage interest should be protected, on the theory that it is in the nature of a purchase-money mortgage, and the lower court so held. The original mortgage given to defendant's father was without question a purchase-money mortgage. As such it was entitled to the highest consideration of a court of equity, taking precedence over prior judgments and all other existing and subsequent claims and liens against the mortgagor to the extent of the land sold."

One other matter requires consideration herein. Appellant contends that the pleadings of plaintiff are insufficient to sustain the decree giving the lien of the mortgage priority over the lien of his judgment. This contention is without merit.

The question of priority was raised by the affirmative allegations in the cross-petition of appellant. His claim of priority was denied in the reply. The burden was on defendant to plead and prove that his judgment lien was superior to the lien of plaintiff's mortgage. The evidence failed to support his contention.

The decree of the district court is affirmed.

AFFIRMED.

MARGARET A. MAUZY, ADMINISTRATRIX OF THE ESTATE OF HENRY MAUZY, DECEASED, APPELLEE, V. JESS N. ELLIOTT ET AL., APPELLEES, IMPLEADED WITH: ALBERT J. GODWIN, ADMINISTRATOR WITH WILL ANNEXED OF THE ESTATE OF ERMA V. ELLIOTT, DECEASED, APPELLANT.

22 N. W. 2d 142

FILED MARCH 1, 1946. No. 31984.

1. **Landlord and Tenant.** In point of legal operation each renewed lease is a new lease and the taking of it, in the absence of language clearly indicating a contrary intention, operates as a surrender of the old one except for the protection of legal interests carved out of it, which, once created, the law will not permit to be destroyed.
2. **Landlord and Tenant**: VENDOR AND PURCHASER. Notice of acceptance of an option to purchase real estate contained in a duly executed written lease is not required to be in writing or in any particular form in the absence of a requirement to that effect in the lease.
3. ———: ———. A mere option to purchase contained in a lease binds only the lessor for the period specified therein until accepted by the lessee. However, when appropriately accepted the option is merged in a completed contract of purchase which is thereafter effective and binding upon both parties, vesting equitable title in the lessee.
4. ———: ———. Where an option to purchase contained in a lease is duly exercised the relation of landlord and tenant ceases and that of vendor and purchaser arises. Thereafter the lessor cannot, by breach of a covenant to convey, compel continuance of the relation of landlord and tenant for the purpose of creating a breach of covenant to pay rent in order to enable him to declare the option forfeited.
5. **Mortgages**: PARTIES. Upon the foreclosure of a mortgage, sale, and confirmation thereunder, if a surplus remains after payment of the mortgage debt and costs, the district court in the exercise of its equitable jurisdiction has full power, upon an application being made for a distribution of the surplus, to bring in all parties necessary to a determination of the ownership of the fund and to try and determine that question.

APPEAL from the district court for Cass County: ARTHUR C. THOMSEN, JUDGE. *Affirmed as modified.*

Kennedy, Holland, DeLacy & Svoboda, D. O. Dwyer & W. L. Dwyer, and *Harry R. Henatsch,* for appellant.

Walter H. Smith and *Leon, White & Lipp,* for appellees.

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

CHAPPELL, J.

This appeal involves primarily the distribution of moneys representing the proceeds received from the sale of real property in the foreclosure of a mortgage. Erma V. Elliott owned an acreage near Plattsmouth. On February 1, 1938, she mortgaged it to one Henry Mauzy. Her husband, Jess N. Elliott, joined in the mortgage. Both the mortgagor and the mortgagee were deceased before this litigation. On March 19, 1943, plaintiff, as administratrix of the estate of Henry Mauzy, filed suit to foreclose the mortgage, then in default. Albert J. Godwin, administrator with the will annexed of the estate of Erma V. Elliott, her husband, Jess N. Elliott, her children, the devisees in her will, and their respective spouses, together with Erna Lapidus and husband, Joe Lapidus, who were alleged to claim some interest in the property, were all made defendants. Defendant administrator answered plaintiff's petition alleging that as administrator he was entitled to receive any and all funds derived from a sale of the land under foreclosure over and above an amount sufficient to satisfy plaintiff's debt for the purpose of paying claims allowed against the estate. He specifically prayed for that relief, together with such other and further relief as might be just and equitable.

Defendants, Lapidus, filed answer and cross-petition denying generally but alleging that on March 16, 1942, they went into possession of the property under a written lease with Erma V. Elliott and Jess N. Elliott, her husband, whereby Erna Lapidus, lessee, agreed with them in part as follows: " * * * to pay * * * as rent * * * Three hundred ($300.00) Dollars, payable $100.00 at signing hereof, receipt of which is hereby acknowledged; $100.00 on or before July 1, 1942 and $100.00 on or before November 1, 1942,

and as part of the consideration for said payments lessee has option to purchase said premises during the term of this lease for $4000.00, in which event rentals paid are to be applied on said purchase price, and in case of exercise of said option lessors are to furnish abstract showing title free and clear of all liens and incumbrances and to convey by warranty deed. In case said option is not exercised during term of this lease then lessee has option of renewal of this lease including said option for an additional year on said terms and conditions by written notice to lessors sixty days prior to March 1, 1943."

Cross-petitioners further alleged in substance that lessee exercised the option of renewal of the 1942 lease in the manner and within the time required, retained possession thereunder, and thereafter in 1943, having complied with the terms of the lease, exercised the option to purchase the property. Lessee reiterated in the cross-petition her previous exercise of the option to purchase and alleged that she was ready, willing, and able to perform as required. By reason thereof it was prayed that plaintiff's petition be dismissed, that specific performance be granted, and for such other and further relief as might be just and equitable.

Defendant administrator answered the cross-petition denying generally but admitting that cross-petitioners had been in possession of the property as tenants at all times when due in 1943. The court was asked to find that Erna Lapidus was holding over her term and had forfeited her right to enforce the option to purchase by reason of the fact that she had failed, neglected, and refused to pay the rent when due in 1943. The court was asked to find that Erna Lapidus had no further rights under the lease and also for such other and further relief as might be just and equitable. The cause was tried as if a general denial thereof had been filed.

On June 24, 1944, trial was had, the parties being present in person and by their respective attorneys. Counsel for the parties were given opportunity to file briefs and on November 25, 1944, the trial court entered a decree of fore-

closure finding and adjudging that the mortgage was valid, in default, and a first lien on the property in the sum of $2,050, with interest on the principal sum of $2,000 at nine percent from and after February 1, 1943. It was ordered if that sum was not paid to plaintiff within 20 days the property should be sold as upon execution, and the proceeds paid to the clerk of the district court to be retained and disbursed as thereafter ordered upon determination of the issues between the several defendants and Erna Lapidus, cross-petitioner, which issues were continued until further order of the court. There was no redemption as afforded and order of sale was issued December 16, 1944. Legal notice of sale was published and on January 22, 1945, the property was sold by the sheriff to Erna Lapidus for $5,500, which was paid to the clerk of the district court. On February 2, 1945, the sale was confirmed and deed ordered. With reference to all the proceedings heretofore recited there was and is no controversy and no appeal was taken therefrom.

This appeal involves only the supplemental decree of the trial court distributing the proceeds of the foreclosure sale. On February 2, 1945, the trial court entered a supplemental decree deciding the issues between the several defendants and cross-petitioner and distributing the proceeds then in the hands of the clerk of the district court. In that connection the court found generally that by reason of the lease, option for renewal, and purchase, together with timely exercise and acceptance thereof, Erna Lapidus was the equitable owner of all the right, title, interest, and equity of redemption of Erma V. Elliott, deceased, her heirs, devisees, administrators, and all persons claiming by or through any of them, except for the sum of $1152.96 which should be paid to defendant administrator for and on behalf of said estate and the heirs entitled thereto. The court also ordered that plaintiff should be paid costs in the sum of $141.54, together with $2,405.50, principal and interest due under the mortgage, and that Erna Lapidus should be paid her costs, together with $1,800 balance then remaining in

the hands of the clerk of the district court which included credit for $300 rentals paid by her in 1942.

Defendants, Jess N. Elliott and the administrator, thereafter filed motion for new trial which was overruled. Only the administrator has appealed contending substantially: (1) That the supplemental decree was void for want of jurisdiction; (2) that the trial court erred in finding that option to purchase was aptly exercised by lessee and in failing to find, in any event, that the option to purchase was forfeited by her failure to pay rentals in 1943; and (3) erred in finding that Erna Lapidus was entitled under the option if properly exercised in 1943 to credit for $300 paid as rent under the 1942 lease. We find that the latter contention has merit but that the other two cannot be sustained.

With reference to the first contention it is appellant's position that the cross-petition of defendants, Lapidus, prayed for specific performance of a contract to convey real estate made by a party deceased before conveyance and having been filed out of time the court lacked jurisdiction to enter any order that would be binding upon the heirs and devisees of Erma V. Elliott, deceased, because no publication was made as provided by section 30-902, R. S. 1943.

At the outset it should be recalled that in the first instance this action was not one for specific performance of such a contract. It was a suit by the administratrix of the mortgagee's estate to foreclose a real-estate mortgage, wherein the mortgagee had died without foreclosing the right of redemption, and all the interest in the mortgaged premises conveyed by the mortgagor, and the debt secured thereby, were personal assets in the hands of the administratrix which she had a legal right to foreclose in the district court, as provided by section 30-411, R. S. 1943.

We must bear in mind that the administrator of the mortgagor's estate, Jess N. Elliott, her husband, together with her heirs, the devisees under the mortgagor's will, and the defendants, Lapidus, who were alleged to claim some interest in the property, were all made parties in the fore-

closure action and there is no contention that they were not properly served therein. The record which imports verity shows that at the trial of the issues all of the parties were present in person and by their respective attorneys. The husband, Jess N. Elliott, one of the heirs, and the defendant administrator all testified as witnesses controverting the issues at the hearing on the merits. Without objection the defendant administrator who represented the estate filed an answer to both plaintiff's petition and defendants' cross-petition.

In such a situation after foreclosure without redemption, a sale of the property, and confirmation thereof, the execution of the sheriff's deed vested in the purchaser the same estate that would have vested in the mortgagee if the equity of redemption had been foreclosed and no other or greater and operated as a bar against the mortgagor, the mortgagee, and all parties to the suit in which the decree for such sale was made, and against their heirs respectively and all persons claiming under such heirs, as provided by section 25-2145, R. S. 1943. There remained then thereafter for disposition only the proceeds of the sale as required by section 25-2146, R. S. 1943. That section provides: "The proceeds of every sale made under a decree in equity shall be applied to the discharge of the debt adjudged by such court to be due, and of the costs awarded, and if there be any surplus, it shall be brought into court for the use of the defendant, or of the persons entitled thereto, subject to the order of the court."

In Montague v. Marunda, 71 Neb. 805, 99 N. W. 653, this court in construing a statute, identical with section 25-2146, *supra,* held: "Upon the foreclosure of a mortgage, and a sale and confirmation thereunder, if a surplus remains after the payment of the mortgage debt and costs, the district court, in its equitable jurisdiction, has full power, upon an application being made for a distribution of the surplus, to bring in all parties necessary to a determination of the ownership of the fund, and to try and determine that question."

In that opinion it was said: "All persons who claimed to

have any interest in the surplus being before the court, it was within its power, as it was its duty, to retain the cause for all purposes necessary to determine the matters still pending, and to do complete and final justice between the parties. To voluntarily relinquish its jurisdiction over the fund, which was in its possession, would be to surrender one of the most beneficial powers of a court of chancery. The fund being in the hands of the court, it was its duty to ascertain to whom it belonged, and not to relegate the parties to another court for that purpose."

As late as Gibson v. Koutsky-Brennan-Vana Co., 143 Neb. 326, 9 N. W. 2d 298, this court said: "It is a long-established rule that a court of equity which has obtained jurisdiction for any purpose will retain jurisdiction for the purpose of administering complete relief between the parties with respect to the subject-matter. Parson Construction Co. v. Gifford, 129 Neb. 617, 262 N. W. 508; Robinson v. Dawson County Irrigation Co., 142 Neb. 811, 8 N. W. (2d) 179. A prayer for general relief in an equity action is as broad as the pleadings and the equitable powers of the court. Olson v. Lamb, 61 Neb. 484, 85 N. W. 397; 21 C. J. 679." See, also, Miller v. Knight, *ante* p. 207, 19 N. W. 2d 153.

Under the circumstances and by virtue of the authorities heretofore cited, we are of the opinion that the trial court had jurisdiction to foreclose the mortgage and thereafter distribute the proceeds of the sale, as it did.

The appellant's second contention that defendant lessee did not exercise the option to purchase or that if she did her rights thereunder were forfeited depends upon the factual situation. Although the administrator contended in the trial court that the options in the lease were invalid from the beginning he has, we believe, abandoned that position in this appeal. Whatever his position is in that regard the record discloses that the lease as made in 1942 was valid and binding on the parties. It cannot be disputed that it was validly executed in writing, delivered on March 16, 1942, and filed of record March 2, 1943.

Admittedly the cross-petitioners went into possession

and paid all installments of rent as they accrued in 1942. They were paid to Jess N. Elliott who admittedly acted for and on behalf of his wife in collecting them and thereafter delivering them to her. On November 12, 1942, it is undisputed that a written notice exercising the option of renewal of the lease for another year was timely served on the lessors as required in the lease. There was no provision in the lease requiring that the option to purchase must be exercised in any particular form or manner. Therefore, it could be exercised in any appropriate manner while the 1942 lease or the renewal lease for 1943 was in force and effect. The applicable rule is: "No particular form of notice is essential in the absence of a requirement to that effect in the instrument giving the option. It is not even necessary that the notice of acceptance be in writing, * * * ." 35 C. J., Landlord and Tenant, s. 184, p. 1041. See, also, Smith v. Gibson, 25 Neb. 511, 41 N. W. 360.

On February 14, 1943, Erma V. Elliott died. On or about March 1, 1943, the first $100 payment of rent for 1943 was tendered to Jess N. Elliott. When the administrator of her estate was appointed on March 19, 1943, the rental was again immediately tendered to the administrator in cash upon two occasions about a week apart. These tenders were admittedly refused only for the reason that the administrator was uncertain of his status is view of plaintiff's foreclosure action then pending. On the occasion of the second tender, the administrator was told substantially that lessee accepted the option and was ready, willing, and able to fulfill the contract of purchase, as provided in the lease. It will be recalled that thereafter on May 26, 1943, the exercise of that option and tender of performance thereof was repeated in the cross-petition and in open court upon trial of the issues. Further it was repeated and reiterated in writing on January 15, 1944.

On July 1, 1943, the administrator attempted to collect personally the rentals from the lessee for the first time. He was told that she desired to consult her attorney. Thereafter on July 3, 1943, and again on November 1, 1943, when

the administrator attempted to collect rentals, he was told substantially that lessee was ready, willing, and able to perform and pay the balance of the purchase price under the option to purchase already theretofore exercised. However, the administrator refused to perform at any time and took no steps to complete the transaction. As a matter of fact in the meantime, without his participation, a contract was drawn by others in an effort to sell the property to another for $500 less than the option provided for in the lease and lessee was sued by the administrator in the county court to recover rentals accruing under the 1943 lease.

We believe the record discloses that the lessee made every effort possible to pay the rent due in March 1943, which was refused, and in the meantime having properly exercised the option to purchase, both orally and in writing, we conclude that her opportunity to do so without further payments of rent, theretofore refused, was not forfeited. In 35 C. J., Landlord and Tenant, s. 185, p. 1041, it is said: "Where the option to purchase is duly exercised by an election to purchase, the relation of landlord and tenant ceases and that of vendor and purchaser arises, and the lessor cannot, by a breach of a covenant to convey, compel the continuance of the relation of landlord and tenant for the purpose of creating a breach of covenant to pay rent so as to enable him to declare the option forfeited. The possession of the lessee becomes that of owner, and he will be entitled to such other rights as may be said to attach to his character as vendee, in so far as the rights of the parties are not peculiarly controlled by express stipulations in the lease. The lessor is not entitled to rent after the option to purchaser is exercised, unless there is an express stipulation therefor." See, also, Smith v. Gibson, *supra*.

We come finally to the contention of the administrator that the trial court erred in permitting the lessee to have credit upon the purchase price for rentals paid during 1942, in the sum of $300. As stated in 35 C. J., Landlord and Tenant, s. 178, p. 1037: "In point of legal operation each renewed lease is a new lease, and the taking of it operates

as a surrender of the old one. But a renewed lease may be considered as a continuance of the original lease to some intents, that is, for the protection of legal interests carved out of it, which, once created, the law will not permit to be destroyed, * * * ."

Bearing that rule in mind we find that the renewal of the lease in the case at bar simply renewed the option to purchase during 1943, which had not yet been exercised under the 1942 lease. In that regard we find that no legal interests were carved out of the 1942 lease, which the law will not permit to be destroyed, except the right to exercise the option to purchase upon the same terms during the existence of the 1943 lease.

As authoritatively stated: "The mere option to purchase binds only the lessor and must be accepted before a completed and enforceable contract of sale is effected. The option and the acceptance constitute the complete contract. On notice of acceptance the contract becomes bilateral, binding both parties, and vesting equitable title in the lessee, and the option becomes completely merged in the contract of purchase. Thereafter the lessor can neither withdraw the option, nor change the price to be paid." 35 C. J., Landlord and Tenant, s. 184, p. 1041. By analogy thereafter the lessee can neither withdraw the acceptance of the option nor change the price to be paid.

While the option of renewal and the option to purchase contained in the 1942 lease were a part of the same contract and interdependent in some respects, as hereinafter noted, they conferred separate and distinct rights and powers upon the lessee. The first conferred the right to renewal of the lease for the year 1943 upon the same terms and conditions by written notice 60 days prior to March 1, 1943, while the latter conferred the right to terminate it and become the absolute owner of the property by purchase for $4,000, with credit thereon for rentals paid during the year of its acceptance. The latter was not an essential covenant of the 1942 lease as such but an independent option therein, and the failure to exercise it in that term was only a condition

upon which renewal of the lease and option to purchase during the 1943 term could depend.

The option to purchase not having been exercised in 1942, the right to do so upon the terms and conditions therein provided was lost at the expiration of the lease for that year and lost entirely except for renewal of the lease and exercise of the option thereafter in 1943. Clearly, there was not a contract of purchase until after the date upon which the option was accepted by the lessee in 1943. Therefore this court cannot say, in the absence of language clearly indicating a contrary intention, that the acceptance of the option to purchase in 1943 gave lessee the right to relate it back to the 1942 lease and receive credit upon the purchase price for rentals paid thereunder. We conclude that the trial court erred in allowing the defendant lessee credit for $300 rentals paid by her in 1942.

In all other respects the judgment of the trial court is hereby affirmed but it is directed that the court modify its supplemental decree in conformity herewith and require that lessee, Erna Lapidus, return $300 paid to her by the clerk of the district court and award it to the defendant administrator.

AFFIRMED AS MODIFIED.

HENRY HAWK, APPELLANT, V. NEIL OLSON, WARDEN OF THE NEBRASKA STATE PENITENTIARY, APPELLEE.

22 N. W. 2d 136

FILED MARCH 8, 1946. No. 31841.

1. **Habeas Corpus**: COURTS. It is for the Supreme Court of this state to decide what issues are justiciable in an application for a writ of habeas corpus made to the courts of this state.
2. **Courts.** The Supreme Court of this state has the undoubted right to decide upon its own jurisdiction and the jurisdiction of the courts of this state to which its appellate power extends.
3. **Habeas Corpus.** To release a person from a sentence of imprisonment by habeas corpus, it must appear that the sentence was absolutely void.

4. ———. Habeas corpus will not lie to discharge a person from a sentence of penal servitude where the court imposing the sentence had jurisdiction of the offense, had jurisdiction of the person of the defendant, and the sentence was within the power of the court to impose.
5. ———. Habeas corpus cannot be used as a substitute for a writ of error.
6. ———. Habeas corpus is a collateral and not a direct proceeding when regarded as a means of attack upon a judgment sentencing a defendant.
7. ———. The regularity of the proceedings leading up to a sentence in a criminal case cannot be inquired into on an application for a writ of habeas corpus, that matter being assailable only in a direct proceeding.
8. **Judgments.** When the judgment is regular upon its face and was given in an action where the court had jurisdiction of the offense and of the person of the defendant, extrinsic evidence is not admissible to show its invalidity.
9. **Constitutional Law.** A constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.
10. **Actions.** The existence of a right is one matter, the availability of a particular remedy in which that right may be asserted is distinctly a separate matter.
11. **Courts.** Where the Supreme Court of the United States considers and determines the existence of a right and reverses and remands a cause for further proceedings not inconsistent with its opinion, the Supreme Court of this state is not foreclosed from determining, and has the right to determine, the availability of the particular remedy sought to be used to assert the right.

APPEAL from the district court for Lancaster County: RALPH P. WILSON, JUDGE. *Motion denied.*

Henry Hawk, pro se, for appellant.

Walter R. Johnson, Attorney General, *H. Emerson Kokjer, John H. Comstock,* and *Rush C. Clarke,* for appellee.

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

SIMMONS, C. J.

In Hawk v. Olson, 145 Neb. 306, 16 N. W. 2d 181, we affirmed a judgment of the district court for Lancaster

County denying petitioner a writ of habeas corpus. The Supreme Court of the United States granted certiorari, because a substantial federal question as to restraint without due process of law under the Fourteenth Amendment seemed to be presented. On the matter coming before that court, it found that petitioner was entitled to a hearing on the claimed violation of the due process clause, and reversed and remanded the cause to us for further proceedings not inconsistent with the opinion of that court. Hawk v. Olson, 326 U. S. 271, 90 L. Ed. 67, 66 S. Ct. 116. Petitioner now moves that the judgment of the Supreme Court of the United States be enforced and that we issue a mandate to the district court for Lancaster County to issue a writ of habeas corpus directing that the petitioner be produced before it for hearing upon his allegations in his petition for the writ. We deny petitioner's motion.

Preliminary to a discussion of the matter now before us, the Supreme Court of the United States disposed of a number of contentions which need not be recited now.

The Supreme Court of the United States stated petitioner's contention thus: " * * * his conviction violates the Fourteenth Amendment because of denial at his trial of an opportunity to examine the charge, subpoena witnesses, consult counsel and prepare a defense." The court said that denial of effective assistance of counsel does violate due process; that habeas corpus in the federal courts was a proper procedure by one convicted of a criminal offense to safeguard an infringement of constitutional rights, even though the events which were alleged to infringe did not appear on the face of the record of his conviction; that the Fourteenth Amendment is violated when a defendant is forced by a state to trial in such a way as to deprive him of the effective assistance of counsel; and that when a state does not provide corrective judicial process, the federal courts will entertain habeas corpus to redress the violation of the federal constitutional right.

In conclusion the Supreme Court of the United States recited certain of the allegations of the petition and held them

sufficient to present the issue that no effective assistance of counsel was furnished in the time between the plea of not guilty and the calling of the jury; that denial of opportunity to consult with counsel on any material step after indictment or similar charge and arraignment violated the due process clause of the Fourteenth Amendment; and that petitioner stated a good cause of action when he alleged facts which supported his contention that, through denial of asserted constitutional rights, he has not had the kind of trial in a state court which the due process clause of the Fourteenth Amendment requires. It held that the petitioner was entitled to an opportunity to prove his allegations.

We decided petitioner's application in our prior opinion on the ground that the issues presented were not justiciable in a habeas corpus proceeding in this state. We quote that paragraph of our opinion. "The petitioner sets forth parts of the evidence taken at the time of trial and attempts to show that the same are contradictory, conflicting, impeached, incompetent, and uncorroborated; that the state was permitted to impeach its own witnesses; *that the court overruled his motion for continuance made after he had been arraigned and pleaded not guilty but before trial;* and that there was error in the instructions given by the court. '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.' * * * 'A judgment or sentence of a court of record in a criminal case is thus supported by the usual presumptions of validity and regularity when thus attacked. To obtain release from a sentence of imprisonment by habeas corpus, such sentence must be absolutely void.' * * * 'A writ of habeas corpus is not a writ for the correction of errors and will not be allowed to be used for that purpose.'" (Emphasis supplied.) Hawk v. Olson, *supra*. Four of the six syllabi written by us set out rules governing the use of the writ of habeas corpus in this state.

We think the Supreme Court of the United States overlooked the full import of our opinion, for it said: "*When the*

corrective process is provided by the state, but error, in relation to the federal question of constitutional violation, creeps into the record, we have the responsibility to review the state proceedings." (Emphasis supplied.) "As the Supreme Court of Nebraska considered the motion for continuance on the merits, *no question of state procedure for the reexamination of criminal convictions arises.*" (Emphasis supplied.) The Supreme Court of the United States thus, as a premise for its jurisdiction to review and for its decision, assumed a proposition of state law contrary to our holding in the case.

It is true that, in a portion of the opinion subsequent to that above quoted, we mentioned this contention regarding a continuance and set out facts alleged by petitioner but only to point out that he set forth no facts which would establish his innocence that he was prevented from presenting, but merely criticized the evidence and claimed that he was innocent. We made no reference to the federal question. As we had held earlier in the opinion, the sufficiency of the evidence and the guilt or innocence of one accused or convicted of a crime was not justiciable in a habeas corpus proceeding. That holding was accepted by the Supreme Court of the United States in its opinion. In footnote 7 to Williams v. Kaiser, 323 U. S. 471, 89 L. Ed. 362, 65 S. Ct. 363, the Supreme Court of the United States indicates that in its opinion allegations of denial of a fair trial, that petitioner was ignorant or innocent, or the court was prejudiced, would not be relevant to petitioner's cause of action based on the constitutional right to counsel.

A "question of state procedure for the reexamination of criminal convictions" did arise and was determined by us. That question remains in this case and is here now. A habeas corpus proceeding is not a "corrective judicial process" in which the questions which petitioner seeks to present may be determined in the courts of this state. Although it holds that habeas corpus is a process available in the federal courts to redress the violation of the federal constitutional right, the Supreme Court of the United States does

not discuss nor pass upon the nature of the remedy available in the courts of Nebraska.

It is not for us to say what constitutes a violation of the due process of law clauses of the Federal Constitution when the Supreme Court of the United States has spoken on that subject with relation to the question presented. Neither is it for us to say what issues may be justiciable in an application for a writ of habeas corpus when that writ is sought in the federal courts. But those are not and were not the issues presented and determined by us.

The issue here now is the same as it was when the case was initially before us, and that is, what issues are justiciable in an application for a writ of habeas corpus in the courts of this state. That question is for the courts of this state to decide. We have the undoubted right to decide upon our own jurisdiction and the jurisdiction of the courts of this state to which our appellate power extends. Davis v. Packard, 8 Peters 312; Johnson v. Radio Station WOW, *ante* p. 429, 19 N. W. 2d 853. The Supreme Court of the United States has said: " * * * the State may supply such corrective process as to it seems proper." Frank v. Mangum, 237 U. S. 309, 335, 59 L. Ed. 969, 983, 35 S. Ct. 582, 590.

In Jackson v. Olson. No. 32012, released concurrently herewith, *post* p. 885, 22 N. W. 2d 124, we have reexamined and restated the rules governing the use of the writ of habeas corpus in this state and pointed out that our holdings are in accord with the decisions of the Supreme Court of the United States there cited. Those rules are: To release a person from a sentence of imprisonment by habeas corpus, it must appear that the sentence was absolutely void. Habeas corpus will not lie to discharge a person from a sentence of penal servitude where the court imposing the sentence had jurisdiction of the offense, had jurisdiction of the person of the defendant, and the sentence was within the power of the court to impose. Such a judgment is not void. Habeas corpus cannot be used as a substitute for a writ of error. Habeas corpus is a collateral and not a direct pro-

ceeding when regarded as a means of attack upon a judgment sentencing a defendant. The regularity of the proceedings leading up to a sentence in a criminal case cannot be inquired into on an application for a writ of habeas corpus, that matter being assailable only in a direct proceeding. When the judgment is regular upon its face and was given in an action where the court had jurisdiction of the offense and of the person of the defendant, extrinsic evidence is not admissible to show its invalidity.

Under those rules the issue, which the Supreme Court of the United States said petitioner presents, cannot be determined in a habeas corpus proceeding in the courts of this state.

The question which petitioner now seeks to present could have been presented and determined by the trial court, in the first instance, on a motion for a new trial and if not determined there to his liking then by this court on a writ of error. And in this connection we mention the holding of the Supreme Court of the United States that the facts pleaded by petitioner did not show an interference with the right of appeal, and (in footnote 2) that a failure to seek a review under our procedure was without excuse. The Supreme Court of the United States has said: "No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it. * * * While this Court in its discretion sometimes departs from this rule in cases from lower federal courts, it invariably adheres to it in cases from state courts, * * * and it could hardly be maintained that it is beyond legislative power to make the rule inflexible in all cases." Yakus v. United States, 321 U. S. 414, 88 L. Ed. 834, 64 S. Ct. 660.

In full accord with our decisions we are required to hold that petitioner's issues which the Supreme Court of the United States said he is entitled to have an opportunity to prove are issues which are not justiciable in a habeas corpus proceeding in this state.

We are of the opinion that denial of the petitioner's motion is not inconsistent with the mandate of the Supreme Court of the United States. The existence of the right is one matter; the availability of a particular remedy in which that right may be asserted is distinctly a separate matter. They are not interdependent, nor intermingled. The decision of the one does not depend upon the decision of the other. A determination of the federal question does not determine the question arising under state law.

The Supreme Court of the United States on certiorari considered and determined the merits of petitioner's allegation that he was being restrained without due process of law under the Fourteenth Amendment. It did not undertake to determine the question and did not discuss nor pass upon the availability of a habeas corpus proceeding in Nebraska as a remedy. Only the federal question was open to the determination of the Supreme Court of the United States.

The Supreme Court of the United States has held: "A judgment of reversal is not necessarily an adjudication by the appellate court of any other than the questions in terms discussed and decided." Mutual Life Insurance Co. v. Hill, 193 U. S. 551, 48 L. Ed. 788, 24 S. Ct. 538. In considering how far a decision made by it reversing a judgment of a state court is binding on the state court, it has held that only those matters which were actually considered and decided by it are foreclosed. Hartford Life Insurance Co. v. Blincoe, 255 U. S. 129, 65 L. Ed. 549, 41 S. Ct. 276.

We have held: "A mandate remanding a cause to a state supreme court for further proceedings not inconsistent with the opinion of the supreme court of the United States leaves open for further consideration undetermined issues arising exclusively under state law, if not mingled with any federal question considered or determined by either court." Engen v. Union State Bank, 121 Neb. 257, 236 N. W. 741. Certiorari denied, 284 U. S. 655, 76 L. Ed. 555, 52 S. Ct. 33.

As we have pointed out, in its opinion the Supreme Court of the United States said: "When the corrective process is

provided by the state but error, in relation to the Federal question of constitutional violation, creeps into the record, we have the responsibility to review the state proceedings," citing Williams v. Kaiser, *supra*; Tompkins v. Missouri, 323 U. S. 485, 89 L. Ed. 370, 65 S. Ct. 370. Here, as we have said, the court proceeded on the assumption that habeas corpus in this state was available as a corrective process to the petitioner upon the facts which he alleged. As we have pointed out, that was an erroneous assumption.

In the Williams case the Supreme Court of the United States said: "Whatever the grounds of that decision (Missouri Supreme Court) it is binding on us insofar as state law is concerned." And further "It is a well established principle of this Court that before we will review a decision of a state court it must affirmatively appear from the record that the federal question was presented to the highest court of the State having jurisdiction and that its decision of the federal question was necessary to its determination of the cause. * * * And where the decision of the state court might have been either on a state ground or on a federal ground and the state ground is sufficient to sustain the judgment, the Court will not undertake to review it." The court further pointed out that Missouri had not suggested that its habeas corpus procedure was not available to petitioner. In the instant case we so held. In the Williams case the court said it had searched for an independent state ground to support the denial of the writ and found none. Here in our prior opinion we stated that "independent state ground." In the Williams case the Attorney General of Missouri went only so far as to say that the petition did not state facts sufficient to justify the appointment of counsel under the Missouri statute. That was held to be an insubstantial ground. Missouri suggested no other state ground. The court accordingly assumed in the Williams case that the denial by the Supreme Court of Missouri was for the reason that the petition stated no cause of action based on the federal right. Here our denial was based on the proposition that habeas corpus proceedings are not available as a rem-

edy under the facts which petitioner alleged. In the Williams case the Supreme Court of the United States said: " * * * if the independent ground was not a substantial or sufficient one, 'it will be presumed that the State court based its judgment on the law raising the Federal question, and this court will then take jurisdiction.' " There is no warrant for such a presumption in this case for the reasons which we have pointed out.

We do not consider our rules denying the use of the writ of habeas corpus under the circumstances here to be either not substantial or not sufficient. We find nothing in the opinion of the Supreme Court of the United States in the instant case indicating that it considers such grounds to be insubstantial. In White v. Ragen, 324 U. S. 760, 89 L. Ed. 932, 65 S. Ct. 978, the Supreme Court of the United States held not only that a decision of a state court that the remedy of habeas corpus is not available under the state practice was an adequate nonfederal ground, but also that it lacked jurisdiction to review such a decision of the state court.

In the Williams case the Supreme Court of the United States further said: "If perchance the Supreme Court of Missouri meant that some reason of state law precludes a decision of the federal question, that question is not foreclosed by this decision." Here we had stated that under the procedure and law of this state habeas corpus was not available to the petitioner in the situation he alleged.

Our action in again stating an independent state ground as the basis of our decision, and in refusing to grant the motion of petitioner, is not without precedent. Georgia Railway & Electric Co. v. City of Decatur, 297 U. S. 620, 80 L. Ed. 925, 56 S. Ct. 606; Georgia Power Co. v. City of Decatur, 181 Ga. 187, 182 S. E. 32; State ex rel. Anderson v. Brand, 214 Ind. 347, 13 N. E. 2d 955; Pauline Oil & Gas Co. v. Fischer, 191 Okl. 346, 130 P. 2d 305.

Were we to issue the mandate, in compliance with petitioner's motion, it would avail him nothing of advantage, for if he were to make the requisite proof in the trial court and avoid the defenses which the Supreme Court of the

United States said may be interposed, still, in keeping with the law of this state, the trial court would be required to deny the writ.

For the reasons given herein, the motion of petitioner is denied.

MOTION DENIED.

YEAGER, J., not participating.

JAMES E. JACKSON, APPELLANT, V. NEIL OLSON, WARDEN OF THE NEBRASKA STATE PENITENTIARY, APPELLEE.
22 N. W. 2d 124

FILED MARCH 8, 1946. No. 32012.

1. **Habeas Corpus.** To release a person from a sentence of imprisonment by habeas corpus, it must appear that the sentence was absolutely void.
2. ———. Habeas corpus will not lie to discharge a person from a sentence of penal servitude where the court imposing the sentence had jurisdiction of the offense, had jurisdiction of the person of the defendant, and the sentence was within the power of the court to impose.
3. ———. Habeas corpus cannot be used as a substitute for a writ of error.
4. ———. Habeas corpus is a collateral and not a direct proceeding when regarded as a means of attack upon a judgment sentencing a defendant.
5. ———. The regularity of the proceedings leading up to a sentence in a criminal case cannot be inquired into on an application for a writ of habeas corpus, that matter being assailable only in a direct proceeding.
6. **Judgments.** When the judgment is regular upon its face and was given in an action where the court had jurisdiction of the offense and of the person of the defendant, extrinsic evidence is not admissible to show its invalidity.
7. **Extradition: CRIMINAL LAW.** Except in the case of a fugitive surrendered by a foreign government, there is nothing in the Constitution, treaties, or laws of the United States which exempts an offender, brought before the courts of a state for an offense against its laws, from trial and punishment, even though brought from another state by unlawful violence, or by abuse of legal process.

8. **Case Overruled.** In re Robinson, 29 Neb. 135, 45 N. W. 267, is overruled.
9. **Courts.** The absence of jurisdiction of the district court will not be presumed, but must affirmatively appear from the face of the record.
10. **Criminal Law.** The right of a defendant, under section 29-1802, R. S. 1943, not to be required, without his assent, to answer an indictment, until one day shall have elapsed after receiving a copy thereof, may be waived. The failure of the record to show that he made any objection raises the presumption that he waived the right.
11. **Constitutional Law.** A constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.
12. **Homicide.** Where an information charges the crime of murder in the first degree, murder in the second degree and manslaughter are included in the charge, the degree ordinarily being for the jury; and where the evidence and circumstances of the killing are such that different inferences may properly be drawn therefrom as to the degree, the court should submit the different degrees to the jury for them to draw the inference.
13. **Criminal Law: CONSTITUTIONAL LAW.** The provision of the Constitution of Nebraska, permitting prosecutions for felony by information, does not conflict with the Fourteenth Amendment to the Constitution of the United States.
14. **Homicide.** The statute limiting prosecutions for felonies, by its specific terms, does not apply to prosecutions for murder. Sec. 29-110, R. S. 1943.
15. **Habeas Corpus.** The principle of res judicata applies in cases of habeas corpus where there has been a hearing upon the merits in a former action of the same kind, and where, in a second petition filed for a writ of habeas corpus, it affirmatively appears that such petition is based upon the same reasons and facts and does not contain a new state of facts different from that which existed at the time the first judgment was rendered.
16. ———. The final adjudication in a habeas corpus proceeding is conclusive on the matters there determined, as against a subsequent application.
17. ———. Where several applications for a writ of habeas corpus, all on similar grounds, have been denied by the courts of this state, a subsequent application on essentially the same grounds constitutes an abusive use of the writ and justifies a denial of it.

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

James E. Jackson, pro se, for appellant.

Walter R. Johnson, Attorney General, *H. Emerson Kokjer*, and *Carl H. Peterson*, for appellee.

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

SIMMONS, C. J.

Petitioner here filed his petition in the district court for Lancaster County for a writ of habeas corpus, naming the Warden of the Nebraska State Penitentiary as respondent. The trial court examined the petition and found that it did not state facts sufficient to constitute a cause of action against the respondent or to afford petitioner relief. It also took judicial notice of its own records and found that three previous petitions had been filed by petitioner alleging substantially the same facts and seeking the same relief. The trial court further found that in all three actions the petitions had been dismissed, the writs denied, and the judgments subsequently affirmed by this court; and that the questions had been adjudicated and determined. The trial court denied the writ and dismissed the petition. Petitioner appeals. We affirm the judgment of the trial court.

Petitioner's application consists of allegations and conclusions of both fact and law. To the application he attaches an exhibit and, by reference, incorporates it in his petition. This exhibit is a copy of a petition for appeal filed in the United States Circuit Court of Appeals for the Eighth Circuit, in which action he unsuccessfully sought a writ of habeas corpus. To this petition (exhibit) are attached copies of pleadings filed in the District Court of the United States for the District of Nebraska; a petition directed to a judge of the Eighth Circuit containing a copy of a part of the journal entry of the district court for Sheridan County, Nebraska; a transcript of certain proceedings in the county court of Sheridan County, Nebraska, and of proceedings in the district court for Sheridan County, Nebraska; likewise, a copy of a letter from an attorney to the petitioner and a copy of an affidavit by a former county attorney of Sheridan County.

Giving petitioner the full benefit of a liberal construction of this pleading and going to all the matters found within the four corners of the application and attached exhibits, we gather that petitioner undertook to allege the following factual situation as a basis for the issuance of the writ.

On April 3, 1920, petitioner was a resident of Antioch in Sheridan County, Nebraska, living with one Florence Feagins, his common-law wife; that on that day she, while under the influence of liquor, threatened petitioner's life with a revolver; that in a scuffle for the possession of the revolver it was discharged, a bullet entering the body of Florence Feagins and causing her death; that the petitioner notified the county officials, who came and examined the body; that a coroner's inquest was held resulting in a verdict that " * * * Florence Feagins came to her death from a gun shot fired by one Jack Jackson * * * "; and that on April 7, 1920, the petitioner appeared before the county attorney for Sheridan County and was told that a prosecution would not be instituted.

Petitioner thereafter traveled a great deal and finally located in the state of California. On October 7, 1934, petitioner was arrested by officials in California and placed in jail on information from the officials of Sheridan County that he was wanted for the murder of Florence Feagins. On October 15, 1934, a complaint was filed in the county court of Sheridan County charging that petitioner feloniously, maliciously, purposely, and of his deliberate and premeditated malice shot Florence Feagins with a revolver, and that as a result she died and defendant "thus committed murder in the first degree." On the same day a warrant was issued for the arrest of petitioner, the return reciting that he could not be found within the jurisdiction of the court.

On November 2, 1934, the then county attorney for Sheridan County and a deputy sheriff of that county "illegally, unlawfully, without jurisdiction or authority of law arrested" petitioner in California, placed him in irons and transported him to Sheridan County, where he was placed in jail under the complaint there filed. Attached to the

pleadings carried as an exhibit is a copy of an affidavit of the then county attorney who filed the murder complaint, reciting that subsequent to the filing of the complaint and the issuance of the warrant, he, as county attorney, made application for a requisition to the Governor of Nebraska, who issued the same to the Governor of California and who appointed the deputy sheriff as the agent of this state to receive and return petitioner to Nebraska; that thereafter the attorney and the deputy went to California and presented the requisition to the Governor of that state, who granted the extradition papers; that thereafter with the extradition papers in their possession they went to the officials who held petitioner in custody, interviewed petitioner, advised him that they had proper extradition papers entitling them to return him to this state; that the papers were exhibited to petitioner and he was advised that he could, if he desired, resist extradition; that petitioner voluntarily agreed to and did return with them voluntarily to the state of Nebraska. Petitioner charges that he believes the affidavit just mentioned to be a forgery, "manufactured," and the result of perjury.

On November 9, 1934, petitioner appeared in the county court of Sheridan County in person and represented by counsel, the complaint was read to him and he pleaded not guilty. It then was agreed that a date for preliminary hearing would be agreed upon by the parties.

On November 28, 1934, petitioner, in court in person and with counsel, moved for additional time before the preliminary hearing was held. It was granted. Again on December 19, 1934, petitioner by his counsel moved for additional time for preparation and to get "in touch with witnesses." It was granted. On February 8, 1935, petitioner appeared in court with his counsel and waived preliminary hearing and was bound over to the next term of the district court for that county.

A transcript of the county court proceedings was filed in the district court on March 12, 1935. On March 17, 1935 (as recited in the copy of the transcript) there was filed in

the district court for Sheridan County an information of the county attorney charging petitioner with murder in the first degree. This information is shown to have been verified March 19, 1935. Other references in the transcript show it to have been filed March 19, 1935. On March 19, 1935, petitioner was arraigned and entered a plea of not guilty.

Petitioner alleged that he was not served with a copy of the information and entered his plea of not guilty without the assistance of counsel. He further alleged that the trial court inquired of him if he intended to represent himself or employ counsel; that he informed the court he had no counsel or money to employ counsel; that he then signed an affidavit and thereafter the court appointed counsel (being the same attorney who theretofore had represented him in the preliminary hearings). These events occurred on March 19, 1935.

Thereafter on March 30, 1935, by permission of the court the names of additional witnesses were endorsed on the information.

On April 1, 1935, the petitioner was placed on trial. He appeared in court in person and by his attorney, a jury was impaneled and sworn, opening statements were made, and the state offered testimony. On April 2, 1935, the state offered testimony and rested its case. The defendant testified in his own behalf and rested his case. The state offered witnesses in rebuttal. On April 3, 1935, additional testimony was completed. The cause was submitted to the jury upon the evidence, the arguments of counsel, and the instructions of the court. Among other instructions, the trial court instructed the jury that if they found from the evidence that beyond a reasonable doubt defendant "purposely and maliciously but without deliberation and premeditation" shot the woman with a revolver and as a direct consequence thereof she died, then defendant "would be guilty of murder in the second degree" and in such case they should so find and return their verdict. On April 4, 1935, the jury returned their verdict in open court, finding that

defendant was guilty of murder in the second degree. The jury was polled and answered that that was its verdict.

On the same day petitioner filed a motion for a new trial setting out particularly some 48 different grounds therefor. Petitioner alleged that this was "a skeleton of a motion." On the same day petitioner filed a motion in arrest of judgment charging that the "facts stated in the information do not state an offense." The trial court overruled and denied both motions. The court then inquired of petitioner if he had anything to say as to why the judgment of the court should not be pronounced against him.

The court thereupon sentenced the petitioner to imprisonment for a term of 30 years. Exceptions were taken to all said rulings. Petitioner was allowed 40 days from the rising of the court to prepare and serve his bill of exceptions. Petitioner has since that time been confined in the state penitentiary.

Upon arrival at the penitentiary, petitioner alleged that he was advised by fellow inmates to contact counsel in Lincoln, Nebraska; that he did so, paying an attorney a fee on the promise that he would appeal said cause to the Supreme Court, but counsel failed to prosecute said appeal; that petitioner was without funds to employ other counsel and hence no further attempt to appeal was made. Petitioner attached a copy of a letter from the attorney addressed to him. It recites that "Pursuent (sic) to your instructions" he had investigated the case at Rushville, investigated the facts, consulted with the attorney who had represented petitioner and with other attorneys in that section of the state who apparently knew something of the case; that petitioner's attorney at the trial "advised me he waived your preliminary hearing because the prosecution gave him all the evidence it intended to use"; that he discussed certain legal questions presented and advised petitioner that he (the attorney) did not feel that any relief could be obtained on appeal; that he found no grounds for reversible error; and that he did not feel the case could be reversed and advised petitioner to abide by the result.

Petitioner in "REASONS FOR GRANTING THE WRIT" alleged that he is innocent and could have proved his innocence if the trial court had made an effective appointment of counsel; that he was deprived of his fundamental right to be served with a copy of the information and the right to be informed of the nature and cause of the accusation, the right to summon witnesses in that witnesses had left the jurisdiction of the court in the years between the time of the alleged offense and the trial; that he was kidnapped out of the state of California and transported through several states of the Union in violation of the "Federal Kidnap Law," citing title 18, section 408(a), U. S. C. A.; that the trial court was without jurisdiction of the offense or the accused, in that no information was filed within three years of the time the alleged offense was committed; that the judgment was an absolute nullity in that the court was without jurisdiction to pronounce the same; and that habeas corpus is the only remedy under the laws of this state by which petitioner "may extricate himself from his illegal confinement." Petitioner further alleges that his conviction was obtained by a "swift, reckless, sham and pretense of a trial" and deprived him of his liberties without due process of law, in violation of the guaranties contained in the Fourteenth Amendment to the Constitution of the United States. Under this latter allegation petitioner presents that (1) he was illegally and unlawfully kidnapped and transported from California to Nebraska in violation of article 4, section 2, clause 2 of the Constitution of the United States and in violation of title 18, section 408(a) of the United States Criminal Code, as amended, and that he never was a fugitive from justice; (2) he was deprived of his fundamental right to be served with a copy of the accusation and to have 24 hours to examine the charge, consult with counsel, summon witnesses and prepare a defense before being placed on trial; (3) the conviction is based on the information of a public prosecutor rather than the presentment or indictment of a grand jury; (4) no information or indictment was ever filed in the trial court within three years after the

alleged offense was committed, and accordingly the trial court was without jurisdiction of the offense.

Petitioner asserts that a judgment of conviction entered in violation of the procedural guaranties of the Fourteenth Amendment to the Constitution of the United States is void and may be questioned collaterally. Petitioner prays that a writ of habeas corpus issue directing the respondent to bring petitioner before the court, together with the true cause of his detention to the end that due inquiry be made.

Petitioner here presents four assignments of error upon which he relies for the reversal of the judgment of the trial court. Under our rules consideration of the cause is limited to errors assigned and discussed, save as to plain errors not assigned which, at our option, we may consider. It must be determined whether or not the questions presented by petitioner's assignments of error are issues which may be determined on an application for a writ of habeas corpus.

In the course of the opinion in Smith v. O'Grady, 312 U. S. 329, 85 L. Ed. 859, 61 S. Ct. 572, the Supreme Court of the United States said: " * * * the opinions of the Nebraska courts do not mark clearly the exact boundaries within which Nebraska confines the historic remedy of habeas corpus * * * ." In a wide variety of cases we have stated, reexamined and restated those boundaries. We cite these decisions without assuming that the list following is all inclusive. See Ex parte Fisher, 6 Neb. 309; In re Balcom, 12 Neb. 316, 11 N. W. 312; In re Betts, 36 Neb. 282, 54 N. W. 524; In re Walsh, 37 Neb. 454, 55 N. W. 1075; State v. Crinklaw, 40 Neb. 759, 59 N. W. 370; In re Havlik, 45 Neb. 747, 64 N. W. 234; State v. Leidigh, 47 Neb. 126, 66 N. W. 308; In re Ream, 54 Neb. 667, 75 N. W. 24; In re Langston, 55 Neb. 310, 75 N. W. 828; In re Fanton, 55 Neb. 703, 76 N. W. 447; McCarty v. Hopkins, 61 Neb. 550, 85 N. W. 540; In re Application of Walker, 61 Neb. 803, 86 N. W. 510; Jahnke v. State, 68 Neb. 154, 94 N. W. 158, 104 N. W. 154; Keller v. Davis, 69 Neb. 494, 95 N. W. 1028; Michaelson v. Beemer, 72 Neb. 761, 101 N. W. 1007; Campion v. Gillan, 79 Neb. 364, 112 N. W. 585; In re Caldwell, 82 Neb.

544, 118 N. W. 133; State v. Birdsall, 88 Neb. 587, 130 N. W. 108; In re Application of Selicow, 100 Neb. 615, 160 N. W. 991; State ex rel. Flippin v. Sievers, 102 Neb. 611, 168 N. W. 99; In re Application of Cole, 103 Neb. 802, 174 N. W. 509, 848; Fuller v. Fenton, 104 Neb. 358, 177 N. W. 154; In re Resler, 115 Neb. 335, 212 N. W. 765; Hulbert v. Fenton, 115 Neb. 818, 215 N. W. 104; In re Carbino, 117 Neb. 107, 219 N. W. 846; Hickman v. Fenton, 120 Neb. 66, 231 N. W. 510; Carlsen v. State, 129 Neb. 84, 261 N. W. 339; Hawk v. O'Grady, 137 Neb. 639, 290 N. W. 911; Alexander v. O'Grady, 137 Neb. 645, 290 N. W. 718; Davis v. O'Grady, 137 Neb. 708, 291 N. W. 82; State ex rel. Gossett v. O'Grady, 137 Neb. 824, 291 N. W. 497; In re Application of Maher, 144 Neb. 484, 13 N. W. 2d 653; In re Application of Niklaus, 144 Neb. 503, 13 N. W. 2d 655; In re Application of Carper, 144 Neb. 623, 14 N. W. 2d 225; In re Application of Tail, 145 Neb. 268, 16 N. W. 2d 161; Hawk v. Olson, 145 Neb. 306, 16 N. W. 2d 181.

These cases have determined the rules governing the use of the writ of habeas corpus in this state. To release a person from a sentence of imprisonment by habeas corpus, it must appear that the sentence was absolutely void. Habeas corpus will not lie to discharge a person from a sentence of penal servitude where the court imposing the sentence had jurisdiction of the offense, had jurisdiction of the person of the defendant, and the sentence was within the power of the court to impose. Such a judgment is not void. Habeas corpus cannot be used as a substitute for a writ of error. Habeas corpus is a collateral and not a direct proceeding when regarded as a means of attack upon a judgment sentencing a defendant. The regularity of the proceedings leading up to a sentence in a criminal case cannot be inquired into on an application for a writ of habeas corpus, that matter being assailable only in a direct proceeding. When the judgment is regular upon its face and was given in an action where the court had jurisdiction of the offense and of the person of the defendant, extrinsic evidence is not admissible to show its invalidity.

Our holdings are in accord with decisions of the Supreme Court of the United States. See Felts v. Murphy, 201 U. S. 123, 50 L. Ed. 689, 26 S. Ct. 366; Woolsey v. Best, 299 U. S. 1, 81 L. Ed. 3, 57 S. Ct. 2; Frank v. Mangum, 237 U. S. 309, 59 L. Ed. 969, 35 S. Ct. 582; Knewel v. Egan, 268 U. S. 442, 69 L. Ed. 1036, 45 S. Ct. 522; Ashe v. United States ex rel. Valotta, 270 U. S. 424, 70 L. Ed. 662, 46 S. Ct. 333; Riddle v. Dyche, 262 U. S. 333, 67 L. Ed. 1009, 43 S. Ct. 555.

We weigh and determine petitioner's assignments of error in the light of the above rules.

We consider initially petitioner's second assignment of error to the effect that the court where he was tried, convicted, and committed was without jurisdiction of his person. Petitioner's contention is that he was seized and arrested in California, kidnapped and brought into this state in violation of the law, involuntarily and against his will. This he contends is in violation of a federal statute involving kidnapping, in violation of article 4, section 2, clause 2 of the Constitution of the United States, and in violation of the due process guaranteed by the Fourteenth Amendment to the Constitution of the United States. He contends that because of this situation, he could not be lawfully held, tried, convicted, or committed.

Petitioner relies principally upon our decision in the case of In re Robinson, 29 Neb. 135, 45 N. W. 267, wherein we held, as summarized in the syllabus, that "When a person is arrested in a sister state, and, without being extradited, is forcibly brought into the jurisdiction of this state to answer to a criminal offense, and is committed to jail to await trial on such charge, *held*, that such person is unlawfully deprived of his liberty and is entitled to be discharged on *habeas corpus*." The major premise in that opinion was that when a fugitive from justice has been extradited from one state to another, he cannot be prosecuted in the state to which he has been surrendered on an offense other than the one for which he was extradited, before he has an opportunity to return to the state from whence he was brought. The minor premise was that there is no difference in principle

between a case where a person is held for an offense other than the one for which he was extradited, and one where he is arrested and taken without authority of law, forcibly and against his will, into the jurisdiction of another state for the purpose of prosecution. The conclusion there was that the court did not acquire jurisdiction of the person of the accused under those circumstances and his detention was unlawful.

To sustain the major premise we relied upon a number of decisions from other jurisdictions to which we shall refer presently.

Our decision in the Robinson case was filed March 11, 1890. Thereafter on April 3, 1893, the Supreme Court of the United States decided the case of Lascelles v. Georgia, 148 U. S. 537, 37 L. Ed. 549, 13 S. Ct. 687, in which it was held that " * * * upon a fugitive's surrender to the State demanding his return in pursuance of national law, he may be tried in the State to which he is returned for any other offence than that specified in the requisition for his rendition, and that in so trying him against his objection no right, privilege or immunity secured to him by the Constitution and laws of the United States is thereby denied." This holding is obviously contrary to the major premise advanced in the Robinson case.

Now, we return to the authorities relied upon in the Robinson case to sustain the major premise.

The first one is In re Cannon, 47 Mich. 481, 11 N. W. 280. The Supreme Court of Michigan in the subsequent case of In re Little, 129 Mich. 454, 89 N. W. 38, distinguished the Cannon case as one not applicable to arrests for crime, and held that the decision in Lascelles v. Georgia was binding so far as the federal question was concerned and followed that decision.

The next case cited by us in the Robinson case is State v. Vanderpool, 39 Ohio St. 273. This was a case of extradition under a treaty between the United States and Great Britain. The Supreme Court of Ohio followed the decision in Ex parte McKnight, 48 Ohio St. 588, 28 N. E. 1034, de-

cided November 17, 1891, and applied it to a case involving interstate extradition. The court in this decision likewise followed United States v. Rauscher, 119 U. S. 407, 30 L. Ed. 425, 7 S. Ct. 234. We do not find where the Supreme Court of Ohio has since reexamined or passed upon the question. However, the Court of Appeals for Hamilton County in that state in Ex parte Moeller, 14 Ohio App. 300, decided in 1921, referred to Ex parte McKnight, *supra,* and Lascelles v. Georgia, *supra,* and pointed out that the cases reached contrary conclusions, and followed the Lascelles case. The Franklin County Court of Common Pleas in Ohio in the case of In the Matter of the Application of John J. Brophy for a Writ of Habeas Corpus, 2 Ohio N. P. 230, held that the authority of the McKnight case had been destroyed by the Lascelles case and followed the latter. See, also, Knipp v. City of Cincinnati, 29 Ohio N. P. N. S. 209, decided March 15, 1932, by the Common Pleas Court for Hamilton County, Ohio.

The next cases cited by us in the Robinson case were Ex parte Hibbs, 26 F. 421, and United States v. Rauscher, *supra.* These were cases of extradition arising under the treaty between the United States and Great Britain. The Supreme Court of the United States in the Lascelles case directly held that they had no application to the interstate rendition of fugitives under the Constitution and laws of the United States.

The next case relied upon by us in the Robinson case is State v. Hall, 40 Kan. 338, 19 P. 918. In the case of In re Flack, 88 Kan. 616, 129 P. 541, the Supreme Court of Kansas reviewed the authorities, referred to the McKnight case from Ohio, reviewed the Rauscher and Lascelles cases and other authorities, and directly overruled State v. Hall. See, also, State v. Wellman, 102 Kan. 503, 170 P. 1052.

The next case relied upon in the Robinson case was Waterman v. State, 116 Ind. 51, 18 N. E. 63. As we now read that case, it does not sustain the proposition for which it was cited. In fact, insofar as it relates to the proposition, it holds to the contrary. However, the Supreme Court of

Indiana in Knox v. State, 164 Ind. 226, 73 N. E. 255, reviewed the Rauscher and Lascelles cases and other authorities, and held that a fugitive from justice upon his return to the state under extradition proceedings could be lawfully held to answer for any crime against the laws of the state, without regard to the particular offense named in the papers for his extradition.

It, therefore, appears that the decisions upon which we relied in the Robinson case to sustain the major premise of that opinion have since been either distinguished or overruled by the courts of the states that wrote them and by the United States Supreme Court.

Furthermore, in State v. Leidigh, 47 Neb. 126, 66 N. W. 308, we had before us the identical question involved in the major premise of the Robinson opinion, and held that what was said in it regarding the right of a state to prosecute a fugitive regularly extradited was mere obiter, and followed the Lascelles case. It further was held that whether the Robinson case should be regarded as authority when applied to a similar set of facts was not then for decision. See, also, In re Application of Walker, 61 Neb. 803, 86 N. W. 510. Accordingly, it appears that the major premise of the Robinson opinion has been repudiated and a contrary holding in accord with the holding of the Supreme Court of the United States has been followed in this state. (This is the general rule. Annotations, 21 A. L. R. 1418; 35 C. J. S., Extradition, s. 21, p. 349; 22 Am. Jur., Extradition, s. 59, p. 297.)

We next come to the proposition involved in the minor premise and the question actually decided in the Robinson case, i. e. that one forcibly and unlawfully carried into this state will not be held to answer to a criminal charge without an opportunity to return to the state from whence he is brought.

Since petitioner bases his claim upon acts of the United States Congress and the United States Constitution, we go to the decisions of the Supreme Court of the United States for an answer to his contentions.

In the Lascelles case the Supreme Court of the United

States said: "But it is settled by the decisions of this court that, except in the case of a fugitive surrendered by a foreign government, there is nothing in the Constitution, treaties or laws of the United States which exempts an offender, brought before the courts of a State for an offence against its laws, from trial and punishment, even though brought from another State by unlawful violence, or by abuse of legal process." See, also, Mahon v. Justice, 127 U. S. 700, 32 L. Ed. 283, 8 S. Ct. 1204; Pettibone v. Nichols, 203 U. S. 192, 51 L. Ed. 148, 27 S. Ct. 111; Sheehan v. Huff, 142 F. 2d 81, certiorari denied in 322 U. S. 764, 88 L. Ed. 1591, 64 S. Ct. 1287.

It is a general rule that where a person accused of a crime is found within the territorial jurisdiction where he is so charged, the right to put him on trial for the offense charged is not impaired by the fact that he was brought from another jurisdiction by illegal means, such as kidnapping, unlawful force, fraud, or the like. Annotations, 18 A. L. R. 509; 22 C. J. S., Criminal Law, s. 146, p. 242; 14 Am. Jur., Criminal Law, s. 217, p. 919.

Accordingly, we reach the conclusion that the manner in which the petitioner alleges he was brought into the state of Nebraska does not entitle him to the issuance of the writ of habeas corpus, and that his second assignment of error is without merit.

In re Robinson, 29 Neb. 135, 45 N. W. 267, is overruled.

Petitioner for his third assignment of error contends that his conviction and commitment deprived him of his liberty without due process of law, in that his trial, conviction and commitment were obtained by a swift, reckless, sham and pretense of a trial in that the trial court deprived him of his fundamental right of 24 hours in which to examine the charge, consult with counsel, and to be informed of the nature and cause of the accusation, and placed him on trial for one offense and convicted him of a separate and distinct offense without jurisdiction or probable cause, in violation of the procedural guaranties of the Fourteenth Amendment to the Constitution of the United States.

We examine petitioner's charges in this third assignment of error for the purpose of determining whether they show that the trial court did not have jurisdiction of the offense or lost that jurisdiction during the progress of the trial. It need not be demonstrated that the trial court had jurisdiction to try a person accused of murder. The absence of jurisdiction of the district court will not be presumed, but must affirmatively appear from the face of the record. Barker v. State, 54 Neb. 53, 74 N. W. 427.

Petitioner first makes the general assertion that his trial, conviction, and commitment were obtained by a "swift, reckless, sham and pretense of a trial." He further limits that to certain specific assertions which will be considered. We pause, however, to point out that petitioner pleads a record in detail which conclusively refutes his general assertion and likewise establishes that his trial was not swift, but one in which each step was deliberate, orderly, and considerate. It not only was not reckless, nor a sham, nor a pretense, but it was a carefully conducted, actual trial in all its steps. Certainly no jurisdictional defect appears on that ground.

Petitioner in his assignment limits the general charge by stating that "the trial court deprived him of his fundamental right of twenty-four (24) hours to examine the charge, consult with counsel, and to be informed of the nature and cause of the accusation * * * ." In this connection petitioner alleges that he was arraigned and entered his plea " * * * without ever having been served with a copy of the accusation (information), * * * ." The record does not show that he made any objection at the time. The record which he pleads shows that the information was filed on March 17, 1935, and that he was "Arraigned March 19, 1935, and entered a plea of not guilty." As has been pointed out the record shows the information to have been verified on March 19, 1935. Petitioner pleads that the information was filed on March 19, 1935. The truth of the record cannot be assailed by extrinsic evidence. Nevertheless it makes no difference in this instance in the result whichever date is accepted as true.

The applicable statute is: "Within twenty-four hours after the filing of an indictment for felony, and in every other case on request, the clerk shall make and deliver to the sheriff, the defendant or his counsel a copy of the indictment, and the sheriff on receiving such copy shall serve the same upon the defendant. No one shall be, without his assent, arraigned or called on to answer to any indictment until one day shall have elapsed, after receiving in person or by counsel, or having an opportunity to receive a copy of such indictment as aforesaid." Sec. 29-1802, R. S. 1943. The record is silent as to a specific statement that a copy of the information was delivered to the sheriff, the defendant or his counsel, nor is there a specific statement that the sheriff served the copy upon the defendant. The right accorded by the statute may be waived. The failure of the record to show that defendant made any objection to proceeding with the trial raises the presumption that he waived the right. Barker v. State, *supra;* Foster v. State, 83 Neb. 264, 119 N. W. 475; Kopp v. State, 124 Neb. 363, 246 N. W. 718. See, also, McCarty v. Hopkins, 61 Neb. 550, 85 N. W. 540.

In Garland v. Washington, 232 U. S. 642, 58 L. Ed. 772, 34 S. Ct. 456, the record did not show that either arraignment or plea was entered, and the accused was put on trial as though he had entered the plea. The state court held that the failure to enter the plea did not deprive the accused of a substantial right, and having proceeded to trial without objection it was waived. The Supreme Court of the United States held that he was not deprived of his liberty without due process of law within the meaning of the Fourteenth Amendment. Certainly if the plea can be waived without denial of due process, then the waiver here does not deny it.

The Supreme Court of the United States has said: "No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it. * * * Courts may for that reason refuse to consider a

constitutional objection even though a like objection had previously been sustained in a case in which it was properly taken. * * * While this Court in its discretion sometimes departs from this rule in cases from lower federal courts, it invariably adheres to it in cases from state courts, * * * and it could hardly be maintained that it is beyond legislative power to make the rule inflexible in all cases." Yakus v. United States, 321 U. S. 414, 88 L. Ed. 834, 64 S. Ct. 660.

This presumption of waiver is strengthened by the fact that the record petitioner pleads shows that he had been fully advised of the nature of the charge against him and had had the benefit of the services of an able and distinguished member of the bar of this state for months prior to and including the day he was arraigned and entered his plea.

In his third assignment petitioner further assigns as error that he was placed on trial for one offense and convicted of a separate and distinct offense without jurisdiction and in violation of the procedural guaranties of the Fourteenth Amendment to the Constitution of the United States. This relates to prisoner's contention that he was informed against for murder in the first degree and found guilty of murder in the second degree. The applicable statute is: "In all trials for murder the jury before whom such trial is had, if they find the prisoner guilty thereof, shall ascertain in their verdict whether it be murder in the first or second degree, or manslaughter; * * * ." Sec. 29-2027, R. S. 1943.

We have held: "Where an information charges the crime of murder in the first degree, murder in the second degree and manslaughter are included in the charge, the degree ordinarily being for the jury; and where the evidence and circumstances of the killing are such that different inferences may properly be drawn therefrom as to the degree, the court should submit the different degrees to the jury for them to draw the inference." Denison v. State, 117 Neb. 601, 221 N. W. 683. See, also, Jackson v. State, 133 Neb. 786, 277 N. W. 92; State v. Hutter, 145 Neb. 798, 18 N. W. 2d 203.

It is obvious that the matters set out in petitioner's third assignment of error do not present even an error of the trial court, let alone raise a jurisdictional barrier. His third assignment of error, relied upon for reversal, is accordingly without merit.

By way of argument of his third assignment of error, but not included therein, petitioner presents two other contentions: First, that he was prosecuted by information and not by indictment of a grand jury. Our Constitution provides: " * * * the Legislature may by law provide for holding persons to answer for criminal offenses on information of a public prosecutor; and may by law, abolish, limit, change, amend, or otherwise regulate the grand jury system." Constitution 1875, art. I, sec. 10. Section 29-1601, R. S. 1943, provides: "The several courts of this state shall possess and may exercise the same power and jurisdiction to hear, try and determine prosecutions upon information, for crimes, misdemeanors and offenses, to issue writs and process, and do all other acts therein, as they possess and may exercise in cases of the like prosecutions upon indictments." The Supreme Court of the United States has held that " * * * the provision of the constitution of Nebraska, permitting prosecutions for felony by information, does not conflict with the Fourteenth Amendment to the Constitution of the United States." Bolln v. Nebraska, 176 U. S. 83, 44 L. Ed. 382, 20 S. Ct. 287. See Duggan v. Olson, *ante* p. 248, 19 N. W. 2d 353. Likewise, the provisions of the Fifth Amendment to the Constitution of the United States do not apply to laws or proceedings under the authority of a state. In re Sawyer, 124 U. S. 200, 219, 31 L. Ed. 402, 408, 8 S. Ct. 482, 492. Second, petitioner contends that the information was not filed within the statutory period as provided by law, to wit: Three years after the alleged crime was committed. The answer is that the statute limiting prosecutions for felonies, by its specific terms, does not apply to prosecutions for murder. Sec. 29-110, R. S. 1943. It is obvious also that these questions, discussed but not assigned, do not present even an error of the trial court, let alone a jurisdictional barrier.

Petitioner's first and fourth assignments of error are that the trial court erred and deprived him of due process of law and the procedural guaranties of the Fourteenth Amendment by not requiring that he be produced and heard upon his petition; and that the court erred in not holding his trial, conviction, and commitment to be unconstitutional and void because they were in violation of the procedural guaranties of the Fourteenth Amendment, and in not releasing him upon his petition. Obviously the merit of these two assignments depends upon the merit of his second and third assignments, which we have considered and disposed of adversely to petitioner. It would have been a futile act to have produced the petitioner before the court, when it was apparent to the court that even if his charges were sustained, the court would be required to deny the writ. Likewise, the court did not err in refusing to release the petitioner upon his petition. We are of the opinion that the trial court did not err in holding that petitioner did not show in his application facts entitling him to an issuance of a writ of habeas corpus.

This disposes of petitioner's assignments of error.

There is one further matter which we consider requires attention. In his petition to a judge of the Eighth Circuit Court of Appeals, attached to and incorporated in his petition herein, petitioner states that the District Court of the United States for the District of Nebraska had on three occasions dismissed similar petitions for writs of habeas corpus, the latest on June 5, 1944, by memorandum opinion "Not to be published." We have examined that opinion. In it the court recites that he had before him a transcript of the complete record of this court in our case No. 31738. The court pointed out that it presented essentially the same grounds as were presented to it (the U. S. District Court). The court held that the petition was clearly inadequate to support a writ, first, because it failed to show an exhaustion of remedies available in the state courts. The court then reviewed petitioner's various contentions and among other things found that his claim of being kidnapped was utterly

false, but, if true, would avail him nothing, and found generally that in its substantive aspects the petition was wholly inadequate. The judge of the Circuit Court of Appeals examined the petition for appeal, the records in the office of the clerk of the United States District Court of Nebraska and found that the petitioner had been duly convicted, sentenced, and committed, and that his petition did not present facts sufficient to constitute a case justifying the issuance of a writ of habeas corpus by a federal circuit judge. Thereafter an appeal from the order was denied. Petitioner accordingly pleads here that he has had a denial of his petition on the merits by the United States Courts of the District of Nebraska and this Circuit.

Petitioner further shows by his exhibits that he had on three occasions sought habeas corpus in the courts of this state on similar petitions, our numbers 30929, 31288, and 31738. These three cases came here on appeal from the district court for Lancaster County. The judgments were affirmed here for want of briefs. Court Journals FFF, p. 187; GGG, p. 388; HHH, p. 484.

In the instant case the trial court held that the petition did not state facts sufficient to justify the issuance of the writ. It also held that because of the three actions previously determined, petitioner was not entitled to any further adjudication of the issues presented.

The rule in this state is: "The principle of *res judicata* applies in cases of habeas corpus where there has been a hearing upon the merits in a former action of the same kind, and where, in a second petition filed for a writ of habeas corpus, it affirmatively appears that such petition is based upon the same reasons and facts and does not contain a new state of facts different from that which existed at the time the first judgment was rendered.

"The final adjudication in a habeas corpus proceeding is conclusive in the matters there determined, as against a subsequent application." Williams v. Olson, 145 Neb. 282, 16 N. W. 2d 178.

In Salinger v. Loisel, 265 U. S. 224, 68 L. Ed. 989, 44 S.

Ct. 519, the Supreme Court of the United States had before it a case in which it was contended that a decision had in another action was a final adjudication and the doctrine of res judicata was invoked making the decision binding on all other courts. The Supreme Court of the United States was "unable to go so far." It stated: "At common law the doctrine of res judicata did not extend to a decision on habeas corpus refusing to discharge the prisoner. The state courts generally have accepted that rule where not modified by statute; the lower Federal courts usually have given effect to it; and this Court has conformed to it and thereby sanctioned it, although announcing no express decision on the point. * * * We regard the rule as well established in this jurisdiction.

"But it does not follow that a refusal to discharge on one application is without bearing or weight when a later application is being considered. In early times when a refusal to discharge was not open to appellate review, courts and judges were accustomed to exercise an independent judgment on each successive application, regardless of the number. But when a right to an appellate review was given the reason for that practice ceased and the practice came to be materially changed,—just as when a right to a comprehensive review in criminal cases was given the scope of inquiry deemed admissible on habeas corpus came to be relatively narrowed.

"The federal statute * * * does not lay down any specific rule on the subject, but directs the court 'to dispose of the party as law and justice may require.' A study of the cases will show that this has been construed as meaning that each application is to be disposed of in the exercise of a sound judicial discretion guided and controlled by a consideration of whatever has a rational bearing on the propriety of the discharge sought. Among the matters which may be considered, and even given controlling weight, are (a) the existence of another remedy, such as a right in ordinary course to an appellate review in the criminal case, and (b) a prior refusal to discharge on a like application. * * * The

decision in the Cuddy case (40 Fed. 62) was on a second application, and was given by Mr. Justice Field. While holding the doctrine of res judicata inapplicable, he said: 'The officers before whom the second application is made may take into consideration the fact that a previous application has been made to another officer and refused; and in some instances that fact may justify a refusal of the second. The action of the court or justice on the second application will naturally be affected to some degree by the character of the court or officer to whom the first application was made, and the fullness of the consideration given to it.'

"In practice the rules we here have outlined will accord to the writ of habeas corpus its recognized status as a privileged writ of freedom, and yet make against an abusive use of it." See, also, Wong Doo v. United States, 265 U. S. 239, 68 L. Ed. 999, 44 S. Ct. 524.

Petitioner in his petition to a judge of the Circuit Court of Appeals asserted that the three affirmances in this court were on orders of the district court for Lancaster County denying and dismissing similar petitions. The trial court found that the three previous petitions filed by petitioner in the trial court alleged substantially the same facts and grounds for relief as did the instant petition. Petitioner further asserted that on three different occasions the District Court of the United States for the District of Nebraska had refused to entertain a hearing on the federal contentions raised in similar petitions. The district court for Lancaster County had this record before it, as pleaded by petitioner, when it denied the writ. We need not now determine that the action was then res judicata under our holdings. Petitioner pleaded not one, but six, prior refusals to issue the writ on a like application. The record shows that petitioner had then already reached that stage where his application constituted an "abusive use" of the writ.

Nevertheless we have here examined plaintiff's petition on its merits as presented to us by his assignments of error to determine whether or not the issues presented raised questions which were justiciable in a habeas corpus pro-

ceeding, and find that they do not.

The trial court properly denied the writ. Its judgment is affirmed.

AFFIRMED.

OMA M. BROWN, APPELLANT, V. GEORGE E. BROWN, APPELLEE.

22 N. W. 2d 148

FILED MARCH 8, 1946. No. 32041.

1. **Divorce.** There may be extreme cruelty justifying a decree of divorce without physical injury or violence. Unjustifiable conduct on the part of husband or wife, which utterly destroys the legitimate ends and objects of matrimony, may constitute extreme cruelty.
2. **Appeal and Error.** When the evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite.
3. **Divorce.** It is impossible to lay down a general rule as to the degree of corroboration required in a divorce action as each case must be decided on its own facts and circumstances.
4. ———. Evidence examined and *held* sufficient to sustain a decree of absolute divorce on defendant's cross-petition.

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

O. A. Drake, for appellant.

George A. Munro, for appellee.

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

CARTER, J.

This is a suit for separate maintenance in which the defendant cross-petitioned for an absolute divorce. The trial court denied the prayer of plaintiff's petition and granted the defendant an absolute divorce. The plaintiff appeals.

The record shows that plaintiff and defendant were mar-

ried on September 11, 1941. Each had been previously married and had grown children. Each was approximately 60 years of age at the time of the marriage. They separated on or near November 3, 1944. They lived on a farm from the time they were married until the separation occurred.

In support of her petition for separate maintenance the plaintiff recites a long list of grievances which it is not necessary to discuss in detail in this opinion. In substance she says that defendant made trips without her, necessitating her being alone or staying with relatives. She complains that he refused to provide funds for her personal use and that she was obliged to use her own money for medical, hospital, and physicians' expenses. She testifies that defendant became angry when she was unable to collect certain money she had loaned out so that he could not use it in paying certain of his obligations. She testifies that he swore at her on several occasions and that he used physical violence upon her on at least one occasion. She testifies that she bought furniture and other household equipment for which she was obliged to pay with her own funds. She does not dispute that defendant furnished groceries and other necessities for the home. She contends that he was sullen and would not talk to her about his business affairs. She complains further that he did not visit her when she was ill and failed to write or advise her of his whereabouts on several occasions. This situation appears to have become progressively worse until she went to the farm on February 21, 1945, and removed all of her property from the home. There is little or no corroboration of most of the charges made.

The evidence of defendant is that plaintiff was ill a good share of the time that they lived together and that he paid numerous hospital, drug, and doctor bills of which he kept no record. He testifies that plaintiff had the privilege of checking on his bank account, although he admits that he had little or no money in the bank at times. He took her to her daughter's many times when she was ill and visited her as often as his farming and stock-raising operations would permit. He testifies that they had trouble over her killing

the neighbors' trespassing turkeys, that she refused to permit him to play the radio, that she attacked him with a butcher knife, that she frequently kicked him, and on three different occasions she locked him out of the house. Defendant claims that in the fall of 1944, the plaintiff told him that she was leaving him and agreed to settle for the amount received from the sale of the chickens, which amount in the sum of $114.40 was paid to her. Defendant testifies that he made three trips to Michigan during the time the parties lived together. He says he went to visit a son at the son's expense. He denies the assertions of the plaintiff that he told her he made these trips in search of a job. He charges that plaintiff let the air out of one of his automobile tires when he declined to take her to the county fair. He explains many of the acts which plaintiff alleges as cruelty in such a manner as to raise a direct conflict in the evidence. There is some corroborating evidence in the record, although most of his testimony remains uncorroborated and in direct conflict with plaintiff's testimony.

The plaintiff contends that she cannot be compelled to accept an absolute divorce when she does not request it and cites the case of Yost v. Yost, 143 Neb. 80, 8 N. W. 2d 686, in support of her contention. We think plaintiff misconstrues that opinion. It is there held that a party may not be required to accept an absolute divorce when she prayed for a divorce from bed and board only, where the other party is not entitled to affirmative relief. In the case at bar, the defendant was found to be entitled to an absolute divorce. The Yost case can give no comfort to the plaintiff if the cross-petition and supporting evidence show the defendant entitled to an absolute divorce.

"There may be extreme cruelty justifying a decree of divorce without physical injury or violence. Unjustifiable conduct on the part of husband or wife, which utterly destroys the legitimate ends and objects of matrimony, may constitute extreme cruelty." Faris v. Faris, 107 Neb. 214, 185 N. W. 347. It is evident from the record that the objects of matrimony have been wholly destroyed in the pres-

ent case. Both parties state that they cannot live together. The question is simply whether or not plaintiff should have a decree for separate maintenance or whether or not the defendant is entitled to an absolute divorce under the evidence before us. The evidence on the material issues was largely in irreconcilable conflict.

This court has held: "When the evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite." Dier v. Dier, 141 Neb. 685, 4 N. W. 2d 731. It is the duty of this court in its hearings of appeals in divorce actions to retry the issues upon the evidence preserved in the bill of exceptions. We have examined the evidence and find it in such hopeless conflict that the rule quoted from the Dier case is applicable. While the evidence in support of defendant's cross-petition for an absolute divorce has the very minimum of corroboration, it is sufficient to sustain the decree of the trial court. It is impossible to lay down a general rule as to the degree or amount of corroboration required in a divorce action, as each case must necessarily be decided upon its own facts and circumstances. Johnsen v. Johnsen, 144 Neb. 208, 12 N. W. 2d 837. After a consideration of the evidence in the light of the foregoing rules we are of the opinion that the plaintiff failed to establish her right to a decree of separate maintenance and that the evidence is sufficient to sustain the cross-petition of defendant asserting his right to an absolute divorce.

The judgment of the district court is in all respects affirmed.

AFFIRMED.

PHILLIP J. BORN, APPELLANT, V. AUGUST KEIL, APPELLEE.
22 N. W. 2d 175

FILED MARCH 15, 1946. No. 31972.

1. **Waters.** Where waters have been carried in a watercourse across one's land and discharged upon the lands of another for more than ten years, the former acquires an easement against the lands of the latter for the purpose of the flow of the waters of such watercourse across his lands in its natural drainage course.
2. ———. Water flowing in a well-defined watercourse may not lawfully be diverted and cast upon the lands of an adjoining landowner where it was not wont to run according to natural drainage.
3. **Injunction: WATERS.** Equity will afford relief by injunction against a continuing injury to land caused by an unlawful discharge of flood or surface waters by an adjoining landowner.
4. ———: ———. Where an obstruction in a natural watercourse constitutes a permanent and continuing injury to an adjoining landowner, he is not confined to an action for damages, but may, on a proper showing, obtain a decree ordering the removal of the obstruction.

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

Walter H. Smith and *Perry, Van Pelt & Marti*, for appellant.

J. Howard Davis and *Wm. R. Patrick*, for appellee.

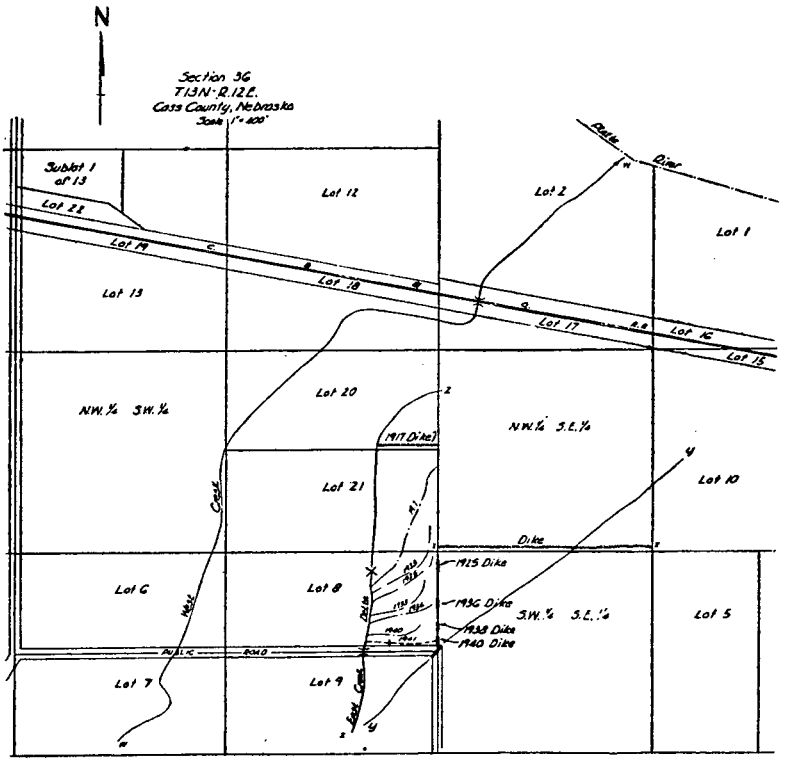
Heard before SIMMONS, C. J., PAINE, CARTER, MESSMORE, YEAGER, CHAPPELL, and WENKE, JJ.

CARTER, J.

This is a suit to enjoin the defendant from maintaining a ditch and dike upon his premises, which carried the waters of a natural watercourse from his land onto plaintiff's land. The defendant denied generally the allegations of plaintiff's petition and cross-petitioned for a mandatory injunction requiring the plaintiff to remove certain dikes and barricades constructed by the plaintiff in defending his land from the waters carried in the ditch in controversy. The trial court held against the plaintiff and he appeals.

The record shows that plaintiff was the owner of Lot 9

and the SW¼ SE¼ of Section 36, and other lands. The defendant was the owner of Lot 8, which lay immediately north of Lot 9. There was a highway running east and west between Lots 8 and 9. At a point 467 feet west of the southeast corner of Lot 8 there was a highway bridge, 16 feet long and 16 feet wide. The natural watercourse herein referred to as East Creek passed under this bridge and crossed onto Lot 8. It then turned east along the north side of the highway through the ditch in controversy to the southeast corner of Lot 8. At this point it discharged any waters flowing in the ditch upon the lands of the plaintiff described as SW¼ SE¼ of Section 36. For convenience, a plat showing the immediate area and certain facts testified to in the evidence is hereafter shown.



This plat is not the reproduction of any single exhibit in the record. It is very similar to plaintiff's Exhibit No. 1 which was admitted in evidence without objection being made thereto.

The evidence shows that East Creek originates a mile and one-half or two miles south of the highway bridge. Springs supply the water found at its source. The evidence is in conflict as to the amount of natural flow carried in East Creek, although all witnesses agree that surface waters increase its flowage after rains and at times cause it to overflow its banks. It varies in width from 8 to 30 feet. Its depth varies from 5 to 15 feet. Its banks are clearly defined. It is clear from the record that East Creek is a natural watercourse from its source to the highway bridge, which has existed during the memory of all who are familiar with it.

The plaintiff testifies that he has lived near this land and known it all his life, he being 70 years of age. His testimony is that East Creek continued on straight north from the highway bridge for at least 80 rods and then turned in a northeasterly direction towards the railroad bridge shown on the plat. Another witness, Fred Hirz, testifies that he lived in that vicinity from the time he was born in 1891 until 1912, and that East Creek continued on north from the highway bridge for a quarter of a mile or more. In 1941 or 1942, he was again at the highway bridge and found that it no longer continued on north, but turned directly east after crossing the highway under the bridge. Otto Petereit, the plaintiff's son-in-law, testifies that he lived in the community since 1912, and that East Creek continued on north from the bridge and crossed Lots 8, 21, and 20. Several other witnesses who were familiar with East Creek for many years back testified that it continued on north from the highway bridge until very recent years. The defendant pleads in his answer that the water had always flowed east immediately after crossing the highway between Lots 8 and 9 and that said easterly course was the natural watercourse. Both he and his son testify that this was the case. No other

witness corroborates their evidence. We are obliged to say that the evidence clearly preponderates in favor of the plaintiff on this issue.

The record is clear, as shown by the contour lines on exhibits prepared by a qualified engineer, that the land on each side of East Creek slopes to the north. It is just as clear that there is also a similar slope to the east. It is evident that, as East Creek proceeded north from the highway bridge, it ran into a flatter area which caused it to lose velocity and deposit sediment. According to the evidence of plaintiff's engineer, this caused a delta to form in Lot 8. As the deposits of sediment grew, the water began to spread. The slope of the land being to the north and east, the natural course of drainage was to the northeast.

The witness Petereit testifies that in 1917, the water pursued a northeasterly course shown substantially by the broken line marked "1917" on the plat. He testifies also that the defendant, with the aid of a county grader, caused the water to change its course in the subsequent years, shown on the plat by the broken lines indicating the year in which the change was made. His testimony is to the effect that the water was caused to flow more to the east after each change, but that the ditch was always turned north before reaching the west line of the SW¼ SE¼ of Section 36. The defendant denies that he ever changed the course of the water at any time.

The evidence shows, and it is also indicated on the plat along the west line of SW¼ SE¼ of Section 36, that plaintiff constructed several dikes to prevent water from entering his land. The witness Petereit explains that this was to protect against overflow waters resulting after heavy rains and that they were not built to protect against the normal flow of East Creek.

It is urged by the defendant that the natural watercourse of East Creek is from the point where it crosses the south line of Lot 9 in a northeasterly direction to the northeast corner of Lot 9 as shown on the plat by the line marked "Y" to "Y." The evidence is undisputed that East Creek

has run north through Lot 9 for more than ten years. It is also shown that defendant purchased Lot 8 with full knowledge that such was the course of East Creek at that time. While it is evident that there is a well-defined drainage course across Lot 9, substantially as shown on the plat by the line marked "Y" to "Y," it is evident that it drains only the area adjacent to it and any overflow waters that might spill out of East Creek during floodtime. There is no basis for a holding that the natural drainage outlet of all waters approaching the south line of Lot 9 is now to the northeast from that point.

There are other important facts in the record bearing upon the controversy. It appears from the record that the defendant constructed a dike along a portion of the south line of Lot 20 for the purpose of preventing the waters of East Creek from proceeding north, which is designated on the plat by a line marked "1917 Dike." He also constructed a dike along the south line of the NW¼ SE¼, which is shown on the plat by a line marked "X" to "X." The latter dike had the effect of trapping the waters in question on the SW¼ SE¼, such waters being restrained on the north by the dike and on the south by the natural elevation of the land. This brought about the flooding and destruction of the 20 to 30 acres of crops on the SW¼ SE¼ of which plaintiff complains.

It is the contention of the plaintiff that the ditch primarily involved in the present controversy was artificially constructed, while the defendant contends that it is a natural watercourse which has existed substantially in its present location for a great many years. An examination into the evidence pertaining to the nature of this ditch appears to be important.

The record shows that after East Creek passes under the highway bridge it turns sharply to the east and follows the highway in an easterly direction to the lands of the plaintiff in the SW¼ SE¼. Its course from the turn to plaintiff's lands in the SW¼ SE¼ is shown on the plat by the broken line designated "1941." The north side of this drain is

banked, causing the stream to make the turn. It is 40 feet north to the bank from the highway bridge. The bank is about four and one-half feet wide at the level of the ground and two feet higher than the level of the ground. The bottom of the ditch is four or five feet below the top of the north bank. Defendant admits that he caused the east 200 feet of this ditch to be dug out and the dirt piled on the north bank. There is evidence in the record that defendant performed work north of the highway bridge, which brought about the deflection of East Creek to the east. This the defendant denies.

We are convinced from the record that the turn immediately north of the highway bridge was the result of artificial construction and that the record amply demonstrates it. In the first place, East Creek is described as a high velocity stream when it is carrying a substantial head of water. This is confirmed by the size and nature of the sediment which it has deposited in the delta formation on Lot 8. The north bank at the point of the turn, according to the testimony of Roy N. Towl, a reputable hydraulic engineer, has no similarity to any of the deposits of sediment found in the delta to the north and is, in his opinion, an artificially constructed bank. In this respect it is noteworthy that the defendant testifies that the ditch has never carried all the floodwaters passing under the highway bridge. The surplus has escaped to the north by spilling over the embankment to the north and draining away in a northeasterly direction. It hardly seems probable that such a bank could withstand the wash of such overflow waters for the long period of time to which the defendant testifies. The evident velocity of East Creek was such that the turn to the east could not have been the work of nature alone. This statement is confirmed by further expert testimony in the record.

Engineer Towl testifies that he has been over the area herein involved and he testifies to the following facts and opinions: East Creek as it enters Lot 8 with a substantial head of water is a stream of high velocity. When it originally flowed onto Lot 8 it spread or fanned out, lost its

velocity, and dropped its sediment over the area. As time passed, a delta was formed with its base in the neighborhood of the highway bridge. The highest ridge of the delta indicates where the stream once flowed and is indicated on the plat by an "X" in the line shown as "Z" to "Z." He further states that the slope of the ditch indicates that if the flow of East Creek with its floods and high water had not been interrupted, the course of the stream would have continued on north or northeast. In other words, the axis of the delta followed the general drainage slope of the area. That water did enter Lot 20 is convincingly established by the fact that defendant banked against water from the south along the south line of Lot 20 in 1917. An examination was made of the watercourse designated on the plat as West Creek where a similar situation existed. Generally, the topography of that drainage area was the same as in East Creek. A delta was there formed similar to the one involved in the present case. In its development the water in West Creek followed the general drainage course of the area as shown on the plat. It is the opinion of Engineer Towl that East Creek would have pursued the same general course except for the construction of an artificial embankment immediately north of the highway bridge.

There is further proof in the record that East Creek has not flowed east in its present course in the manner and for the time testified to by the defendant. There are several pictures in the record showing the conditions existing at the point where the water enters the SW¼ SE¼. There are also pictures showing this alleged watercourse as it flows over the lands of the plaintiff in that 40 acres. Clearly, they depict no condition indicating that for 40 years or more this ditch has been a natural watercourse. The damage by washing and flooding was clearly of recent origin. The evident force of the water as it entered the SW¼ SE¼ was such that if it had been of long duration, a well-defined watercourse with a much greater carrying capacity would appear on the ground than these pictures show.

We conclude from the evidence that the natural water-

course of East Creek is to the north from the highway bridge and that it now flows east from that point because of the artificial construction hereinbefore described.

East Creek as described in this record is a watercourse. We think, also, that the owner of Lot 9 has acquired an easement against Lot 8 for the purpose of the flow of the waters of East Creek across Lot 8 in its natural drainage course. Bures v. Stephens, 122 Neb. 751, 241 N. W. 542; Central Irrigation District v. Gering Irrigation District, 122 Neb. 199, 240 N. W. 289. Water flowing in a well-defined watercourse cannot be lawfully diverted and cast upon the lands of an adjoining proprietor where it was not wont to run in the course of natural drainage. Kane v. Bowden, 85 Neb. 347, 123 N. W. 94; Keifer v. Stanley, 111 Neb. 822, 198 N. W. 144. Where an obstruction in a natural watercourse constitutes continuing and permanent injury to an adjoining landowner, such landowner may, on a proper showing, obtain a decree ordering the removal of the obstruction. Leaders v. Sarpy County, 134 Neb. 817, 279 N. W. 809. Injunction affords the proper remedy in such a case. Jacobson v. Van Boening, 48 Neb. 80, 66 N. W. 993.

In applying the foregoing principles of law to the evidence before us we are convinced that the plaintiff is entitled to relief. The judgment of the district court is reversed and the cause remanded with directions to enter a decree awarding an injunction as prayed for in plaintiff's petition.

REVERSED.

EVELYN L. HACKBARTH, AS ADMINISTRATRIX OF THE ESTATE OF WALTER E. HACKBARTH, DECEASED, AND EVELYN L. HACKBARTH, APPELLEES, V. FRED W. HACKBARTH, APPELLANT.

22 N. W. 2d 184

FILED MARCH 15, 1946. No. 32042.

1. **Specific Performance.** Specific performance of an oral agreement will be enforced by a court of equity where one party has wholly

and the other party partly performed it, and its nonfulfillment on the one hand would amount to a fraud on the party who has fully performed it.

2. ———. The evidence necessary to establish an oral agreement which will be enforced by a court of equity because of performance by one party and part performance by the other must be clear, satisfactory, and unequivocal.
3. **Statute of Frauds.** An oral contract to convey real estate is unenforceable under the statute of frauds unless there has been part performance by the promisee which is solely referable to the contract sought to be enforced and not such as might be referable to any other contract or hypothesis.
4. **Equity.** Courts of equity may grant specific performance of an oral agreement to transfer title to personal property as well as to real estate.
5. **Trial.** The rule requiring agreement between pleadings and proof is not applicable where the issue was tried without objection by either party.
6. **Equity.** A court of equity having obtained jurisdiction of a cause will retain it for all purposes, and render such a decree as will protect the rights of the parties before it.

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

Beeler, Crosby & Baskins, for appellant.

Beatty & Clarke and *S. S. Diedrichs,* for appellees.

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

CARTER, J.

This is a suit to enforce an oral contract to convey certain real and personal property. The trial court decreed specific performance as to the real property involved in the action. As to the personal property, the trial court held that an oral contract to convey had not been established, but that an oral agreement had been made in 1943 whereby plaintiff's decedent was to share in the crops and the increase of the livestock. The defendant appeals from that part of the decree awarding specific performance of the oral agreement to convey the real property. The plaintiff cross-appeals from that part of the decree finding that an

oral agreement to convey a one-half interest in all the personal property of the defendant was not established.

The evidence shows that the defendant, Fred W. Hackbarth, was, at all times mentioned herein, the owner of Section 11 and the West Half of Section 12, Township 13, Range 33, Lincoln County, Nebraska, consisting of 960 acres. In 1933, this land was being farmed by the defendant with the aid of his son, Walter E. Hackbarth, then 25 years of age. The petition alleges that in 1933, the son became dissatisfied and informed his father of an intention to leave. This resulted in the alleged oral agreement to the effect that if the son would continue to work on the farm, the father would, upon the payment of the indebtedness against his lands, then amounting to $12,500, convey the West Half of Section 11 and one-half of the livestock, machinery, and other personal property on the place to the son, Walter. The son remained on the place and continued with the farm work. No one disputes that Walter was a hard and faithful worker during all the time that he lived on the place.

On June 14, 1941, Walter E. Hackbarth married Evelyn L. Hackbarth, the plaintiff. No children were born to the marriage. On October 24, 1943, Walter E. Hackbarth died as a result of injuries sustained while operating a corn-picker in the course of his farm work. The suit is brought by plaintiff, personally and as administratrix of her husband's estate, to enforce the oral agreement alleged to have been made.

Plaintiff testifies that prior to her marriage to Walter, defendant asked her if they planned to live on Walter's place or to stay at his place which was on Section 12. Plaintiff testifies that defendant pointed out various items of property as belonging to Walter and mentioned that he and Walter had been working as partners. In January 1942, Walter was advised that he had been classified 1-A under the Selective Service Act, and decided to go into the army. Plaintiff says that the defendant came to her and asked her to persuade Walter to appeal from the local draft board's

classification so that he might continue the farm operations which the defendant was unable to handle. Plaintiff testifies that she told defendant there was nothing in it for Walter to stay so far as she could see. She says defendant told her that he had previously agreed with Walter that if he would stay and help pay off the indebtedness on the land he would put the West Half of Section 11 in Walter's name and they would also be partners in the livestock, machinery, and crops. She says the defendant said that if Walter volunteered for army service he would be walking out on his agreement and that all would be lost because he, the defendant, was not in physical condition to carry on by himself. There are statements of several disinterested witnesses who testify in substance that defendant had told them that he and Walter were working "50-50" and that when the mortgages were paid off, the West Half of Section 11 would be Walter's.

In securing the deferment of Walter in order that he might continue to manage and operate the farm, the defendant signed an affidavit that " * * * years ago when said management was undertaken by said registrant affiant and said registrant had an understanding whereby registrant was to acquire at least three hundred twenty acres of said farm if he would remain and operate the same and assist in reducing and paying off the indebtedness existing from the purchase price * * * ."

On the same occasion and in the presence of the defendant, Walter signed an affidavit in support of his application for deferment in which it was stated in part: "That said place has been successfully operated in that the Federal loan carried thereon has been substantially reduced during the past few years and strict attention is required to realize a sufficient profit and to continue to pay off a loan of $12,500 which now stands against the place, and affiant was heretofore offered and assured an interest in said place to the extent of three hundred twenty acres thereof if he would remain at home and operate the place and assist in paying off the indebtedness and which he has been engaged in doing for eleven years."

The defendant denies that he ever agreed to convey the West Half of Section 11 to Walter under any condition. He states that he intended to provide for Walter by his will to a greater degree than to his other heirs. His will, executed in June 1943, is in evidence and by it the defendant provides that the West Half of Section 12 shall be devised to Walter. Because of its ambulatory character the will cannot, in any sense of the word, be a compliance, substantial or otherwise, with the alleged oral agreement. The defendant states that he never had any difficulty with Walter at any time and infers that the present litigation grew out of the efforts of the plaintiff to acquire a part of his property. In this respect it is noteworthy that defendant admits he discussed the matter before he had met the plaintiff. This is demonstrated by the following question and answer appearing in the record: "Q. You and he never at any time had any conversation, that if he would stay there until the debt was paid off, you would give him 320 acres of land, is that correct? A. No, I haven't; but I made him a proposition that I would compensate him for his part when I got through with it." There are other statements in the record indicating that Walter's status had been a subject of consideration before the plaintiff attained an interest by marrying Walter. We think this dissipates any inference that the claim is a pure fabrication on the part of plaintiff.

The evidence is clear that Walter E. Hackbarth worked on the farm and complied in all respects with the terms of the oral agreement until the indebtedness was paid off in 1943. We think that the oral agreement was established by clear, satisfactory, and convincing evidence. We think also that there was a full compliance with the agreement on the part of Walter prior to his death and that equity requires that the defendant comply therewith by conveying the West Half of Section 11 to the heirs of Walter E. Hackbarth, or, in the alternative, that the trial court quiet the title to such land in the heirs of the said Walter E. Hackbarth.

It is the general rule that an oral agreement for the transfer of title to real estate is voidable under the statute of

frauds. Sec. 36-103, R. S. 1943. A well-known exception to that rule is that specific performance of an oral agreement to convey real estate will be enforced by a court of equity when one party has wholly performed his part thereof and the other party has not performed his part, and its nonperformance on the one hand would amount to a fraud on the party who has fully performed it. Harrison v. Harrison, 80 Neb. 103, 113 N. W. 1042; Damkroeger v. James, 95 Neb. 784, 146 N. W. 936; Craig v. Seebecker, 135 Neb. 221, 280 N. W. 913. The evidence necessary to establish an oral agreement which falls within the statute of frauds must be clear, satisfactory, and unequivocal. Crnkovich v. Crnkovich, 144 Neb. 904, 15 N. W. 2d 66. An action in equity to enforce an oral agreement thus established by proof is protected by statute. Sec. 36-106, R. S. 1943. Before specific performance of an oral agreement to convey real estate will be decreed, the acts claimed to be in part performance must unequivocally indicate the existence of the contract alleged and cannot be accounted for on any other reasonable hypothesis. Taylor v. Clark, 143 Neb. 563, 13 N. W. 2d 621; Crnkovich v. Crnkovich, *supra*. We think the evidence bearing upon the oral agreement to convey the West Half of Section 11 to Walter E. Hackbarth is clearly within the foregoing rules and is such as not to be barred by the statute of frauds.

The plaintiff cross-appeals from the finding of the trial court that an oral agreement to convey a one-half interest in the personal property of the defendant when the indebtedness against the land was paid off was not established. The general rule is that courts of equity may grant specific performance of an oral agreement to convey personal property as well as real estate. Cox v. Johnston, 139 Neb. 223, 296 N. W. 883. The applicable rules require the same character of evidence to prove oral agreements for the transfer of personal property by specific performance as they do for such a transfer of the title to real estate. Teske v. Dittberner, 70 Neb. 544, 98 N. W. 57; Hespin v. Wendeln, 85 Neb. 172, 122 N. W. 852.

The evidence of an oral agreement to convey a one-half interest in the personal property of the defendant to Walter, upon the payment of the mortgage debts against the land, consists solely of the testimony of the plaintiff. The defendant denies that any such agreement was made prior to 1942. There is evidence in the record that defendant and his son Walter were operating the 960 acres on a "50-50" basis in 1942 and 1943. Defendant contends that Walter was to receive one-half of the crops and one-half of the calves raised after the payment of all costs connected with the operation of the farm. There is in evidence copies of the income-tax returns filed by the defendant with the Department of Internal Revenue for the years 1942 and 1943, together with the work sheets from which the computations were made. These clearly indicate that defendant and his son were engaged in a joint enterprise wherein each was to receive one-half of the profits after the payment of all taxes, labor, and other expenses in connection with the ownership and management of the 960 acres. All of the evidence in the record, other than the evidence of the plaintiff, is as consistent with the theory of the defendant with reference to the personal property as with that of the plaintiff. The affidavits filed with the draft board, hereinbefore alluded to, contain nothing which supports the plaintiff's position. Applying the rules previously announced in this opinion, we conclude that the evidence is not clear, satisfactory, and unequivocal in establishing an oral contract to convey one-half of the personal property as alleged in the petition.

We do conclude, however, that defendant and Walter were operating the 960 acres on a "50-50" basis and that each was entitled to one-half of the net profits during 1943. Whatever the exact language of the parol agreement was, under which they were operating the farm, the income-tax returns show definitely an intent to create a joint enterprise by which each was to receive one-half of the net profits.

While this later agreement was not made an issue by the pleadings, evidence was produced by the parties with reference thereto. No objection appears to have been made and

no error assigned in this court because thereof. The case is similar in principle to Johnson v. Weskamp, 122 Neb. 381, 240 N. W. 514, wherein we said that the rule requiring agreement between pleadings and proof is inapplicable where the issue was tried without objection by either party. The court having obtained jurisdiction of the cause, it will retain it for all purposes and render such a decree as will protect the rights of the parties. We are of the opinion, therefore, that the order of the trial court ordering an accounting of the amounts due the estate of Walter E. Hackbarth under the 1943 agreement should not be disturbed.

The judgment of the district court is affirmed.

AFFIRMED.

CONSUMERS PUBLIC POWER DISTRICT, APPELLANT, V. CHARLES E. ELDRED ET AL., APPELLEES.
22 N. W. 2d 188

FILED MARCH 15, 1946. No. 32025.

1. **Injunction: EMINENT DOMAIN.** Injunction is a proper action in which to present the question of unlawful or improper exercise of the power of eminent domain.
2. **Eminent Domain.** The right to question the legality or regularity of the taking of property by eminent domain is available to a party whose property is sought to be taken.
3. ———. The power of eminent domain is an inherent attribute of sovereignty and it exists independently of Constitution. Constitutional provisions relating thereto are in no sense a grant but are a limitation upon the power.
4. ———. The power of eminent domain is exercisable through the Legislature or through some department or agency by authority of the Legislature.
5. ———. The power of eminent domain may be exercised at will except to the extent and degree that it is constitutionally restricted.
6. ———. Generally the necessity or expediency of appropriating particular property for public use is not a matter for judicial cognizance, but is for determination by the legislative branch of government.

7. ———. A city of the first or second class or a village, in taking by eminent domain an electric light and power plant operating within or partly within and partly without the city or village, if the owner is not a public corporation and political subdivision, is required to take the entire property and not any divided or segregated part thereof.
8. ———. If eminent domain is exercised against a public corporation and political subdivision the taking is limited to the electric distribution system.
9. **Statutes.** Where a legislative act is complete in itself but is repugnant to, or in conflict with, a prior law, which is not referred to nor in express terms repealed by the later act, the earlier statute is repealed by implication.
10. **Pleading.** The doctrine of relation is a fiction of law adopted by the courts solely for the purpose of justice, and is only applied for the security and protection of persons who stand in some privity.
11. **Eminent Domain.** The description of property to be taken by eminent domain by a city of the first or second class or village must be accurate to the degree that the property may be identified by reference to the proposal.
12. ———. It is the duty of the condemnor in eminent domain proceedings to bring in all parties having an interest therein, except where parties are unknown.
13. ———. A franchise is not a condition precedent to resist, on the ground of illegality, the taking of property by eminent domain.

APPEAL from the district court for Morrill County: CLAIBOURNE G. PERRY, JUDGE. *Reversed and remanded with directions.*

Davis, Stubbs & Healy, for appellant.

Bern R. Coulter and *Neighbors & Danielson,* for appellees.

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

YEAGER, J.

This is an action by petition for injunction instituted by plaintiff in the district court for Morrill County, Nebraska, against the three members of a court of condemnation appointed to appraise properties of the plaintiff in and in the vicinity of Bridgeport, Nebraska, and the mayor, the mem-

bers of the city council, the city clerk, the city treasurer, the city attorney, and the special attorney of the said city of Bridgeport for the purpose of enjoining further proceedings in condemnation of the properties of the plaintiff.

To the petition the members of the court of condemnation filed a joint demurrer. All other defendants joined in a demurrer. The two demurrers were identical. The grounds of demurrer were (1) that the court was without jurisdiction over the persons or the subject matter, (2) that the plaintiff had no legal capacity to sue, (3) that there was a defect of parties defendant, (4) that several causes of action were improperly joined, and (5) that the petition failed to state sufficient facts to constitute a cause of action.

The demurrers were sustained and a judgment of dismissal of the action was rendered. From the order sustaining the demurrers and the judgment of dismissal the plaintiff has appealed.

The assigned grounds for reversal are that the court erred in sustaining the demurrers and that it erred in dismissing the action.

Because of its length we consider it inadvisable to quote herein the petition which is attacked by the demurrer, hence reference herein shall be to its substance. Prior to January 2, 1942, the Western Public Service Company, a corporation, chartered under the laws of Maryland, was the owner and operator of an electric producing and generating system with distribution lines and equipment in and extending outside the city of Bridgeport, Nebraska, certain real estate and leases on real estate used in its business, and an ice plant. All of these holdings were on January 2, 1942, conveyed and transferred to the plaintiff.

On December 22, 1941, the city council of the city of Bridgeport enacted an ordinance whereby February 17, 1942, was fixed as a date whereupon the voters of the city would be called upon to vote on the question of whether or not the city would take by condemnation certain of the property and rights of the Western Public Service Company. The ordinance contained a description of the prop-

erty it was proposed should be taken in case of a favorable vote on the proposition. Pursuant to the ordinance the proposition to be voted on was promulgated and as promulgated duly published. The election was held on the date fixed by the ordinance and notice of election. The proposal to condemn was approved by a sufficient vote of the people.

The city of Bridgeport had actual notice at the time of the sale and transfer from the Western Public Service Company to the plaintiff herein and the plaintiff herein had notice of the ordinance submitting the condemnation proposal to the vote of the people.

The result of the election was duly certified to the Supreme Court and pursuant to statute Charles E. Eldred, Earl L. Meyer, and William F. Spikes, all judges of the district court, were appointed as members of a court of condemnation. This court of condemnation was ordered to proceed to Morrill County, Nebraska, to organize and to proceed to appraise the value, for condemnation purposes, of the property condemned or sought to be condemned.

The condemnation court entered upon the performance of its function and this action was brought to enjoin them from proceeding with that performance and to enjoin the officials and representatives of the city of Bridgeport from proceeding further in the condemnation of the property and rights of the plaintiff.

Plaintiff alleged grounds for injunction and the questions presented by this appeal are the same. They are in substance that the proceedings are illegal, irregular, and void for the following reasons:

That the proceeding as instituted is against and in the name of a corporation having no interest in the property.

That the statements of fact contained in the proposal to the voters and in the ballot were untrue and misleading.

That the city is estopped to proceed further in the proceeding on account of the misleading information given to the voters.

That the description of the property to be condemned is ambiguous and fails to conform to the exactitude required in condemnation proceedings.

That if the proceeding be construed as having been instituted against a private corporation it is defective for failure to follow statutory requirements as to the amount of property to be taken.

That there is no statutory authority for condemnation of the property of one public agency by another where the property sought to be condemned is already dedicated to a public use.

That the power of the city to condemn property of the plaintiff does not extend beyond the electric distribution system within the city.

That the power of the city to acquire property by condemnation was nonexistent until after a favorable vote of the people, therefore the condemnation in question here, namely against the Western Public Service Company, may not be pursued against the property of the plaintiff.

The first question presented by the briefs is the propriety of an action in injunction to reach the matters contended for by plaintiff. As to this there can hardly be any question. This court as well as the courts of other jurisdictions is committed to the rule that injunction is a proper action in which to present the question of unlawful or improper exercise of the power of eminent domain. Drummond v. City of Columbus, 136 Neb. 87, 285 N. W. 109; May v. City of Kearney, 145 Neb. 475, 17 N. W. 2d 448.

The general rule is not questioned by the appellees. In this connection they contend however that appellant is prevented from raising by injunction any question as to the correctness or sufficiency of the description contained in the proposal submitted to the electorate. On authority of May v. City of Kearney, *supra*, they insist that this question may be raised only by a citizen and taxpayer.

That case cannot be considered as authority for this contention. The phase of that case upon which appellees rely went only to the point of saying that a citizen and taxpayer, and not the Consumers Public Power District, could question the legality of an election held for the purpose of issuing bonds the proceeds of which were to be used in payment

of costs of property acquired by eminent domain. The holding was in nowise connected with proceedings leading up to and in condemnation.

Strange indeed would be a rule the effect of which was to say that the owner of property sought to be taken by eminent domain is barred from challenging the legality or regularity of the taking.

There can be no question that the appellant has available to it the right to question the legality and regularity of the proceedings and doings of the appellees in all respects as they are set forth in the petition.

A determination of the questions presented by the petition herein and the demurrers thereto depends in the main upon the interpretation and application of Nebraska statutes and their coordination with certain fundamental and well-established legal principles and procedures in and for the taking of property under the sovereign power of eminent domain.

It may be well to repeat here that the power of eminent domain is an inherent attribute of sovereignty and it exists independently of Constitution. Constitutional provisions relating thereto are in no sense a grant but are a limitation upon the power. The power is exercisable through the Legislature or through some department or agency by authority of the Legislature. The power may be exercised at will except to the extent and degree that it is constitutionally restricted. May v. City of Kearney, *supra.*

Generally the necessity or expediency of appropriating particular property for public use is not a matter for judicial cognizance, but is for determination by the legislative branch of government. The state possesses the power as a sovereign, and as such exerts it. May v. City of Kearney, *supra;* Adirondack Ry. Co. v. New York State, 176 U. S. 335, 20 S. Ct. 460, 44 L. Ed. 492.

In pursuance of its authority and prerogative the Legislature in 1919 empowered cities of the first and second class, if certain procedures were followed and a favorable vote of the electors was had on the proposition, to acquire by em-

inent domain "any water works, water works system, gas plant, electric light plant, or electric light and power plant, or heating plant, or street railway, or street railway system, located or operating within or partly within and partly without such city if the main part of such works, plant or system be within any such city * * * ." Sec. 19-701, Comp. St. 1929. In 1941, the Legislature repealed the section of the statutes containing this power but reenacted it with but one substantial change. The change extended the powers enumerated to villages as well as to cities of the first and second class. Sec. 19-708, C. S. Supp. 1941; sec. 19-701, R. S. 1943.

It will be noted that the section of the statute during the time involved in these proceedings contained the following provision: "Provided, that where any public utility properties supplying different kinds of service are operated as one unit and under one management the right to acquire and appropriate as herein provided shall cover and extend to the entire property and not to any divided or segregated part thereof, * * * ." Sec. 19-708, C. S. Supp. 1941.

As is clearly indicated by an examination of the provisions of this section of the statute municipalities of the classes named were empowered by the Legislature to take by eminent domain the kind and character of property therein named and described. It will also be noted that coupled with the power, if exercised, was a requirement that all such property and not segregated portions must be taken.

It is likewise clear from the presentation here that it was the power thus granted by the Legislature that the appellees were seeking to exercise. It is also clear that they were seeking to exercise it against the Western Public Service Company, a public service company, and not against the Consumers Public Power District.

As we understand the allegations of the petition herein it is not the contention of appellant that authority to exercise the powers granted by these provisions is nonexistent, but that such power does not exist against appellant and its

properties. Further it does not contend that statutory power to take by eminent domain of its properties in Bridgeport, Nebraska, does not exist, but on the contrary that it does exist within certain limits under other and different statutory provisions. It contends that the provisions of the chapter of which section 19-701, R. S. 1943, is a part has no application to taking property from it under the power of eminent domain except as to procedures in taking. It does contend however that even if the provisions of section 19-701, R. S. 1943, are applicable to it the proposal submitted to the electors is fatally defective.

Appellant contends that the proposal is in two respects defective, namely, that the property to be taken is insufficiently described, and that the property to be taken is limited to less than all in contravention of statutory mandate.

It contends that it is a public corporation and political subdivision within the meaning of Senate File 310 as amended and that the power to take property from it by eminent domain is found in and controlled by the provisions of section 70-650, R. S. 1943, the source of which was an amendment in 1939 to section 70-712, C. S. Supp. 1937, which section was section 12, chapter 86, Laws of 1933, as amended by section 7, chapter 152, Laws of 1937. Chapter 86 of the Laws of 1933 is what is popularly known as Senate File 310 or the Public Power and Irrigation Districts Act. The section as amended and revised, the amendment and revision being of no importance here, and as it existed prior to the amendment of 1945 thereto, is the following:

"Whenever any public power district or public power and irrigation district shall, as herein provided, acquire by purchase, lease, or otherwise, any electric distribution system, or any part or parts thereof, situated within or partly within any city or village, if any part of such system be within such city or village, such acquisition shall be upon the condition that such city or village may purchase, and such district shall be required to sell to such city or village, such electric distribution system, situated within or partly within such city or village, but not within the corporate

limits of any other city or village, by paying to such public power district or public power and irrigation district, such sum as is fair and reasonable, including reasonable severance damages. If any city or village and such district shall fail to agree upon a price and terms for the sale of such property to such city or village, the procedure for determining such price and terms of sale, and for compelling such sale shall be the same as is provided by sections 19-701 to 19-706, inclusive. In determining the amount of such severance damages, the court shall take into account, together with other relevant factors, the economic effect, if any, upon the system as a going concern as it remains after the severance, caused by severance therefrom of the part taken. In entering its award the court shall show how much of the total thereof was allowed for the physical property taken, and how much was allowed for other values and damages, if any."

By its pleading appellant has brought itself within the provisions and definitions of the act as a public corporation and a political subdivision. Sec. 70-602 et seq., R. S. 1943.

Specifically appellant contends that the city, since plaintiff is a public corporation and political subdivision within the meaning of Senate File 310 as amended, is limited by section 70-650, R. S. 1943, to the taking of its electric distribution system, whereas the proposal which was submitted to the electors was not so limited, and that therefore all proceedings had pertaining thereto were misleading, illegal, and void, also that the property sought to be taken was insufficiently described.

Appellees insist on the other hand that though appellant was the owner of the properties at the time of the submission of the proposition to the electors, since the Western Public Service Company was the owner at the time of the enactment of the ordinance of the city for submission, the proceedings were controlled by section 19-701 et seq., R. S. 1943. They further insist that the property was sufficiently described to permit the city to take by eminent domain. They contend that section 70-650, R. S. 1943, is cumulative

of section 19-701, R. S. 1943, and not a limitation and restriction thereon.

In support of their contention on cumulation they cite and quote from State ex rel. Consumers Public Power District v. Boettcher, 138 Neb. 22, 291 N. W. 709. In that case, referring to procedure in taking, it was said that there was no conflict between the two acts and that the later was cumulative of the former. The statement however had no reference to matters of substance wherein by the earlier act the city was required to take all the property of a public utility organization whereas by the later it was restricted and limited in its taking to the distribution system.

As to this matter of substance where there is real and substantial conflict the expression in the opinion in State ex rel. Consumers Public Power District v. Boettcher, *supra*, can have no application. The applicable rule in these circumstances is the well-established one that where a legislative act is complete in itself but is repugnant to, or in conflict with, a prior law, which is not referred to nor in express terms repealed by the later act, the earlier statute is repealed by implication. State v. Hevelone, 92 Neb. 748, 139 N. W. 636; State ex rel. Thayer v. School District, 99 Neb. 338, 156 N. W. 641. Of course the repeal is only effective to the extent of the repugnancy or the conflict.

The implied repeal in this instance would effect the removal of public corporations and political subdivisions of the state from the operation of section 19-701, R. S. 1943, and leave applicable section 70-650, R. S. 1943.

The contention of appellees in this respect cannot be sustained. We are required to hold that in a taking by a city from a public corporation and political subdivision organized under Senate File 310 the city is limited in its taking to the electric distribution system.

In support of their contention that proceedings are available under section 19-701, R. S. 1943, since the Western Public Service Company was owner at the time of the enactment of the ordinance, appellees rely on the doctrine of "relation" or "relation back." The doctrine has been de-

fined as follows: "That principle by which an act done at one time is considered by a fiction of law to have been done at some antecedent period. * * * It is a fiction of law adopted by courts solely for the purposes of justice; a legal fiction invented to promote the ends of justice, or to prevent injustice and the occurrence of injuries where otherwise there would be no remedy." 53 C. J., Relation, s. 3, p. 1185.

The doctrine can have no application here since a necessary element and condition precedent to its application is absent. In order that it shall apply privity must exist. In Gibson v. Chouteau, 13 Wall. (U. S.) 92, it was said: "The error of the learned court consisted in overlooking the fact that the doctrine of relation is a fiction of law adopted by the courts solely for the purposes of justice, and is only applied for the security and protection of persons who stand in some privity with the party that initiated proceedings for the land, and acquired the equitable claim or right to the title."

Privity has been defined in Black's Law Dictionary, (3d ed.) p. 1423, as follows:

"Mutual or successive relationship to the same rights of property."

"Derivative interest founded on, or growing out of, contract, connection, or bond of union between parties; mutuality of interest."

"In a general, nontechnical sense, private knowledge; joint knowledge with another of a private concern, which is often supposed to imply consent or concurrence; cognizance implying consent or concurrence."

There is nothing in the facts in this case as alleged in the petition from which it may be said that privity existed between the city of Bridgeport and the Western Public Service Company on account of the proposal of the ordinance to take the property of the Western Public Service Company.

Whether or not there was privity between the Western Public Service Company and the Consumers Public Power District is not a matter of concern here. If there was no benefit flowed from it to the city. A party to claim the benefit of the doctrine of relation must be a privy.

Assuming that the city of Bridgeport was empowered to take the properties as if they were the properties of the Western Public Service Company and under the terms and provisions of section 19-701, R. S. 1943, was the description sufficient for that purpose?

The proposal containing the description of properties to be taken and those not to be taken is the following:

" 'Shall the City of Bridgeport, Nebraska, by the exercise of the power eminent domain acquire and appropriate for public use all of the public utility property of the Western Public Service Company, a corporation, located and and (sic) operated partly within and partly without the City of Bridgeport, Nebraska, consisting of the ice plant, street lighting system, electric light and power plant, transformers, substation and the entire distributing system of the Western Public Service Company supplied with electricity from such electric light and power plant, transformers and substation and which is located partly within and partly without the corporate limits of the said City, and including the following described real estate and other property:

(a) Lot One (1), Block Five (5), Original Town of Bridgeport, Morrill County, Nebraska, together with the power plant, transformer and substation improvements located thereon,

(b) A certain lease made by the Chicago, Burlington & Quincy Railroad to the Western Public Service Company, dated the 1st day of February, 1930, and covering the following described property situated in the City of Bridgeport, Morrill County, Nebraska, to-wit: Beginning at a point eighty and nine-tenths (80.9) feet northeasterly from and at right angles to the center line of the main railroad track as measured from a point in the said center line four hundred and sixty (460) feet northwesterly from its intersection with the west line of "L" Street produced; thence northwesterly parallel with said center line fifty and three-tenths (50.3) feet; thence northeasterly at right angles to said center line sixty-five (65) feet; thence southeasterly parallel with said center line fifty and three-tenths (50.3)

feet; thence southwesterly at right angles to said center line sixty-five (65) feet to point of beginning. Said above described tract lying within Section Thirty-two (32), Township Twenty (20), North, Range Fifty (50) West of the Sixth Principal Meridian.

(c). A certain lease made by C. H. Silvernail to the Western Public Service Company, dated the 1st day of November, 1940, and covering the following described property, to-wit: Lot Twelve (12), Block Seven (7), Original Town of Bridgeport, Morrill County, Nebraska,

(d). The right of said company to use any other real estate in connection with and incident to its use of the above described real estate and property,

(e), All real, personal and mixed property of all kinds and descriptions owned by said corporation which constitutes a part of, or are appurtenant to, or are used in connection with said public utility properties in serving said City and its inhabitants and such rural lines as are a part of the unit serving said City, whether such property be located within or without or partly within and partly without the corporate limits of said City.

And excluding, and not including, the following described property,

(a). The 33,000 volt transmission line and its poles of the Western Public Service Company within and without the corporate limits of the said City.

(b). The 33,000 volt branch transmission line and its poles of the Western Public Service Company delivering power to the Lyman-Richey Sand & Gravel Corporation pit within and without the corporate limits of said City.

(c). The 2300 volt primary line and its poles running northerly from the electric light and power plant, transformers and substation located on Lot one (1), Block Five (5), Original Town of Bridgeport, Morrill County, Nebraska, to the unincorporated Village of Northport, Nebraska, within and without the corporate limits of said City.'"

The decisions and texts on the subject of eminent domain

are in accord on the proposition that property to be taken must be described with a reasonable degree of accuracy.

Dailey v. Missouri P. R. Co., 103 Neb. 219, 170 N. W. 888, is a case wherein it was declared that the petition in condemnation was insufficient because of inaccuracy of description. The reason given was the following: "A petition containing statements so inaccurate respecting dimensions would be very apt to mislead the appraisers in the assessment of damages under the statute. * * * A petition to condemn the land of another for the use of a railroad is the basis of the proceeding, and before an owner over his protest can be compelled under the sovereign power of eminent domain to part with the title to his land, it is essential to the validity of the proceedings that the petition filed with the county judge * * * accurately describe the tract sought to be condemned."

Other reported cases on the subject of accuracy in description of property to be taken by eminent domain are Blue River Power Co. v. Hronik, 112 Neb. 500, 199 N. W. 788; Omaha & R. V. R. Co. v. Rickards, 38 Neb. 847, 57 N. W. 739.

In an unreported case in the United States District Court of Nebraska, Omaha Division, No. 1317 Equity, wherein existed a situation very much like the one presented here, in a memorandum opinion, it was said: "In Nebraska, numerous authorities involving eminent domain statutes hold that the petition, under which proceedings to condemn are instituted, must accurately describe the property sought to be taken, and that such description is necessary to confer jurisdiction. This does not mean the exactness required by deeds of conveyance but substantial accuracy and a certainty by reason of which the identical property can be definitely located." It is pointed out in the opinion that the proposal was void since in the description in the proposal to the electorate a power of selection was delegated to the court of condemnation whereas that power was resident in the electorate.

The holding was followed in a later case in the United

States District Court of Nebraska, Lincoln Division, No. 561 Equity.

Of course the opinions in these cases are not binding on this court but we consider the reasoning persuasive and sound and expressive of a proper attitude to be taken toward the description of property to be taken by proceedings in eminent domain.

In Nichols on Eminent Domain, (2d ed.) Vol. 2, Par. 399, p. 1068, wherein is discussed description of land sought to be taken it is said: "The petition must contain an accurate description of the land sought to be taken, so that the extent of the claim will appear on the record. This description should be, it is sometimes said, as accurate as is required in the case of a deed of land. At any rate it must be such that a surveyor could locate the parcel described without the aid of extrinsic evidence. * * * It is no objection that the description is incomplete or unintelligible without consultation with a map or plan, if the map is referred to in the description and is filed with it, and taken together the map and the description make clear what is intended to be included in the taking. A map not referred to in the description cannot be considered, and a plan referred to in the description, but not filed * * * is unavailable."

The rule requiring accuracy in the description of property is not one of caprice or of mere technicality. It is a rule of reason and of necessity and not of expediency. As pointed out in Dailey v. Missouri P. R. Co., *supra*, inaccuracy or insufficiency of description in the petition would be apt to mislead the appraisers in the assessment of damages. There is however a more cogent and compelling reason for the rule. The petition, where petition is the basis of the proceeding, is the instrument or vehicle of conveyance of the property and rights from the condemnee to the condemnor, and of necessity such an instrument should intrinsically contain a description of the property and rights conveyed.

In cases such as the one here under consideration, it is true, no petition is required, but the proposal adopted by

the electors has the office of the petition in the ordinary condemnation proceeding. In the matter of description the rules applying to petitions should apply with equal force.

From an examination of the proposal it cannot well be said that the description meets the requirements of the rules of the decisions and the texts.

Attention is directed to the first paragraph of the proposal as hereinbefore quoted. It will be observed that the description is "all of the public utility property of the Western Public Service Company, a corporation, located and and (sic) operated partly within and partly without the City of Bridgeport, Nebraska, * * * and the entire distributing system of the Western Public Service Company supplied with electricity from such electric light and power plant, transformers and substation and which is located partly within and partly without the corporate limits of the said City, * * * ."

Attention is also directed to paragraphs (d) and (e) of the proposal.

It will be observed that the only description is by name of the claimed owner and by indefinite location of property.

It cannot be reasonably asserted that anyone except by extrinsic examination and investigation could locate the property or ascertain the quantity thereof from the description contained in these paragraphs of the proposal.

We cannot do other than to conclude, assuming that the city is empowered to condemn the properties of plaintiff under the provisions of section 19-701, R. S. 1943, and further assuming that the allegations of plaintiff's petition are true, that the city is barred from so doing under the proposal herein involved on account of inaccuracy and insufficiency of description in the proposal. For this reason the demurrers were improperly sustained.

The next contention of appellant to which we give attention is that the proposal was fatally defective in that the Western Public Service Company was named as owner whereas at the time of the election the appellant was owner of the property sought to be condemned.

It would appear in the light of the holdings of this court and in the light of our holding herein that the doctrine of "relation" is not applicable that the position is well taken.

In Gerrard v. Omaha, N. & B. H. R. R. Co., 14 Neb. 270, 15 N. W. 231, it was said: "The R. R. Co. acquires merely the right of way possessed by the parties to the proceedings. It is therefore its duty to bring in all parties having an interest in the estate in order that the condemnation money may be properly applied."

In Nichols on Eminent Domain, (2d ed.) Vol. 2, Par. 403, p. 1074, it is said: "It is the duty of a corporation seeking to acquire land by eminent domain to ascertain the state of the title so that it may designate in its petition and make parties respondent or defendant all persons or corporations having any such interest in the property sought to be taken as will entitle them under the constitution or laws of the state to compensation for the taking."

The effect, according to Nichols, Eminent Domain, (2d ed.) Vol. 2, Par. 404, p. 1075, is that: "It is generally held that, when the condemnation of land is effected by judicial decree, failure to designate in the petition and to make a party respondent the owner of any interest in the land taken whose title appears of record or is otherwise ascertainable on reasonable inquiry renders the proceedings ineffectual to transfer such interest to the condemning party, * * * ."

In case property is held in trust or title is in a minor, notice to the representative is sufficient and if ownership is unknown it is sufficient to so state in the petition. Nichols on Eminent Domain, (2d ed.) Vol. 2, Par. 403, p. 1074.

In the light of the opinion in May v. City of Kearney, *supra*, the tenor and effect of which is to say that the court of condemnation has but one function and that is to assess damages, it is imperative that the proposal shall name the persons in favor of whom an award may be assessed in order to render the condemnation valid as to them.

Having already held that the city of Bridgeport was limited in a proceeding against the appellant to the taking of the electric distribution system, it becomes necessary to say

also that the proposal goes far beyond any such limitation. For that reason, if the allegations of the petition in that respect are true, the proceedings are void, they being violative of the power granted under section 70-650, R. S. 1943, and on that ground the demurrers were improperly sustained.

What was said in our consideration of accuracy and sufficiency of description of property in a proposal under section 19-701, R. S. 1943, is equally applicable to a proposal under section 70-650, R. S. 1943, and in its disposition it must receive the same treatment.

We deem it unnecessary, in the light of the disposition of the questions already discussed, to consider the questions of estoppel, the character of the information given to the voters, or the power generally of one public agency to condemn against another.

One matter remains which seems to require some attention. It is contended that the appellant has no standing in court since it has no franchise to operate its system of utilities in the city of Bridgeport, Nebraska. This theory on its face appears unsound. No authorities are cited and we have found none the effect of which is to say that a franchise to conduct a public utility in a city or village is a condition precedent to the right to resist, on the ground of illegality, the taking of property by eminent domain.

For the reasons herein set out we conclude that the demurrers of the defendants were improperly sustained. The judgment of dismissal is reversed and the cause remanded to the district court with directions to overrule the demurrers.

REVERSED WITH DIRECTIONS.

WENKE, J., concurring.

I concur with the majority opinion for the reason, as fully set forth in the opinion, that the provisions of section 70-650, R. S. 1943, are applicable and a controlling restriction upon the power of the city of Bridgeport to take.

Therefore, the other questions decided in the majority opinion become immaterial, particularly the question of the accuracy and sufficiency of the description of the property

sought to be taken by the city, as set forth in the proposal, for it is clearly in excess of its authority to take.

If the city had the authority to take the property as set forth in the submitted proposal then it would be my opinion that the description is sufficiently accurate.

DONALD S. WIGHTMAN, APPELLEE, V. CITY OF WAYNE, NEBRASKA, A MUNICIPAL CORPORATION, C. H. HENDRICKSON, INTERVENER, APPELLANT.
22 N. W. 2d 294

FILED MARCH 15, 1946. No. 32057.

1. Parties. Under the statute the right of a party to intervene in an action is absolute, subject only to the condition that he exhibit a pleading containing allegations which demonstrate a right in the subject matter being litigated.
2. ———. Any party has the right to question the right of intervention in a case to which he is a party.

APPEAL from the district court for Wayne County: LYLE E. JACKSON, JUDGE. *Reversed and remanded with directions.*

Mark J. Ryan, for appellant.

H. E. Siman, Russell W. Bartels, and *Fred S. Berry*, for appellees.

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

YEAGER, J.

This is an action by plaintiff against the defendant wherein plaintiff seeks a declaratory judgment decreeing the rights of plaintiff and defendant to the proceeds of sale of certain real estate in the city of Wayne, county of Wayne, Nebraska, title to which is in plaintiff. The plaintiff filed a petition and an amended petition in the case. C. H. Hendrickson filed a petition of intervention to which objection was interposed by plaintiff. The objections were sustained and the petition of intervention dismissed. From the order

dismissing the petition of intervention intervener has appealed. The proceeding here is between plaintiff who is appellee and intervener who is appellant.

The errors assigned and requiring consideration herein are that the court erred in denying the right to intervene and in dismissing the petition; and that the plaintiff was without right to question the right of intervention.

In order to arrive at a proper determination of the questions presented it becomes necessary to recite the background of the present case as disclosed by the petition and the opinions in Taxpayers' League v. Wightman, 139 Neb. 212, 296 N. W. 886, and Wightman v. City of Wayne, 144 Neb. 871, 15 N. W. 2d 78, which opinions are referred to in the petition.

On or about March 18, 1932, in an action by the city of Wayne a tax-foreclosure decree was entered foreclosing tax liens on Lots 1, 2, and 3, Block 6, Crawford & Brown's Addition to the city of Wayne, Wayne County, Nebraska. By the decree one Alice V. Lewis was awarded a first lien for $235.72 and the city of Wayne a second lien for $2,713.76. On October 19, 1936, a sale was made under the decree to Walter S. Bressler, city clerk of the city of Wayne, for $4,600. No money was paid. Title under the deed was held in trust for the city. In June 1938, appellee started negotiations with the city for the purchase of the lots. A price was agreed upon which was $1,500. However, there was the outstanding lien of Alice V. Lewis and a right of redemption which did not expire until October 19, 1938. A deed was secured from the titleholder and the lien of Alice V. Lewis was paid off. Thereafter on October 5, 1938, at the request of the city of Wayne a deed was issued by Walter S. Bressler to appellee. The purchase price was $1,500. Immediately appellee entered into possession and erected improvements costing $8,500.

Thereafter an action was instituted in which appellant herein, as a citizen and taxpayer, sought to have the deed from Bressler to appellee set aside as a fraud upon him and the other taxpayers of the city. The case reached this court

where it was disposed of by opinion in 139 Neb. 212, 296 N. W. 886. This court in the opinion held that the transaction was fraudulent and set aside the deed from Bressler to the appellee herein and the sale to Bressler under the foreclosure decree. The effect of this was to restore to the city its lien declared in the original tax-foreclosure decree.

Following the decision of that case an action was filed in the district court for Wayne County by plaintiff herein against the defendant herein, the purpose of which was to require the city to convey to plaintiff title to the lots in question free and clear of the liens of the tax-foreclosure decree. Appellant herein intervened and defended against the claim for relief. That case reached this court as 144 Neb. 871, 15 N. W. 2d 78. The relief prayed was denied.

This action was thereafter instituted and the purpose is to have the court declare that the lien of the tax-foreclosure decree attaches to the three lots but not to the improvements erected thereon by appellee and that when sale is had that the proceeds be distributed in the proportions that the land and the improvements bear to the sale price.

It is against this claim for relief that appellant seeks to defend, as a citizen and a taxpayer, as is disclosed by the petition of intervention.

The appropriate statute on intervention is the following: "Any person who has or claims an interest in the matter in litigation, in the success of either of the parties to an action, or against both, in any action pending or to be brought in any of the courts of the State of Nebraska, may become a party to an action between any other persons or corporations, either by joining the plaintiff in claiming what is sought by the petition, or by uniting with the defendants in resisting the claim of the plaintiff, or by demanding anything adversely to both the plaintiff and defendant, either before or after issue has been joined in the action, and before the trial commences." Sec. 25-328, R. S. 1943.

It is clear from this and the interpretative decisions that the right to intervene is absolute.

In the syllabus of In re Estate of Keller, 101 Neb. 115,

162 N. W. 511, it is said: "Since the amendment of 1887, appearing now as sections 7609-7611, Rev. St. 1913, any person claiming an interest in the subject-matter of an action may intervene at any time before trial, as a matter of right." The proposition was before the court and passed upon in the opinion.

Though to intervene is a matter of right it is not without condition. The right is conditioned on the exhibition of an appropriate pleading setting forth in fact a right legally cognizable in the action. A mere conclusion or declaration without a statement of the facts upon which it depends is not sufficient basis upon which to allow intervention.

It was said in Parker v. City of Grand Island, 115 Neb. 892, 215 N. W. 127: "Intervention was unknown at common law and equity, and is a creature of statute. * * * In this state sections 8552-8554, Comp. St. 1922, create and regulate that right. These provisions are to be liberally construed. However, they must be substantially followed, and the applicant must bring himself within their provisions, otherwise he is a mere interloper."

In Cornhusker Electric Co. v. City of Fairbury, 131 Neb. 888, 270 N. W. 482, it was said: "The petition in intervention must state such facts as, if conceded to be true, will entitle the applicant to some relief or, in other words, will sustain his right to intermeddle in the proceedings and support a decree and judgment in his favor or in favor of the party whom he undertakes to assist."

In order to ascertain whether appellant has a right to intervene or is a mere interloper it becomes necessary to examine his petition and the petition of the plaintiff. This examination discloses that the plaintiff's petition was drawn with reference to the opinions in Taxpayers' League v. Wightman, *supra,* and Wightman v. City of Wayne, *supra.* The petition of intervention was likewise drawn. The subject of those two cases and of this one is the same. In the first this court held, over objection, that the plaintiff there, who is intervener and appellant here, was as a citizen and taxpayer a proper party litigant to protect the subject mat-

ter. In the second appellant was intervener. Whether or not his right to intervene was questioned is not apparent from the petition but certain it is that his effort was not unavailing in bringing about the result of that action.

In the light of the fact that this court said once that appellant was a proper party in litigation to protect this subject matter on behalf of himself and the other citizens and taxpayers of the city of Wayne it would be inconsistent to say that this no longer is true.

On grounds other than mere inconsistency we think that appellant has a right of intervention in this case.

The history of this litigation as set forth in the petition discloses a situation which this court held to amount to a fraud upon the taxpayers of the city of Wayne. It took action by a taxpayer to correct the evil accomplished. It should never be said that watchful citizens may be denied the right to intervene in actions where real or apparent necessity exists to protect the taxpayers against the misdoings of public officials with the public revenue or property. We are unwilling to announce such a principle in this case.

The question of whether or not a plaintiff may object to intervention must be resolved against the appellant.

In Parker v. City of Grand Island, *supra*, the intervention was by answer. The plaintiff challenged the sufficiency of the answer to show a right of intervention. The court sustained the contention of the plaintiff.

In Cornhusker Electric Co. v. City of Fairbury, *supra*, the right of intervention was denied on objection of both plaintiff and defendant.

We think the proper rule is that the attack on a petition of intervention on the ground that it contains no proper averments of interest in a matter in litigation may be made by any party to the action.

For the reasons herein stated the judgment of the district court dismissing the petition of intervention is reversed and the cause remanded with directions to overrule the objections thereto.

REVERSED WITH DIRECTIONS

PAINE, J., participating on briefs.

INDEX

Abatement and Revival.

1. The refusal to revive a cause of action in the name of the heirs of a deceased person is not prejudicially erroneous where it appears as a matter of law that the moving party has no rights which he can enforce against them. *County of Sarpy v. Wright* 193
2. A suit for divorce abates on the death of either party before final judgment, and is not subject to revivor. *Williams v. Williams* 383
3. Where death occurs prior to the time when decree of divorce can go into effect, the subject matter is gone and the parties can never be divorced by operation of law. *Williams v. Williams* 383

Abstracts of Title.

Where abstracts of title are furnished as an incident to the security of an obligation, the co-owners of the obligation secured are equally entitled to the use of the abstracts. *Hoover v. Haller* 697

Accord and Satisfaction.

1. The burden of proof to maintain an alleged accord and satisfaction is upon the party seeking to enforce it. *Cox v. Rippe* 309
2. A payment or other performance by a third person, accepted by a creditor in full or partial satisfaction of his claim, discharges the debtor's duty in accordance with the terms on which the third person offered it. *Gordon v. Young* 578

Acknowledgments.

1. The act of an officer in taking an acknowledgment to a conveyance of real estate is a ministerial one. *Evers v. Evers* 104
2. A notary's acknowledgment is not conclusive that instrument was executed and acknowledged on the date that it bears; it is prima facie correct, but is subject to impeachment. *Evers v. Evers* 104
3. Deeds and mortgages of real estate, duly authenticated in the mode prescribed by statute, should not be set aside except upon clear and convincing proof that the

certificate of acknowledgment is false, and the burden of proof is upon the party alleging such falsity to prove it. *Kucaba v. Kucaba* 116

Actions.

1. An action against a municipal corporation to recover damages for trespass upon or injury to real estate is properly brought in the county where the real estate or some part thereof is situated. *Cooper v. Sanitary District No. 1* 412
2. In classifying causes of action as permanent or transitory for compensation in eminent domain proceedings, the question is not whether such damages were suffered because that is a fact common to both. *Robinson v. Central Neb. Pub. P. & I. Dist.* 534
3. Where structure causing injury is permanent, the injury cannot be classified as transient unless structure was erected or maintained without lawful right, or has been put to an unlawful or improper use, or unless it was negligently constructed or operated. *Robinson v. Central Neb. Pub. P. & I. Dist.* 534
4. The purpose of the Declaratory Judgments Act is to have a declaration of rights not theretofore determined, and not to determine whether rights theretofore adjudicated have been properly adjudicated. It was never intended as a substitute for a new trial, or other steps that the code requires to be taken in the same action, or for an appeal to the Supreme Court. *Strawn v. County of Sarpy* 783
5. A declaratory judgment action will not be entertained if there is pending, at the time of the commencement thereof, another action or proceeding to which the same persons are parties, and in which the same identical issues may be adjudicated that are involved in the declaratory judgment action. *Strawn v. County of Sarpy* 783
6. The existence of a right is one matter, the availability of a particular remedy in which that right may be asserted is distinctly a separate matter. *Hawk v. Olson* 875

Adverse Possession.

1. Adverse possession begins from date when a right of entry and right of possession exist, and not from the date when remainderman has a right to bring action to quiet title as to his future interest. *Unick v. Saint Joseph Loan & Trust Co.* 789
2. Possession by one claiming under a disseizing tenant in common, if there is privity between them and the pos-

session of both are adverse, may be tacked to the disseizor's title so as to perfect title as against the cotenants disseized. *Unick v. Saint Joseph Loan & Trust Co.*... 789
3. Some writing which purports to give title to the premise is essential to give color of title to an adverse occupant, and oral transactions, however effective they may be as between the parties, do not constitute color of title. *Williams v. Beckmark*..... 814

Appeal and Error.
1. It is not prejudicial error to fail to instruct on comparative negligence when the evidence discloses that the contributory negligence of plaintiff exceeds slight negligence. *Shiman Bros. & Co. v. Nebraska National Hotel Co.* 47
2. Where a mandate of the Supreme Court makes the opinion of the court a part thereof by reference, the opinion should be examined in conjunction with the mandate to determine the nature and terms of the judgment to be entered or the action to be taken thereon. *Glissman v. Bauermeister* 197
3. While Supreme Court in action in equity is required to try case de novo and reach an independent conclusion, it will consider the fact that the trial court observed the witnesses and must have accepted one version of the facts rather than the other. *Miller v. Knight*..... 207
4. In a law action, findings of fact have same effect as verdict of a jury, and will not be disturbed on appeal if there is competent evidence to support them. *Faught v. Dawson County Irrigation Co*..... 274
5. Mandamus will not issue to review the action of an inferior court where there is an adequate remedy at law, and the writ may not be used to usurp or take the place of an appeal or writ of error. *State ex rel. Wolski v. Reed* 348
6. Where an appeal is taken from an order of the county court in a probate proceeding involving separate claims, and the county court includes the entire proceedings in one transcript, the district court acquires jurisdiction to hear and determine the separate claims. *In re Estate of Jelinek* 452
7. In a case tried to a court, the presumption obtains that the court, in arriving at a decision, considered such evidence only as is competent and relevant, and the Supreme Court will not reverse a case so tried because other evidence was admitted. *Coffin v. Maitland*..... 477
8. The jury are the judges of the credibility of witnesses

who testify before them, and unless the decision of the jury is clearly wrong, it will not be set aside. *Morrow v. State* 601
9. Unless objection is made to remarks of trial judge, error cannot be predicated thereon upon appeal. *Morrow v. State* 601
10. Assignment of error in motion for new trial that court erred in giving a group of instructions requires consideration only to extent of ascertaining that one of the instructions was properly given. *Morrow v. State* 601
11. Assignment of error in motion for new trial that court refused to give a group of instructions requires consideration only to extent of ascertaining that one of the requested instructions was properly refused. *Morrow v. State* 601
12. While equity action is required to be tried de novo upon appeal, Supreme Court will, when evidence is conflicting, consider the fact that trial judge observed the witnesses and their manner of testifying and must have accepted one version of the facts rather than the other. *Reetz v. Olson* 621
13. Where it is necessary to determine question of propriety of allowance of attorney's fees and expenses to trustee, Supreme Court will, in the absence of a bill of exceptions, presume that the trial court correctly determined the issue upon competent evidence. *Linn v. Linn* 666
14. When allowance of attorney's fees must be determined from evidence, and there is no bill of exceptions, error in making or refusing allowance will not be presumed but must affirmatively appear from the record. *Linn v. Linn* 666
15. Supreme Court will, on its own motion, refuse to consider a bill of exceptions which is not allowed as such by the trial court or authenticated by the certificate of the clerk of the trial court. *Bednar v. Bednar* 726
16. Where there is no bill of exceptions on appeal in an action in equity, the judgment of the trial court will be affirmed if the pleadings are sufficient to support the judgment. *Bednar v. Bednar* 726
17. A failure of the trial court to instruct upon the effect of certain evidence in the record cannot be reviewed in the Supreme Court where no requested instruction was tendered and no assignment of error of such failure was made in the motion for new trial. *Nygaard v. Stull* 736
18. To review errors of law occurring upon the trial of an equity case, a motion for new trial is necessary. *Oertle v. Oertle* 746

19. Ordinarily, the Supreme Court, in its appellate jurisdiction, will not pass upon an issue that is neither raised by the pleadings nor decided by the trial court. *De Lair v. De Lair* 771
20. A point raised for the first time in the reply brief will not be considered by the Supreme Court. *De Lair v. De Lair* 771
21. An order affecting a substantial right in an action upon a summary application after judgment is a final order from which an appeal may be taken. *De Lair v. De Lair* .. 771
22. Where evidence is in irreconcilable conflict, Supreme Court in equity case will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite. *Brown v. Brown* 908

Appearances.

1. Where a person has filed a special appearance challenging the jurisdiction of the court, but remains in court and takes part in the trial, he thereby waives the failure of the court to rule on his special appearance and makes a general appearance. *Enquist v. Enquist* 708
2. To make an appearance in court special, and not general, every act must be consistent with the theory that the court has no jurisdiction of the person. *Enquist v. Enquist* 708

Attorney and Client.

1. A nonresident attorney who voluntarily, and in the performance of his business as an attorney, comes into the state to conduct litigation on behalf of a client, is not privileged from service of summons. *State v. Tautges, Rerat & Welch* 439
2. Where employer appeals to Supreme Court from an award of the district court in a workmen's compensation case and fails to obtain any reduction in the amount of the award, Supreme Court will allow a reasonable sum for attorneys' fees in Supreme Court. *Gilmore v. State* .. 647
3. Where services of a litigant's attorney result in recovering or preserving property or funds for the benefit of all others in the same class, the court may in the exercise of sound legal discretion order a reasonable attorney fee to be paid from the common fund or by those benefited by it. *Linn v. Linn* 666

Automobiles.

1. A motorist who drives his automobile so fast on a high-

way at night that he cannot stop within the area lighted by his headlights is negligent as a matter of law. *Dickenson v. County of Cheyenne* 36
2. The presumption that an employee, driving his master's truck when an accident occurs, is acting within the scope of his employment disappears when evidence is introduced showing that such employee was engaged on his own personal affairs, and the plaintiff is then required to show by evidence that the act of driving the truck was within the scope of the employment. *Witthauer v. Paxton-Mitchell Co* 436
3. Evidence was held insufficient to sustain a recovery by a guest against the host under the guest statute. *Gohlinghorst v. Ruess* 470
4. Where the evidence is in sharp conflict in a property damage case arising out of a collision between an automobile and a transport, a question for the jury is presented. *Herman v. Firestine* 730

Bailments.

1. A bailment is for hire where it is a necessary incident of a business in which the bailee make a profit. *Shiman Bros. & Co. v. Nebraska National Hotel Co* 47
2. When a bailment is reciprocally beneficial to both parties, the law requires ordinary diligence on the part of the bailee and makes him responsible for ordinary negligence. *Shiman Bros. & Co. v. Nebraska National Hotel Co.* 47
3. A pledge is a bailment of personal property as a security for some debt or engagement, the property being redeemable on specified terms. *Glissman v. Bauermeister* 197

Brokers.

1. Where a real-estate broker, while his brokerage contract is in force, obtains a purchaser and no sale is made during the existence of the contract but sale is thereafter made by owner to person procured by the agent on substantially same terms, the broker is entitled to a commission. *Peters v. Dreger* 670
2. Where subsequent sale is made to person procured by agent but not on substantially the same terms that had been offered through the broker's efforts, he is not entitled to a commission. *Peters v. Dreger* 670
3. A principal cannot defeat right of real-estate broker to commission by inability to convey good title to real estate arising from failure to obtain joinder in conveyance by a third person who has an interest. *Peters v. Dreger* 670

Carriers.

1. The liability of a contract carrier for loss or damage to property being transported is determined by the contract made by the parties. *Lincoln Drug Co. v. Harman*.. 354
2. In the absence of a contract provision on the subject a contract carrier is liable only for damage or loss occasioned by his negligence. *Lincoln Drug Co. v. Harman*.... 354
3. When a contract carrier agrees to haul merchandise as directed by the consignee, the fact that the initial haul is made by his agent who is a common carrier does not increase the liability of the contract carrier, even though a through bill of lading was issued by the initial carrier. *Lincoln Drug Co. v. Harman*..... 354

Chattel Mortgages.

1. In a prosecution for unlawful sale of mortgaged property without written consent of mortgagee, oral consent of such mortgagee to the sale of the mortgaged chattels, coupled with payment of the value of the property, is a defense. *Mullins v. State*..... 521
2. Where evidence establishes payment by mortgagor of value of chattels sold under oral consent of mortgagee, verdict of guilty of unlawful sale of mortgaged property without written consent of mortgagee should be set aside. *Mullins v. State*..... 521

Common Law.

1. The common law is not immutable, but is flexible, and by its own principles adapts itself to varying conditions. *State v. Tautges, Rerat & Welch*..... 439
2. The courts have power to modify the common law, adopting such of its principles as are applicable and rejecting such as are inapplicable. *State v. Tautges, Rerat & Welch* 439

Conflict of Laws.

1. Whether a conditional sale contract is legally effective to keep title in vendor of chattels depends upon the law of the place where the chattel was at the time of the sale. The requirements of acknowledgment and registration are controlled by the law of the state of the situs of the chattel. *North American Acceptance Corporation v. Meeks* 546
2. If, after a valid conditional sale in another state, the chattel is taken into this state, the vendor's title to the chattel will be recognized in this state. *North American Acceptance Corporation v. Meeks*..... 546

Contracts.

1. When a contract is partly written and partly oral, the clear, positive terms of the written portion of the contract will prevail over evidence of parol statements or recollections of one of the parties contrary thereto and inconsistent therewith. *Cox v. Rippe* 309
2. Unless minds of the parties have met, specific performance of a contract will not be decreed. *Horn v. Stuckey* .. 625
3. In order to establish a contract capable of specific performance it must be shown that there was a definite offer and an unconditional acceptance. *Horn v. Stuckey* .. 625
4. Contract for sale of real estate may be made by correspondence if all of the elements of a valid and binding contract are contained in the correspondence passing between the parties. *Horn v. Stuckey* 625

Constitutional Law.

1. Legislature has power to provide for trial of criminal offenses upon information instead of indictment. *Duggan v. Olson* 248
2. Statute permitting trial of criminal offenses upon information does not violate due process clause of federal constitution. *Duggan v. Olson* 248
3. Home rule charter of metropolitan city relating to firemen's pensions is valid and constitutional. *Sullivan v. City of Omaha* 297
4. The conditions and restrictions of the Constitution and statutes relative to a bicameral legislature, so far as they may be applicable, attach to the unicameral legislature. *Mekota v. State Board of Equalization and Assessment* 370
5. A constitutional provision is to be interpreted and understood in its most natural and obvious meaning, unless the subject indicates or the text suggests that they have been used in a technical sense. *Mekota v. State Board of Equalization and Assessment* 370
6. Courts may not supply what they deem unwise omissions, nor add words which substantially add to or take from the Constitution as framed. *Mekota v. State Board of Equalization and Assessment* 370
7. The Constitution as amended must be construed as a whole. *Mekota v. State Board of Equalization and Assessment* 370
8. Where the words of the Constitution are plain, direct, and unambiguous, no interpretation is needed to ascertain their meaning. *Mekota v. State Board of Equalization and Assessment* 370

9. No sentence, clause, or word of the Constitution should be rejected as meaningless or superfluous, if it can be avoided. *Mekota v. State Board of Equalization and Assessment* 370
10. The courts should accord to the language of the Constitution the meaning which obviously would be accepted by a layman. *Mekota v. State Board of Equalization and Assessment* 370
11. The provision of the Constitution with reference to formulation of budget applies only to departments, institutions, and agencies of the state in being at the commencement of the legislative session. *Mekota v. State Board of Equalization and Assessment*..... 370
12. Statute which seeks to deprive the owner of lands of his action for damages because of a majority negative vote on the creation of a drainage district below a sanitary drainage district is unconstitutional and void. *Cooper v. Sanitary District No. 1*..... 412
13. The words "or damaged" in constitutional provision include all actual damages resulting in exercise of the right of eminent domain which diminish the market value of private property. Their insertion was intended as a grant and not a limitation. *Robinson v. Central Neb. Pub. P. & I. Dist*..... 534
14. The same constitutional provision that requires one who lawfully takes or damages property for public use to pay just compensation therefor protects him when he is without fault from paying more than once. *Robinson v. Central Neb. Pub. P. & I. Dist*..... 534
15. A constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it. *Hawk v. Olson*..... 875
Jackson v. Olson..... 885
16. Prosecutions for felony by information in courts of this state do not conflict with the Fourteenth Amendment to the Constitution of the United States. *Jackson v. Olson*.. 885

Corporations.

1. Where a foreign corporation by transaction of business in this state secures a promissory note under a contract valid under the laws of its domicile but in violation of local law, if it resorts to the courts of this state to enforce collection of the note, it owes the reciprocal duty to abide by the local law in effect when the transaction was had. *Refrigeration & Air Conditioning Institute, Inc., v. Hilyard*..... 42

2. A foreign corporation cannot exercise powers or do acts contrary to the laws of the state whose comity it enjoys, even though such powers or acts may be authorized by its own charter or by the laws of its own state. *Refrigeration & Air Conditioning Institute, Inc., v. Hilyard* 42
3. Under statute prior to 1943 amendment, all occupation taxes against domestic corporations for profit were a lien upon all the property of the corporation from and after the time they were determined and assessed in the office of the Secretary of State. *Licking v. Hays Lumber Co.* 240
4. Under statute prior to 1943 amendment, when occupation taxes were determined and assessed in office of Secretary of State, it constituted notice to all parties having or claiming any rights in or to such property. *Licking v. Hays Lumber Co* 240

Costs.

Where a judgment is obtained for the recovery of specific real property, the costs follow the judgment. *Tuttle v. Wyman* 146

Counties.

1. A county is only required to use reasonable and ordinary care in the maintenance and repair of county highways. *Dickenson v. County of Cheyenne* 36
2. Word "insufficiency" used in statute making county liable for insufficiency of its highways means being inadequate to the need, use, or purpose of the highway. *Dickenson v. County of Cheyenne* 36

Courts.

1. A final order of the county court within its jurisdiction with all proper parties before it and not appealed from is not subject to collateral attack except for fraud. *Mead Co. v. Doerfler* 21
2. If a foreign corporation transacts business in this state contrary to local laws, and a contract growing out of such transaction is subsequently entered into valid in another state, though invalid here, it will not be enforced in this state as a matter of comity. *Refrigeration & Air Conditioning Institute, Inc., v. Hilyard* 42
3. The county court has jurisdiction in civil actions where the debt or sum claimed does not exceed one thousand dollars, exclusive of costs. *Johnson v. Washburn* 335
4. In civil actions it is the debt or amount claimed by the plaintiff which determines the jurisdiction of the county court over the subject matter. *Johnson v. Washburn* 335

5. Where the amount claimed is within the jurisdiction of the court at the time the action is brought, the fact that interest accruing before final judgment increases the amount to more than the jurisdictional limit will not defeat jurisdiction. *Johnson v. Washburn* 335
6. Where a judgment of a court of last resort of a state is reversed by the Supreme Court of the United States, the state court in entering judgment on the mandate may properly decide upon its own jurisdiction and upon the jurisdiction of all the inferior courts to which its appellate power extends. *Johnson v. Radio Station WOW, Inc.* 429
7. A direction in a mandate of the Supreme Court of the United States ordering a court of last resort of a state to withhold execution on a judgment entered on issues solely within the jurisdiction of the state court will be treated as advisory and not mandatory. *Johnson v. Radio Station WOW, Inc.* 429
8. The courts have power to modify the common law, adopting such of its principles as are applicable and rejecting such as are inapplicable. *State v. Tautges, Rerat & Welch* 439
9. A trial court is not required to helplessly sit by and permit a litigant to toy with the processes of the court by insisting under oath at different times on the truth of each of two contradictory stories according to the exigencies of the particular occasion presenting itself. *Gohlinghorst v. Ruess* 470
10. Custodia legis doctrine should not be extended to protect a debtor from the just claims of a creditor simply on the theory of safeguarding officers of the court. *Emerson-Brantingham Implement Co. v. Hallgren* 530
11. Rule of stare decisis has a limited application. The positive authority of a decision is coextensive only with the facts on which it is founded, and can apply only in subsequent cases in which the issues are similar. *International Harvester Co. v. County of Douglas* 555
12. A decree of final settlement by county court which construes a will so as to deprive a devisee of an interest in real property devised to him and gives it to other devisees to satisfy a claim against him for a debt to the testator is void for want of jurisdiction. *Hiatt v. Hiatt* 652
13. Courts should expedite rather than delay the conclusion of litigation. *Hoover v. Haller* 697
14. Where a person has filed a special appearance challenging the jurisdiction of the court, but remains in court and takes part in the trial, he thereby waives the failure

of the court to rule on his special appearance and makes a general appearance. *Enquist v. Enquist* 708
15. To make an appearance in court special, and not general, every act must be consistent with the theory that the court has no jurisdiction of the person. *Enquist v. Enquist* 708
16. Supreme Court of this state has the right to decide upon its own jurisdiction and the jurisdiction of courts of this state to which its appellate power extends. *Hawk v. Olson* 875
17. It is for the Supreme Court of this state to decide what issues are justiciable in an application for a writ of habeas corpus made to the courts of this state. *Hawk v. Olson* 875
18. Where the Supreme Court of the United States determines the existence of a right and reverses and remands a cause for further proceedings not inconsistent with its opinion, the Supreme Court of this state is not foreclosed from determining the availability of the particular remedy sought to assert the right. *Hawk v. Olson* 875
19. The absence of jurisdiction of the district court will not be presumed, but must affirmatively appear from the face of the record. *Jackson v. Olson* 885

Criminal Law.
1. District judge sitting in chambers within his judicial district may receive plea of guilty to a felony. *Duggan v. Olson* 248
2. Legislature has power to provide for trial of criminal offenses upon information instead of indictment. *Duggan v. Olson* 248
3. Statute permitting trial of criminal offenses upon information does not violate due process clause of federal constitution. *Duggan v. Olson* 248
4. A defendant, by pleading guilty, waives all defenses other than that the information charges no offense. *Duggan v. Olson* 248
5. A valid plea of guilty dispenses with the necessity of a jury and even of a trial at law. *Duggan v. Olson* 248
6. The constitutional right of the accused to have the assistance of counsel may be waived. *Duggan v. Olson* 248
7. Supreme Court will not interfere with verdict of guilty in criminal case which is based upon conflicting evidence unless it is so lacking in probative force that as a matter of law it is insufficient to support a finding of guilt beyond a reasonable doubt. *Severin v. State* 506
8. Where intent is necessary element of the crime charged,

evidence of wrongful intent must be produced from which a jury may find that such intent was conceived or existed in the county where the crime is alleged to have been committed. *Severin v. State* 506
9. Criminal intent is purely a mental process and difficult to establish by direct proof. It is generally a conclusion that must be drawn after a consideration of the actions of the defendant viewed in the light of the attendant circumstances. *Severin v. State* 506
10. Whether wrongful intent existed in county where crime is alleged to have occurred is usually a question of fact for the jury to determine after considering the actions of the defendant and surrounding circumstances. *Severin v. State* 506
11. In a prosecution for unlawful sale of mortgaged property without written consent of mortgagee, oral consent of such mortgagee to the sale of the mortgaged chattels, coupled with payment of the value of the property, is a defense. *Mullins v. State* 521
12. Where evidence establishes payment by mortgagor of value of chattels sold under oral consent of mortgagee, verdict of guilty of unlawful sale of mortgaged property without written consent of mortgagee should be set aside. *Mullins v. State* 521
13. There is nothing in the Constitution or laws of the United States which exempts an offender, brought before the courts of a state for an offense against its laws, from trial and punishment, even though brought from another state by unlawful violence or by abuse of legal process. *Jackson v. Olson* 885
14. Right of defendant to have one day after receiving copy of indictment on information before arraignment may be waived, and failure of record to show objection raises a presumption of waiver. *Jackson v. Olson* 885
15. Prosecutions for felony by information in courts of this state do not conflict with the Fourteenth Amendment to the Constitution of the United States. *Jackson v. Olson* .. 885

Crops.

1. Whether damages to an unmatured annual crop are speculative or not must be decided by whether there is sufficient data to determine with reasonable certainty the probable value the crop would have had if matured. *Faught v. Dawson County Irrigation Co* 274
2. In case of destruction of a perennial crop, the measure of damages is the difference between the value of the land before and after the destruction. *Faught v. Dawson County Irrigation Co* 274

Damages.

1. Where verdict is rendered for defendant, an instruction on measure of damages in the event of recovery by plaintiff is not prejudicially erroneous even though not technically correct. *Shiman Bros. & Co. v. Nebraska National Hotel Co* 47
2. Rule of allocation of damages is applicable where damage is caused by the several and independent negligent acts of two or more parties, so that it may be found that the act of each resulted in some injury and the consequences of the acts are separable. *Faught v. Dawson County Irrigation Co* 274
3. Whether damages to an unmatured annual crop are speculative or not must be decided by whether there is sufficient data to determine with reasonable certainty the probable value the crop would have had if matured. *Faught v. Dawson County Irrigation Co* 274
4. In case of destruction of a perennial crop, the measure of damages is the difference between the value of the land before and after the destruction. *Faught v. Dawson County Irrigation Co* 274
5. Application of the rule of allocation of damages is clarified in opinion. *Faught v. Dawson County Irrigation Co.* 274
6. Where some damage would have occurred even if the artificial channel had not been built, a drainage district is liable only for such damages in addition thereto as were caused by the damming or retarding of the water to a greater height or for a longer time than would otherwise have occurred. *Cooper v. Sanitary District No. 1* .. 412
7. The rule as to allocation of damages is applicable where damage is caused by the several and independent negligent acts of two or more parties, so that it may be found that the act of each resulted in some injury and the consequences of their acts are separable. *Mohatt v. Olson* .. 764

Deeds.

1. Where an interest in the premises is retained by the grantor of a deed, such interest will support the imposition of a restriction on alienation where it is reasonably necessary to protect the interest retained. *Watson v. Dalton* 78
2. The term "condition subsequent" denotes that part of a deed by virtue of which the grantor, or his successor in interest, has the power to terminate the interest which has been created. *Watson v. Dalton* 78
3. While conditions subsequent are not favored, no par-

ticular words are necessary to create them, although such conditions must be fairly expressed and apt and sufficient words employed. *Watson v. Dalton* 78
4. The phrase "subject to the conditions above stated" in a deed usually indicates an intent to create an estate subject to a condition subsequent, even when no express clause providing for termination accompanies it. *Watson v. Dalton* 78
5. The nature of the event specified in the limitations, their importance to the grantor in protecting an estate retained, the consideration, the relation of the parties, and the purposes of the conveyance, are all factors in determining whether limitation is so expressed as to create a power of termination. *Watson v. Dalton* 78
6. When a grantor retains a life estate and places restrictions on alienation in the deed against conveying or encumbering within a specified time, and before the period has elapsed the grantor dies leaving the grantee as his sole heir, the restrictions on alienation then become unenforceable, and conveyance by the grantee will pass a fee simple title. *Watson v. Dalton* 86
7. Where it is sought to cancel a deed for want of mental capacity of the grantor, the burden of proof is on the party who alleges such mental incapacity. *Kucaba v. Kucaba* 116
8. To set aside a deed on the ground of want of mental capacity of the grantor, it must be clearly established that the mind of the grantor was so weak or unbalanced at the time of the execution of the deed that he could not understand the purport and effect of what he was then doing. *Kucaba v. Kucaba* 116
9. The party attacking an instrument on the ground that its execution was procured by undue influence has the burden to establish that fact. However, the circumstances under which it was made, the condition of the grantor at the time and the injustice to him and his heirs, if it is upheld, may be such as to cast upon the grantee the burden of evidence to show that it is not tainted with undue influence but is the deliberate and bona fide act of the grantor. *Kucaba v. Kucaba* 116
10. In determining whether the facts and circumstances are sufficient to raise a presumption of undue influence, the court will examine the transaction with care and closely scrutinize everything done by the donees to secure the deed in question. *Kucaba v. Kucaba* 116
11. Recital in deed that conveyance is subject to mortgages of record does not estop grantee from showing invalid-

ity of apparent encumbrance, where encumbrance is not made a part of consideration and is not assumed. *Gordon v. Young* 578

Descent and Distribution.

A proceeding in the probate court to settle the estate of a decedent is a proceeding in rem, and everyone interested in such settlement is a party with constructive notice thereof whether he is named or not. *Johnson v. Marsh*.. 257

Divorce.

1. The right of a prevailing spouse to have a divorce decree set aside within six months is not an absolute but a qualified right. *Carpenter v. Carpenter* 140
2. The control of a divorce decree is within the sound judicial discretion of the trial court. *Carpenter v. Carpenter* 140
3. Where an application to set aside a decree is made within six months following its rendition, it is not to be granted ex parte, but notice and a reasonable opportunity must be given to the other party to be heard. *Carpenter v. Carpenter* 140
4. In order to set aside an interlocutory decree of divorce, the following things must be shown: (1) Legal collusion must be absent; (2) the setting aside of the decree must not produce an unconscionable result; and (3) where property rights have been affected by the decree, there should be the greatest possible restoration of the parties to the status quo existing at the time of the decree. *Carpenter v. Carpenter* 140
5. In allowing alimony, court will consider ages of the parties, their earning ability, duration of and conduct of each during the marriage, station in life, circumstances and necessities of each, health and physical condition, when property was accumulated, and all other circumstances bearing upon the question, and from all the elements determine the rights of the parties. *Vocelka v. Vocelka* 268
6. A suit for divorce abates on the death of either party before final judgment, and is not subject to revivor. *Williams v. Williams* 383
7. Where death occurs prior to the time when decree of divorce can go into effect, the subject matter is gone and the parties can never be divorced by operation of law. *Williams v. Williams* 383
8. In a divorce action the property interests involved are merely incidental to the principal object of the action,

and if the decree of divorce cannot take effect, matters incidental thereto do not take effect. *Williams v. Williams* 383
9. Upon granting an absolute divorce, the court may divide the property, both real and personal, between the parties as the demands of justice and equity may require. *Metschke v. Metschke* 461
10. Whether accusations of infidelity made by one spouse against the other constitute extreme cruelty must be determined by the facts of each particular case, and in no case will be given that effect unless they are shown to be either unfounded or malicious. *Oertle v. Oertle* 746
11. A decree of divorce should only be granted when the evidence brings the case within the definition of the statute providing for such relief. *Oertle v. Oertle* 746
12. Any unjustifiable conduct on the part of either the husband or wife which so grievously wounds the mental feelings of the other or so utterly destroys the peace of mind of the other as to seriously impair the bodily health and endanger the life of the other, or such as utterly destroys the legitimate ends and objects of matrimony, constitutes extreme cruelty, although no physical or personal violence may be inflicted or even threatened. *Oertle v. Oertle* 746
13. There may be extreme cruelty justifying a decree of divorce without physical injury or violence. Unjustifiable conduct on the part of a spouse, which utterly destroys the legitimate ends and objects of matrimony, may constitute extreme cruelty. *Brown v. Brown* 908
14. It is impossible to lay down a general rule as to the degree of corroboration required in a divorce action as each case must be decided on its own facts and circumstances. *Brown v. Brown* 908
15. Evidence was sufficient to sustain a decree of absolute divorce in cross-petition of husband. *Brown v. Brown* 908

Drains.

1. It is the duty of those who build structures across natural drainways to provide for the natural passages through such obstruction of all waters which may be reasonably anticipated to drain there. This is a continuing duty. *Faught v. Dawson County Irrigation Co* 274
2. A sanitary drainage district is liable for negligence in the construction and maintenance of its works. *Cooper v. Sanitary District No. 1* 412
3. Statute which seeks to deprive the owner of lands of his action for damages because of a majority negative vote

on the creation of a drainage district below a sanitary drainage district is unconstitutional and void. *Cooper v. Sanitary District No. 1* 412
4. Whatever may be done by an upper riparian landowner in the protection and improvement of his land may be done by a legally organized sanitary drainage district. *Cooper v. Sanitary District No. 1* 412
5. Where damage would have occurred whether or not the works of a drainage district had been constructed, such damages are not chargeable to a drainage district organized in the upper reaches of the stream. *Cooper v. Sanitary District No. 1* 412
6. Where the construction of an artificial channel by a drainage district does not dam or retard the flow of the stream to the damage of upper owners, or make the position of owners of land downstream more hazardous, the artificial channel cannot be said to be negligently constructed. *Cooper v. Sanitary District No. 1* 412
7. Where plaintiff fails to show the extent of the increased overflow of water arising from claimed negligent construction of a drainage district, either as to its quantity or duration, and the amount of damages arising therefrom, no basis for a judgment exists. *Cooper v. Sanitary District No. 1* 412
8. A drainage district is not required to construct a channel of sufficient size to carry off all the floodwaters of the watershed. Its only duty to lower landowners is to refrain from negligently creating conditions more hazardous than existed before their operations commenced. *Cooper v. Sanitary District No. 1* 412

Easements.

1. After an easement to drain waters across the lands of another has been legally acquired, it is limited both as to extent and nature to the terms of the original grant. *Webb v. Platte Valley Public Power & Irrigation District* 61
2. Waters carried in a watercourse across land for more than ten years give rise to an easement. *Born v. Keil* 912

Ejectment.

A party defendant in an action in ejectment may plead facts showing an equitable right to a conveyance from plaintiff, and if he proves himself the equitable owner and entitled to possession, he will not only defeat the action but entitle himself to a decree of specific performance. *Williams v. Beckmark* 814

Embezzlement.

Source of particular funds is not ordinarily material to establish embezzlement other than that the funds embezzled came into defendant's possession by virtue of the relationship charged in the information at or about the time charged. *Severin v. State* 506

Eminent Domain.

1. Where there was defect in initiating condemnation proceedings, right of municipal corporation to condemn depended upon new compliance with statute. *City of Kearney v. Consumers Public Power District* 29
2. Where proposed ditch interferes with proper drainage of highway, condemnation proceedings to obtain right-of-way for ditch on highway may be dismissed. *County of Dawson v. South Side Irrigation Co* 512
3. The words "or damaged" in constitutional provision include all actual damages resulting in exercise of the right of eminent domain which diminish the market value of private property. Their insertion was intended as a grant and not a limitation. *Robinson v. Central Neb. Pub. P & I. Dist* 534
4. The same constitutional provision that requires one who lawfully takes or damages property for public use to pay just compensation therefor protects him when he is without fault from paying more than once. *Robinson v. Central Neb. Pub. P. & I. Dist* 534
5. If the landlord's right of action under eminent domain is satisfied by payment of just compensation, a subsequent grantee or subsequent tenant would take subject thereto. *Robinson v. Central Neb. Pub. P. & I. Dist* 534
6. Actions to recover compensation for property taken or damaged for public use by proper construction and operation are permanent as distinguished from transient in character and damages are ordinarily recoverable in but one action. *Robinson v. Central Neb. Pub. P. & I. Dist.* 534
7. Injunction is a proper action in which to present the question of unlawful or improper exercise of the power of eminent domain. *Consumers Public Power District v. Eldred* 926
8. The right to question the regularity of taking of property by eminent domain is available to a party whose property is sought to be taken. *Consumers Public Power District v. Eldred* 926
9. Eminent domain is an inherent attribute of sovereignty and exists independently of Constitution. Constitutional

provisions relating thereto are not a grant but a limitation upon the power. *Consumers Public Power District v. Eldred* 926
10. Eminent domain is exercisable through the Legislature or through some department or agency authorized by the Legislature. *Consumers Public Power District v. Eldred* .. 926
11. Eminent domain may be exercised at will except to the extent and degree that it is constitutionally restricted. *Consumers Public Power District v. Eldred* 926
12. Necessity or expediency of appropriating particular property for public use is a legislative and not judicial question. *Consumers Public Power District v. Eldred* 926
13. Where city of the first or second class or a village undertakes to acquire by eminent domain from a private owner an electric light and power plant operating partly within and partly without the city or village, it is required to take the entire property and not any divided or segregated part thereof. *Consumers Public Power District v. Eldred* 926
14. If eminent domain is exercised against a public corporation or political subdivision, the taking is limited by statute to the electric distribution system. *Consumers Public Power District v. Eldred* 926
15. The description of property to be taken by eminent domain must be accurate to the degree that the property may be identified by reference to the proposal. *Consumers Public Power District v. Eldred* 926
16. It is the duty of the condemnor in eminent domain proceedings to bring in all parties having an interest therein, except where parties are unknown. *Consumers Public Power District v. Eldred* 926
17. A franchise is not a condition precedent to resist, on the ground of illegality, the taking of property by eminent domain. *Consumers Public Power District v. Eldred* 926

Equity.

1. Equity will permit a merger when to do so will best subserve the purposes of justice and the actual and just intent of the parties. *Watson v. Dalton* 86
2. A prayer for equitable relief is as broad as the pleadings and the equitable powers of the court. *Miller v. Knight* 207
3. While Supreme Court in action in equity is required to try case de novo and reach an independent conclusion, it will consider the fact that the trial court observed the witnesses and must have accepted one version of the facts rather than the other. *Miller v. Knight* 207

4. Equity will not afford relief if party has an adequate remedy by statutory proceedings in the original action. *Johnson v. Marsh* 257
5. Independently of any statute of limitations equity will refuse relief when it is sought after undue and unexplained delay, and when injustice would be done in the particular case by granting the relief asked. *Johnson v. Marsh* 257
6. Independently of any statutory limitation of actions, equity may, in the exercise of its own inherent powers, refuse relief where it is sought after undue and unexplained delay, and where injustice would be done by granting the relief sought. *Kozina v. Watkins Lumber Co.* 594
7. Where facts pleaded by person claiming the right to redeem disclose inexcusable negligence and that it would be inequitable to enforce his claim because of change in condition or relation of the parties, the doctrine of laches is applicable. *Kozina v. Watkins Lumber Co.* 594
8. Courts of equity may grant specific performance of an oral agreement to transfer title to personal property as well as real estate. *Hackbarth v. Hackbarth* 919
9. A court of equity having obtained jurisdiction of a cause will retain it for all purposes, and render such a decree as will protect the rights of the parties before it. *Hackbarth v. Hackbarth* 919

Estates.

1. Intention of parties to create an estate upon a contingency must be gathered from the entire instrument and according to its terms. *Watson v. Dalton* 78
2. A condition, the breach of which is good ground in equity for canceling the conveyance of which it is a part, will be held to be a condition subsequent unless there is something in the instrument showing a contrary intent. *Watson v. Dalton* 78
3. An estate subject to a condition subsequent does not end automatically, but is divested only if the person having the power to terminate it chooses to exercise that right. *Watson v. Dalton* 78
4. Right to terminate estate subject to a condition subsequent does not expire with death of the creator of the estate but such right passes to his heirs. *Watson v. Dalton* 78
5. An otherwise valid restraint on alienation in the form of a condition subsequent ceases to exist upon a union of the power to enforce the restraint and the interest so restrained in the same person. *Watson v. Dalton* 78

6. When a restraint in the form of a condition subsequent has been terminated at or prior to the time of alleged violation thereof, one against whom enforcement is sought has a defense thereto. *Watson v. Dalton* 78
7. Estates upon condition subsequent are not favored, and no deed will be construed to create such an estate unless the language used is so clear that no room is left for any other construction. *Watson v. Dalton* 86
8. Whenever a person acquires a greater and a lesser estate in the same property, with no intervening estate, the lesser estate is merged in the greater estate. *Watson v. Dalton* 86
9. As estate in fee simple is the greatest estate a person can possess in land. *Watson v. Dalton* 86
10. An estate in fee simple is an estate of inheritance without condition, alienable by the owner or transmissible to his heirs absolutely. *Watson v. Dalton* 86
11. An estate in fee simple is not subject to special or executory limitation or to a condition subsequent. *Watson v. Dalton* 86
12. Restrictions contained in deed did not create a condition subsequent. *Watson v. Dalton* 86

Estoppel.

1. Under Uniform Sales Act, determination of question of estoppel depends upon the facts and circumstances attending the sale. *North American Acceptance Corporation v. Meeks* 546
2. Recital in deed that conveyance is subject to mortgages of record does not estop grantee from showing invalidity of apparent encumbrance, where encumbrance is not made a part of consideration and is not assumed. *Gordon v. Young* 578

Evidence.

1. While a presumption will serve in the place of evidence in favor of a party until the opposite party has adduced evidence, such presumption is not evidence and should never be weighed as such. *In re Estate of Goist* 1
2 Where mental condition of a person becomes a subject of inquiry, opinion of nonexpert witness, who is shown to have had an extended and intimate acquaintance with such person and gives facts and circumstances upon which opinion is based, is admissible as evidence, and the weight to be given such testimony is for the jury, to be considered in connection with the credibility and intelligence of the witness, and his opportunities for observation. *In re Estate of Goist* 1

3. Burden of proof means duty resting upon party, usually having the affirmative, to establish by a preponderance a proposition essential to the maintenance of an action. The burden of proof never shifts. *Shiman Bros. & Co. v. Nebraska National Hotel Co*..... 47
4. Burden of evidence means duty of controverting prima facie case or presumption which, if nothing further appeared, would entitle party to verdict or judgment. The burden of evidence shifts throughout the trial. *Shiman Bros. & Co. v. Nebraska National Hotel Co*..... 47
5. Evidence of other fraudulent transfers about the same time are admissible in evidence upon question of fraudulent disposition of property. *Evers v. Evers*..... 104
6. Evidence admitted generally is in the case for any legal purpose, although, when introduced, it was intended for a particular purpose. *Kucaba v. Kucaba*..... 116
7. Evidence which is offered and admitted for a limited purpose cannot be used for another and totally different purpose. *Kucaba v. Kucaba*..... 116
8. Value of opinion testimony as to handwriting depends upon character of the witness, his opportunity for acquiring knowledge of the handwriting in question, and the cogency of the reasons for his opinion. *Kucaba v. Kucaba*..... 116
9. The burden of proof in any cause rests upon the party who, as determined by the pleadings or the nature of the case, asserts the affirmative of an issue and remains there until the termination of the action. *Kucaba v. Kucaba*..... 116
10. The plaintiff may offer sufficient evidence to make a prima facie case, or he may be aided by a presumption of law which, if nothing further appeared, would entitle him to a judgment, and when this happens the burden of evidence devolves upon the adverse party. *Kucaba v. Kucaba*..... 116
11. The admissions and declarations of a party against his own interest upon a material matter and with reference to the issues being tried, are admissible in evidence against such party. *Tuttle v. Wyman*..... 146
12. A court may take judicial notice of its own proceedings and judgments in a prior action where cases are interwoven and interdependent. *Johnson v. Marsh*..... 257
13. The hearsay rule forbids the use of an assertion, made out of court, as testimony to establish the truth of the fact asserted, unless the circumstances under which the statement was made are such as to justify the waiver of the requirement that it be given under oath and subject to cross-examination. *Hamilton v. Huebner*..... 320

14. In order for testimony to be admissible as res gestae, it is required that (1) there be some shock to the feelings sufficient to render the utterance spontaneous and unreflecting; (2) the utterance must have been before there had been time to contrive and misrepresent; and (3) it must relate to the circumstance causing the shock to the feelings. *Hamilton v. Huebner* 320
15. To be a part of the res gestae a declaration need not necessarily be coincident in point of time with the main fact proved, but it is enough that the two are so clearly connected that the declaration can, in the ordinary course of affairs, be said to be a spontaneous explanation of the real cause. *Hamilton v. Huebner* 320
16. Statements may be admissible as res gestae provided there has not been time for the exciting influence of the shock to lose its sway and be dissipated. *Hamilton v. Huebner* 320
17. In order to be admissible as res gestae, the statement must appear to have been made by the speaker under the stress of nervous excitement and shock produced by the act in issue. *Hamilton v. Huebner* 320
18. Hardship in a particular case does not warrant an exception to the hearsay rule. *Hamilton v. Huebner* 320
19. Presumption is not evidence, and will not prevent a directed verdict when the evidence rebutting it is convincing and undisputed. *Witthauer v. Paxton-Mitchell Co.* .. 436
20. A person is not incompetent to testify by reason of having a direct legal interest in the result of a suit, unless it clearly appears that he will gain or lose by the direct legal operation and effect of the judgment or final order that may be rendered in the proceeding in which the testimony is offered, or that the judgment that may be pronounced in that proceeding would be legal evidence for or against the witness in some other action. *In re Estate of Jelinek* 452
21. A written statement made by a party out of court and contradictory of a claim made in an action is admissible in evidence as an admission against interest, for the purpose of testing the credibility of such party as a witness. *Anderson v. Neb. Defense Corporation* 446
22. Where a plaintiff, without reasonable explanation, testifies to facts materially different upon a vital issue than had previously been testified to by him under oath in another action, and it appears that the change was made to meet the exigencies of the pending action, the evidence is discredited as a matter of law and should be disregarded. *Gohlinghorst v. Ruess* 470

23. Where testimony relied upon to show good faith is given by interested relatives, the reasonableness of their evidence bears considerable weight in arriving at a just conclusion. *Filley v. Mancuso* 493
24. In prosecution for rape, lack of relationship between prosecutrix and accused may be shown by circumstantial evidence, and a conviction will not be reversed because no witness testified in direct language to such fact. *Jump v. State* 501
25. Where party desires to make experiment in court or offer evidence of an experiment made out of court, he should first show that conditions and circumstances exist similar to those prevailing at the time of the occurrence involved in the controversy. *Franks v. Jirdon* 585
26. To authorize reception in evidence of experiments, it is not required that conditions be identical but it is sufficient if there is a substantial similarity. *Franks v. Jirdon* 585
27. Discretion is conferred upon trial court in the reception of evidence of experiments, and judgment will not be reversed for admission or rejection of such evidence unless there has been a clear abuse of discretion. *Franks v. Jirdon* 585
28. Negative testimony of plaintiff that she did not hear the bell or whistle of an approaching train, without further explanation, is not sufficient to overcome positive testimony of reliable and competent witnesses that bell was ringing and whistle blowing. *McIntosh v. Union P. R. R. Co* 844

Executions.

When in a proceeding in aid of execution it is disclosed that a judgment debtor has an interest in a distributive share of an estate, it is the duty of district court to impress a lien upon such share in favor of the judgment creditor. *Emerson-Brantingham Implement Co. v. Hallgren* 530

Executors and Administrators.

1. As a general rule, until the estate has been closed, the personal representative of a deceased person is the only proper party plaintiff in an action for recovery of assets on behalf of the estate. *Mead Co. v. Doerfler* 21
2. As an exception to the general rule, a claimant may bring action on his own behalf and all others similarly situated if it appears that the personal representative has failed, neglected, and refused to prosecute action on behalf of the estate. *Mead Co. v. Doerfler* 21

3. Where appeal is taken from an order of the county court in a probate proceeding involving separate claims, and the county court includes the entire proceedings in one transcript, the district court acquires jurisdiction to hear and determine the separate claims. *In re Estate of Jelinek* 452
4. When in a proceeding in aid of execution it is disclosed that a judgment debtor has an interest in a distributive share of an estate, it is the duty of district court to impress a lien upon such share in favor of the judgment creditor. *Emerson-Brantingham Implement Co. v. Hallgren* 530
5. An administrator of an intestate estate as such does not have a right to contest a purported will presented for probate in the estate that he is administering. *In re Estate of Sexton* 618
6. An interest in the fees of administration is not sufficient to entitle an administrator to contest a purported will. *In re Estate of Sexton* 618
7. Unless authorized by statute or by the terms of a will, the personal representative may not mortgage the decedent's realty. *Columbus Land, Loan & Bldg. Assn. v. Wolken* 684
8. An executor or administrator has no inherent authority to borrow money, and loans not authorized by statute, will, or order of court will not bind estate. *Columbus Land, Loan & Bldg. Assn. v. Wolken* 684
9. When a note and mortgage are executed by a representative of an estate pursuant to statute, it does not make estate liable for debt or obligation so created, and in case of foreclosure mortgagor must look solely to the property mortgaged for satisfaction thereof. *Columbus Land, Loan & Bldg. Assn. v. Wolken* 684
10. Final settlement of estate and discharge of executor does not bar action against execution, as office of executor is an enduring one and decree upon final accounting only discharges him from liability for the past. *Columbus Land, Loan & Bldg. Assn. v. Wolken* 684
11. An action in equity may be brought in the district court to partition personal property by the owner of an undivided interest therein against the administrator of an estate of a deceased person, which estate is also the owner of an undivided interest. *Hoover v. Haller* 697
12. Personal estate of a deceased person is primarily liable for all debts created or assumed by him, whether secured by mortgage on real estate or not, and heirs and devisees

have the right to require the payment of such debts out of the personal estate. *Lienhart v. Conway* 821
13. A mortgage indebtedness against real estate contracted or assumed by a testator is a debt within meaning of statute requiring debts to be paid out of personal estate. *Lienhart v. Conway* 821
14. Devisee of real estate may require mortgage indebtedness to be paid out of personal estate, and action is not controlled by statute of limitations relating to filing of claims against estates. *Lienhart v. Conway* 821

Extradition.

There is nothing in the Constitution or laws of the United States which exempts an offender, brought before the courts of a state for an offense against its laws, from trial and punishment, even though brought from another state by unlawful violence or by abuse of legal process. *Jackson v. Olson* 885

Food.

Excise tax upon imitation butter held unconstitutional because based upon an unreasonable and arbitrary classification. *Thorin v. Burke* 94

Fraud.

1. To maintain an action for false representation, the plaintiff must allege and prove (1) what representation was made, (2) that it was false and so known to be by the defendant charged with making it, or else was made without knowledge as a positive statement of known fact, (3) that the plaintiff believed the representation to be true, (4) that he relied and acted upon it, and (5) that he was thereby injured. *Campbell v. C & C Motor Co* 721
2. To recover damages in a law action for fraud, the plaintiff must prove he has suffered loss directly as a consequence thereof and to an extent that is definite and ascertainable. *Campbell v. C & C Motor Co* 721

Fraudulent Conveyances.

1. Fraudulent intent is a question of fact and not of law, when considered in the matter of conveyance charged to have been made to hinder, delay, and defraud creditors. *Evers v. Evers* 104
2. Intent to defraud creditors may be established by proof of facts from which inference thereof may be reasonably drawn. *Evers v. Evers* 104
3. Statutes avoiding fraudulent conveyances protect person having a claim for damages. *Evers v. Evers* 104

4. A claim for damages arising from a tort not yet reduced to judgment is within the protection of the statutes against fraudulent conveyances. *Evers v. Evers* 104
5. Where a conveyance is made after liability accrued, but before suit, the judgment obtained relates back and has the standing of existing indebtedness as of the time the original cause of action accrued. *Evers v. Evers* 104
6. Creditors protected by statutes avoiding fraudulent conveyances include those having a cause of action for damages from wrongful death. *Evers v. Evers* 104
7. Where conveyance between relatives has the effect of hindering or delaying a creditor in the collection of his debt, burden is on the parties to the conveyance to establish the good faith of the transaction. *Evers v. Evers* 104
8. In an action to set aside a fraudulent conveyance, the petition sufficiently charges a cause of action if it alleges that the conveyance was made for the purpose and with the intent to defraud creditors. *Filley v. Mancuso* 493
9. Financial condition of grantor at time of alleged fraudulent transfer is an evidential fact and need not be pleaded, but his financial condition at the time of commencement of action must be set forth. *Filley v. Mancuso* 493
10. Allegations in petition that conveyance was made without consideration and with intent to place property beyond reach of creditors state a cause of action without allegation that grantee had knowledge of or participated in the fraud. *Filley v. Mancuso* 493
11. A conveyance between near relatives which has the effect of hindering or delaying creditors is presumptively fraudulent, and burden rests on the parties to the conveyance to establish the good faith of the transaction. *Filley v. Mancuso* 493
12. Intent to defraud creditors may be established by proof of facts from which such inferences thereof may reasonably be drawn. *Filley v. Mancuso* 493
13. Where testimony relied upon to show good faith is given by interested relatives, the reasonableness of their evidence bears considerable weight in arriving at a just conclusion. *Filley v. Mancuso* 493
14. Where grantee had knowledge of intent of grantor to hinder and delay his creditor by a conveyance of his property, the conveyance is void as to existing creditors whether or not an adequate consideration was paid. *Filley v. Mancuso* 493

Garnishment.

Proceedings against a garnishee cannot be quashed or a garnishee discharged by reason of any informality or irregularity of the affidavit or summons. *Johnson v. Washburn* 335

Habeas Corpus.

1. If an application for a writ of habeas corpus sets forth facts which, if true, would entitle petitioner to a discharge, the writ is a matter of right and petitioner must be produced for hearing. If facts set forth in application disclose that petitioner is not entitled to writ, it should be denied. *Duggan v. Olson* 248
2. It is for the Supreme Court of this state to decide what issues are justiciable in an application for a writ of habeas corpus made to the courts of this state. *Hawk v. Olson* 875
3. To release a person from a sentence of imprisonment by habeas corpus, it must appear that the sentence was absolutely void. *Hawk v. Olson* 875
   Jackson v. Olson 885
4. Habeas corpus will not lie to discharge a person from a sentence to penal servitude where the court imposing the sentence had jurisdiction of the offense and of the person of the defendant, and the sentence was within the power of the court to impose. *Hawk v. Olson* 875
   Jackson v. Olson 885
5. Habeas corpus cannot be used as a substitute for a writ of error. *Hawk v. Olson* 875
   Jackson v. Olson 885
6. Habeas corpus is a collateral and not a direct proceeding when regarded as a means of attack upon a judgment sentencing a defendant. *Hawk v. Olson* 875
   Jackson v. Olson 885
7. The regularity of the proceedings leading up to a sentence in a criminal case cannot be inquired into on an application for a writ of habeas corpus, since that matter is assailable only in a direct proceeding. *Hawk v. Olson* 875
   Jackson v. Olson 885
8. Principle of res adjudicata applies in cases of habeas corpus where there has been a hearing upon the merits in a former action of the same kind, and where in a second action, it affirmatively appears that the petition is based upon the same reason and facts as the first action. *Jackson v. Olson* 885
9. The final adjudication in a habeas corpus proceeding is

conclusive on the matter there determined, as against a subsequent application. *Jackson v. Olson* 885
10. Where several applications for a writ of habeas corpus, all on similar grounds, have been denied by the courts of this state, a subsequent application on essentially the same grounds constitutes an abusive use of the writ and justifies a denial of it. *Jackson v. Olson* 885

Highways.
1. A county is not an insurer of those having occasion to use county highways. *Dickenson v. County of Cheyenne* .. 36
2. County would not be required to erect warning sign calling attention to jog in highway on correction lines arising from government survey unless a duty to do so would be required in the exercise of reasonable and ordinary care. *Dickenson v. County of Cheyenne* 36
3. The rules of the road prescribed by statute extend to all public highways, however created, and to all roads not public highways if used for travel by the public. *Nygaard v. Stull* 736
4. A ramp constructed on railroad property for the general use of the public in carrying on its business with the railroad company, even though the license to the public to use it could be terminated at any time by the railroad company, is a highway. *Nygaard v. Stull* 736

Homesteads.
The homestead exemption is not a proper subject for consideration upon proceedings for the confirmation of sale of real estate on execution. *Enquist v. Enquist* 708

Homicide.
1. Where an information charges murder in the first degree, murder in the second degree and manslaughter are included in the charge, and where the evidence and circumstances of the killing are such that different inferences may be drawn as to the degree, the court should submit the different degrees to the jury. *Jackson v. Olson* 885
2. Statute limiting time within which prosecutions for felonies should be commenced does not apply to murder. *Jackson v. Olson* 885

Husband and Wife.
1. Postnuptial contracts between husband and wife are invalid. *Johnson v. Marsh* 257
2. Where one spouse furnishes all or a larger part of the consideration for a conveyance of property, there is a re-

buttable presumption that the placing of title in the name of one spouse was intended by the other as a gift. *Hoover v. Haller* 697

Improvements.

A claimant to compensation for improvements under the Occupying Claimants Act must have held the property under color of title to warrant a recovery. *Williams v. Beckmark* 814

Indictment and Information.

1. Right of defendant under statute to one day in which to plead to information may be waived. *Duggan v. Olson*.... 248
2. A defendant, by pleading guilty, waives all defenses other than that the information charges no offense. *Duggan v. Olson*..... 248

Injunctions.

1. Injunctive relief against issuance of bonds to pay cost of obtaining property destroyed right of municipality to claim any rights under its condemnation proceedings theretofore instituted. *City of Kearney v. Consumers Public Power District*..... 29
2. Where an obstruction in a natural watercourse constitutes a permanent and continuing injury to an adjoining landowner, he is not confined to an action for damages but may obtain a decree ordering the removal of the obstruction. *Born v. Keil*..... 912
3. Equity will afford relief by injunction against a continuing injury to land caused by an unlawful discharge of flood or surface waters by an adjoining landowner. *Born v. Keil*..... 912
4. Injunction is a proper action in which to present the question of unlawful or improper exercise of the power of eminent domain. *Consumers Public Power District v. Eldred*..... 926

Innkeepers.

An innkeeper will not be liable for loss of personal property bailed to him if the loss was occasioned by a want of ordinary, prudent care on the part of the bailor, and whether the bailor has exercised such care is usually a question of fact for the jury. *Shiman Bros. & Co. v. Nebraska National Hotel Co.*..... 47

Joint Tenancy.

Where a conveyance of property is made to two or more persons, and the instrument is silent as to the interest

which each is to take, there is a rebuttable presumption that their interests are equal. *Hoover v. Haller* 697

Judgments.

1. Demurrer was properly sustained to cause of action complaining of final order extending widow's allowance, which order was within jurisdiction of county court with all parties before it, no appeal having been taken, and no fraud having been alleged. *Mead Co. v. Doerfler* 21
2. If the court had jurisdiction of all parties and of subject matter, a judgment rendered in an action is not subject to collateral attack where the judgment is voidable and not void. *Stanton v. Stanton* 71
3. Where a court has jurisdiction, a party cannot during the pendency of an action dispose of property and avoid the effect of the final judgment in the case. *Stanton v. Stanton* 71
4. Dormancy statute does not apply to a decree for the sale of specific real property. *Stanton v. Stanton* 71
5. The purpose of a specific decree is to establish upon some particular property an encumbrance or right arising from a lien which antedated the decree. *Stanton v. Stanton* 71
6. When a sufficient affidavit for constructive service has been filed and an order of court entered finding that sufficient investigation has been made and ordering service by publication, such order is conclusive and binding upon the parties until modified, vacated, or set aside either on appeal or in a proceeding instituted for that purpose. *County of Douglas v. Feenan* 156
7. When a sufficient notice is published in the manner provided by statute after obtaining order for constructive service and a judgment or decree is entered thereon, such judgment or decree is not void because of lack of jurisdiction of the parties so served. It is final and binding until modified, vacated, or set aside, and is not subject to collateral attack. *County of Douglas v. Feenan* 156
8. A court may take judicial notice of its own proceedings and judgments in a prior action where cases are interwoven and interdependent. *Johnson v. Marsh* 257
9. To be entitled to equitable relief against the enforcement of a judgment procured by fraud, a party must not have neglected to avail himself of a statutory remedy. *Johnson v. Marsh* 257
10. A motion to vacate a default judgment in the municipal court of metropolitan and primary cities must be made within ten days and in the manner provided by statute. *State Furniture Co. v. Abrams* 342

11. Generally a judgment may be taken by default where it appears that the process has been duly served as required by statute, although it is the fact of service rather than the proof of service that gives the court jurisdiction. *State Furniture Co. v. Abrams* 342
12. A judge of the district court may, if the ordinary remedy is inadequate, be compelled by mandamus to vacate or set aside an order or judgment granted by him without jurisdiction or authority. *State ex rel. Wolski v. Reed* 348
13. A decree foreclosing a tax-sale certificate cannot be collaterally attacked for irregularities or defects that do not go to the jurisdiction of the court. *Coffin v. Maitland* 477
14. A judgment of a court upon a subject within its general jurisdiction, but which is not brought before it by any statement or claims of the parties, and is foreign to the issues submitted for its determination, is a nullity. *Hallgren v. Williams* 525
15. The purpose of the Declaratory Judgments Act is to have a declaration of rights not theretofore determined, and not to determine whether rights theretofore adjudicated have been properly adjudicated. It was never intended as a substitute for a new trial, or other steps that the code requires to be taken in the same action, or for an appeal to the Supreme Court. *Strawn v. County of Sarpy* 783
16. Lien of a judgment does not take priority over a prior unrecorded mortgage made in good faith for a valuable consideration. *Omaha Loan & Bldg. Assn. v. Turk* 859
17. Prior unrecorded deed or mortgage, made and delivered in good faith for a valuable consideration, will take precedence over a judgment, provided such deed or mortgage is recorded before any deed to the real estate be recorded which is based on the judgment. *Omaha Loan & Bldg. Assn. v. Turk* 859
18. The filing of a transcript of a judgment of the municipal court in the office of the clerk of the district court is not a recording within the meaning of the recording act. *Omaha Loan & Bldg. Assn. v. Turk* 859
19. When the judgment is regular upon its face and was given in an action where the court had jurisdiction of the offense and of the person of the defendant, extrinsic evidence is not admissible to show its invalidity. *Hawk v. Olson* 875
Jackson v. Olson 885

Judicial Sales.

1. A purchaser at a judicial sale becomes a party to the proceedings and is concluded by the orders of the court entered therein. *County of Sarpy v. Wright* 193
2. When an owner of real property sold at judicial sale for the payment of delinquent taxes purports to redeem the same by paying an amount less than that called for by the decree, and the purchaser accepts and retains the amount thus bid, such purchaser is estopped to deny the validity of the redemption so made. *County of Sarpy v. Wright* 193
3. A foreclosure sale, unless the decree otherwise provides, transfers to the purchaser every right and interest in the property of all parties to the action. *Licking v. Hays Lumber Co* 240
4. Trial court has duty to determine whether price obtained at tax-foreclosure sale was adequate or whether at a subsequent sale more would be realized. *County of Nance v. Thomas* 640
5. A bidder at a judicial sale whose bid has been accepted may appeal from an order setting the sale aside. *Enquist v. Enquist* 708
6. The doctrine of caveat emptor applies to all judicial sales, subject to the qualification that the purchaser is entitled to relief on the ground of after-discovered mistake of material facts or fraud, where he is free from negligence. *Enquist v. Enquist* 708
7. It is error for a trial court to direct disposition of the money paid in by a successful bidder on execution sale when no defect appears in the sale and the same has not been set aside. *Enquist v. Enquist* 708

Landlord and Tenant.

1. A tenancy from month to month may be terminated by agreement at any time without notice. *Alloway v. Aiken* 714
2. Whether or not the tenant agreed to surrender and vacate the premises is a question for the jury. *Alloway v. Aiken* 714
3. The existence of oral covenants between landlord and tenant affecting the tenant's occupancy of the premises and claimed violations thereof by the tenant are questions for the jury. *Alloway v. Aiken* 714
4. Statute does not require 30-day written notice to vacate a tenancy from month to month, and in the absence of such a requirement, an oral notice is sufficient, provided it is absolute and states the time which is properly on the

first day after the 30-day period ends. *Alloway v. Aiken* 714
5. Each renewed lease is a new lease and the taking of it, in the absence of language indicating a contrary intent, operates as a surrender of the old lease except for the protection of legal interests carved out of it which, once created, the law will not permit to be destroyed. *Mauzy v. Elliott* 865
6. Notice of acceptance of an option to purchase real estate contained in a lease is not required to be in writing or in any particular form in the absence of a requirement to that effect in the lease. *Mauzy v. Elliott* 865
7. Option to purchase contained in lease binds only the lessor until accepted by the lessee, but when accepted the option is merged in a completed contract of purchase which is thereafter binding upon both parties, vesting equitable title in the lessee. *Mauzy v. Elliott* 865
8. Where option to purchase contained in a lease is exercised, the relation of landlord and tenant ceases to exist and that of vendor and purchaser arises. Lessor cannot thereafter declare option forfeited for failure to pay rent. *Mauzy v. Elliott* 865

Larceny.
1. In a prosecution for larceny as bailee, the gist of the offense is the conversion of property lawfully obtained with intent to steal. *Morrow v. State* 601
2. To establish charge of larceny as bailee, state must prove that accused came into possession of property lawfully and thereafter unlawfully and with intent to steal converted same to his own use. *Morrow v. State* 601

Limitations of Actions.
1. The statute of limitations begins to run in the case of a constructive trust from the time of the discovery of the wrong or fraud, for the prevention of which the trust was imposed. *Tuttle v. Wyman* 146
2. As applied to ousted cotenants, statute of limitations to recover land begins to run from the time of ouster, and, if action is not brought within the statutory period, operate both to bar recovery of the land and to vest title in the disseizor. *Unick v. Saint Joseph Loan & Trust Co.* 789

Lis Pendens.
Rule that purchaser pendente lite takes title to property involved in litigation subject to judgment finally entered was adopted out of considerations of public pol-

icy and to inspire confidence in titles based upon judgment. *Stanton v. Stanton* 71

Mandamus.

1. A judge of the district court may, if the ordinary remedy is inadequate, be compelled by mandamus to vacate or set aside an order or judgment granted by him without jurisdiction or authority. *State ex rel. Wolski v. Reed* 348
2. Mandamus will not issue to review the action of an inferior court where there is an adequate remedy at law, and the writ may not be used to usurp or take the place of an appeal or writ of error. *State ex rel. Wolski v. Reed* 348

Master and Servant.

1. Where an employer furnishes to an employee two places to work, one obviously to the employee safe and the other obviously unsafe, with the place of working left to the choice of the employee and he chooses the latter and is injured, the employer cannot be held negligent for failure to furnish a reasonably safe place to work. *Ellis v. Union P. R. R. Co.* 397
2. Where an employee has placed himself in a situation of danger and seeks to avoid the consequences thereof, the burden is on him to adduce evidence from which a reasonable inference can be drawn that in the exercise of reasonable care he did not or could not have known of his danger. *Ellis v. Union P. R. R. Co.* 397
3. The presumption that an employee, driving his master's truck when an accident occurs, is acting within the scope of his employment disappears when evidence is introduced showing that such employee was engaged on his own personal affairs, and the plaintiff is then required to show by evidence that the act of driving the truck was within the scope of the employment. *Witthauer v. Paxton-Mitchell Co.* 436

Mortgages.

1. When the entering of satisfaction of mortgage and taking of a new one are practically simultaneous or parts of the same transaction, the mortgage is renewed and not extinguished, and an intervening lien does not obtain priority. *Hadley v. Schow* 163
2. Where holders of second mortgage lien were made parties to foreclose suit, even though prior mortgage was not mentioned, the purchaser at sheriff's sale became the title owner of the premises. *Hadley v. Schow* 163

3. An allegation in a petition to foreclose a first mortgage on real estate with reference to a junior mortgage stating that whatever interest in, right or title to or lien upon the real estate the junior mortgagee has is subject, junior and inferior to the lien of plaintiff's first mortgage, is sufficient upon which to base a decree foreclosing the first mortgage and barring the second mortgage. *Scheumann v. Prudential Ins. Co. of America* 173
4. A grantee of land need not pay a mortgage thereon which constituted no part of the consideration of his purchase, and which was not made in good faith for real indebtedness, notwithstanding recital in deed that title was taken subject to mortgages of record. *Gordon v. Young* 578
5. In absence of agreement to the contrary, a mortgagor is entitled to the rents and profits until mortgagee is authorized to proceed by action on the mortgage to subject the property to the payment of the debt. *Federal Farm Mortgage Corporation v. Ganser* 635
6. Upon condition broken, if property is inadequate security, mortgagee has equitable lien upon rents and profits, or so much thereof as may be necessary to security of the mortgage, which he may enforce by proper proceedings. *Federal Farm Mortgage Corporation v. Ganser* 635
7. Mortgagee is entitled to have his debt secured out of property pledged as security for its payment without being forced to resort to other remedies he may have. *Federal Farm Mortgage Corporation v. Ganser* 635
8. In order to constitute a mortgage, it is essential that there be an agreement, either express or implied, to pay a sum of money either on account of a preexisting debt or a present loan. *Columbus Land, Loan & Bldg. Assn. v. Wolken* 684
9. The personal liability of the mortgagor is not necessarily incident to a mortgage and it may be so framed or the authority to execute it so limited as to exclude that element. *Columbus Land, Loan & Bldg. Assn. v. Wolken* 684
10. When a note and mortgage are executed by a representative of an estate pursuant to statute, it does not make estate liable for debt or obligation so created, and in case of foreclosure mortgagor must look solely to the property mortgaged for satisfaction thereof. *Columbus Land, Loan & Bldg. Assn. v. Wolken* 684
11. In a suit to foreclose a real-estate mortgage, the execution, breach thereof, identity of real estate described, and amount remaining due, are material issues to be determined by the decree. *Columbus Land, Loan & Bldg. Assn. v. Wolken* 684

12. In a mortgage foreclosure suit, the findings of fact in decree of foreclosure on issues properly pleaded are not subject to review on objections to a deficiency judgment. *Columbus Land, Loan & Bldg. Assn. v. Wolken* 684
13. Where facts pleaded do not show a personal liability, decree of foreclosure does not bar any defense that person may have against deficiency judgment. *Columbus Land, Loan & Bldg. Assn. v. Wolken* 684
14. Lien of a judgment does not take priority over a prior unrecorded mortgage made in good faith for a valuable consideration. *Omaha Loan & Bldg. Assn. v. Turk* 859
15. Prior unrecorded deed or mortgage, made and delivered in good faith for a valuable consideration, will take precedence over a judgment, provided such deed or mortgage is recorded before any deed to the real estate be recorded which is based on the judgment. *Omaha Loan & Bldg. Assn. v. Turk* 859
16. A purchase-money mortgage takes precedence over prior judgments and all other existing and subsequent claims and liens against the mortgagor to the extent of the land sold. *Omaha Loan & Bldg. Assn. v. Turk* 859
17. Upon confirmation of mortgage foreclosure sale, district court in exercise of its equitable jurisdiction has full power to bring in all parties necessary to a determination of ownership and distribution of surplus remaining after payment of mortgage debt and costs. *Mauzy v. Elliott* 865

Municipal Corporations.

1. Injunction against municipality from issuing bonds to tender an award is condemnation proceedings nullified proceedings theretofore taken. *City of Kearney v. Consumers Public Power District* 29
2. Where opinion of Supreme Court nullified proceedings theretofore taken to condemn property, in subsequent appeal from award of damages for property taken, motion to dismiss entire proceedings should be sustained. *City of Kearney v. Consumers Public Power District* 29
3. Each deposit of city funds in a bank is a contract express or implied between the city and the bank. *City of Lincoln v. First National Bank* 221
4. Where statute prohibits city officer from having any interest in contract with city, deposit of funds of city in bank in which city officer is a stockholder, director or officer is void. *City of Lincoln v. First National Bank* 221
5. Legislative act of state-wide concern takes precedence over municipal action under home rule charter and amendments thereto. *Sullivan v. City of Omaha* 297

6. Home rule charter of metropolitan city relating to firemen's pensions is valid and constitutional. *Sullivan v. City of Omaha* 297
7. Pension rights of firemen in metropolitan city operating under home rule charter are determinable from that charter and amendments thereto in the absence of legislative act occupying that field. *Sullivan v. City of Omaha* 297
8. An action against a municipal corporation to recover damages for trespass upon or injury to real estate is properly brought in the county where the real estate or some part thereof is situated. *Cooper v. Sanitary District No. 1* 412
9. In an action to disconnect territory from a municipal corporation, the burden is upon the petitioner to establish that justice and equity require that such territory be disconnected. *Lee v. City of Harvard* 807
10. When a small tract of land has been within a municipal corporation for many years, and the streets on all sides have been improved, street lights installed, with city water available as well as protection of fire department, such property has not lost its character as city property and should not be detached. *Lee v. City of Harvard* 807
11. Where city of the first or second class or a village undertakes to acquire by eminent domain from a private owner an electric light and power plant operating partly within and partly without the city or village, it is required to take the entire property and not any divided or segregated part thereof. *Consumers Public Power District v. Eldred* 926

Negligence.

1. When plaintiff's negligence is more than slight as compared with the negligence of the defendant, and is clearly the proximate cause of an accident, the court should direct a verdict for the defendant. *Dickenson v. County of Cheyenne* 36
2. An instruction that plaintiff must establish that the negligence of the defendant caused the damage is sufficient relative to proximate cause, where there is no question of a remote or intervening cause. *Shiman Bros. & Co. v. Nebraska National Hotel Co* 47
3. Burden of proving negligence rests on party alleging it. *Shiman Bros & Co. v. Nebraska National Hotel Co* 47
4. Under the last clear chance doctrine, the defendant will be liable for the failure to exercise reasonable care, notwithstanding the negligence of a plaintiff, if, at the

time the injury was done, it might have been avoided by the exercise of reasonable care on the part of the defendant. *Ellis v. Union P. R. R. Co.* 397
5. Before the doctrine of last clear chance can apply, the defendant must have had a chance to have avoided the accident, for the doctrine presupposes time for action. *Ellis v. Union P. R. R. Co.* 397
6. In the absence of proof of opportunity to avoid injuring a person after his danger was discovered, or ought to have been discovered, there is no reason for the application of the last clear chance doctrine. *Ellis v. Union P. R. R. Co.* 397
7. A plaintiff will not be permitted to recover under the last clear chance doctrine if he, being in a perilous situation negligently created by himself, had the last clear chance to escape and neglected to do so up to the time of the accident. *Ellis v. Union P. R. R. Co.* 397
8. The doctrine of last clear chance does not apply where the negligence of the injured party is contemporaneous and active up to the time of the accident, and thus contributed to cause the accident. *Ellis v. Union P. R. R. Co.* 397
9. To recover under the doctrine of the last clear chance, a plaintiff must have been in a position of peril which was known or, by the exercise of reasonable care, should have been known by defendant in time to avoid injury by the exercise of ordinary care. *Loudy v. Union P. R. R. Co.* 676
10. Traveler upon public highway who attempts to cross railroad track in front of approaching train is guilty of contributory negligence as a matter of law barring recovery if he knew or should have known that the approaching train was in such close proximity to the crossing that a reasonably prudent person could not fairly expect to cross in safety. *Loudy v. Union P. R. R. Co.* 676
11. Where traveler is guilty of violation of stop, look, and listen rule, his contributory negligence will defeat recovery for damages resulting from collision with train at crossing even though no signal by locomotive bell or whistle was given as required by statute. *Loudy v. Union P. R. R. Co.* 676
12. Where negligence of one party is merely passive and causes only a condition while that of the other party is the moving and effective cause of an accident, the latter is the proximate cause. *Loudy v. Union P. R. R. Co.* 676
13. Traveler on highway, when approaching railroad cross-

ing, has duty to look and listen for approach of trains, and if he fails without reasonable excuse to exercise such precautions, he is guilty of contributory negligence more than slight as a matter of law and cannot recover damages arising from collision with a train. *McIntosh v. Union P. R. R. Co* 844

14. A traveler upon a public highway who attempts to cross a railroad track in front of an approaching train, if he knew or ought to have known of its approach, is guilty of such contributory negligence as will bar recovery if the approaching train was in such close proximity to the crossing that a reasonably prudent person could not fairly expect to cross in safety. *McIntosh v. Union P. R. R. Co* 844
15. Where railroad company, in ordinary conduct of its business leaves freight cars on yard track which partially obstruct view of persons passing over a crossing, this does not of itself render company liable for accidents, but merely imposes duty of greater care, both upon the company and those who use the highway. *McIntosh v. Union P. R. R. Co* 844

Nuisances.

If a nuisance is permanent in its nature, there is but one cause of action, and the rights of the party claiming to be injured by the nuisance are settled once and for all. If, however, the nuisance is of a continuing nature, successive actions may be maintained for the damages occurring from time to time. *Vana v. Grain Belt Supply Co.* 132

Officers.

1. The Department of Industrial Development was an office within the meaning of the Constitution requiring a two-thirds vote for its creation. *Mekota v. State Board of Equalization and Assessment* 370
2. An executive state department is one having executive powers and jurisdiction throughout the state. *State ex rel. Howard v. Marsh* 750
3. An executive state officer is one whose duties are mainly to cause the laws to be enforced, and whose duties pertain to the execution and enforcement of the laws by one charged with that particular duty. *State ex rel. Howard v. Marsh* 750
4. The heads of executive state departments designated as such by the legislative enactment bringing them into being are executive officers of the state. *State ex rel. Howard v. Marsh* 750

5. The Director of the Department of Agriculture and Inspection is clothed with full power without restriction or limitation to execute and administer the laws pertaining to the duties and functions of the department. *State ex rel. Howard v. Marsh* 750
6. The functions of the Department of Agriculture and Inspection are executive in the main and while not designated in the act creating the department, they are found in preexisting statutes and are incorporated, by reference, from such statutes. *State ex rel. Howard v. Marsh* 750
7. The declaration of ineligibility to any other office contained in the Constitution includes ineligibility to become a candidate for election to, as well as ineligibility to hold, office. *State ex rel. Howard v. Marsh* 750
8. The Director of the Department of Agriculture and Inspection is an officer mentioned in article IV of the Constitution and as such is ineligible to be or become a candidate for Governor during the term of his appointment. *State ex rel. Howard v. Marsh* 750

Parties.

1. Upon confirmation of mortgage foreclosure sale, district court in exercise of its equitable jurisdiction has full power to bring in all parties necessary to a determination of ownership and distribution of surplus remaining after payment of mortgage debt and costs. *Mauzy v. Elliott* 865
2. It is the duty of the condemnor in eminent domain proceedings to bring in all parties having an interest therein, except where parties are unknown. *Consumers Public Power District v. Eldred* 926
3. Right of a party to intervene in an action is absolute, subject only to the condition that he exhibit a pleading containing allegations which demonstrate a right in the subject matter being litigated. *Wightman v. City of Wayne* 944
4. Any party has the right to question the right of intervention in a case to which he is a party. *Wightman v. City of Wayne* 944

Partition.

1. Equity has jurisdiction to partition personal property and, if partition in kind is not possible, to partition by sale. *Hoover v. Haller* 697
2. An action in equity may be brought in the district court to partition personal property by the owner of an undivided interest therein against the administrator of an

estate of a deceased person, which estate is also the owner of an undivided interest. *Hoover v. Haller* 697

Partnership.

Where the members of a partnership reside in another state and are not within this state, service of summons upon the firm, as a firm, cannot be made in a county where it has no place of business. *State v. Tautges, Rerat & Welch* 439

Payment.

1. Where a party voluntarily complies with the terms of a contract under fear and apprehension of litigation, unaccompanied by any act of hardship or oppression, coercion or compulsion, he cannot thereafter avoid the contract and recover back money paid in compliance therewith. *Malec v. ASCAP* 358
2. Where a party, under a mistake of law or in ignorance thereof, with full knowledge of all the facts and in the absence of fraud, coercion, compulsion, hardship or oppression, voluntarily complies with the terms of a contract made void and nonenforceable by legislative act, he cannot recover back money paid under such contract. *Malec v. ASCAP* 358

Pensions.

Pension rights of firemen in metropolitan city operating under home rule charter are determinable from that charter and amendments thereto in the absence of legislative act occupying that field. *Sullivan v. City of Omaha* 297

Pleading.

1. A motion for judgment on the pleadings requires a consideration of what may be found in all the pleadings as the ultimate facts. *Vana v. Grain Belt Supply Co* 132
2. A default is an admission of such facts only as are properly alleged. *Scheumann v. Prudential Ins. Co. of America* 173
3. Where, in a foreclosure, defendant is called upon to disclose his supposed but unknown interest in the subject of the action and makes default, he will be held thereby to have admitted that his interest therein is subordinate to that of the plaintiff. *Scheumann v. Prudential Ins. Co. of America* 173
4. A general demurrer admits all allegations of fact well pleaded, but does not admit inferences of the pleader from the facts alleged, expressions of opinion, theories

of the pleader, arguments, allegations as to what will happen in the future, or allegations contrary to facts of which the court may take judicial notice or contrary to law. *Johnson v. Marsh* 257

5. A motion for judgment on the pleadings admits the truth of all well-pleaded facts in the pleadings of the opposing party, together with all reasonable inferences to be drawn therefrom. The party moving for judgment on the pleadings admits, for the purposes of the motion, the untruth of his own allegations insofar as they have been controverted. *International Harvester Co. v. County of Douglas* 555
6. A demurrer admits the truth of the facts well pleaded, but it does not admit the conclusions of law drawn therefrom by the pleader. *Kozina v. Watkins Lumber Co.* 594
7. Where the laches of the plaintiff and the staleness of his claim are apparent from his petition, objection may be taken by demurrer. *Kozina v. Watkins Lumber Co.* 594
8. Where facts pleaded in petition are insufficient to state a cause of action against demurring defendants, demurrers thereto are properly sustained. *Kozina v. Watkins Lumber Co.* 594
9. A party defendant in an action in ejectment may plead facts showing an equitable right to a conveyance from plaintiff, and if he proves himself the equitable owner and entitled to possession, he will not only defeat the action but entitle himself to a decree of specific performance. *Williams v. Beckmark* 814
10. The doctrine of relation is a fiction of law adopted by the courts solely for the purpose of justice, and is only applied for the security and protection of persons who stand in privity. *Consumers Public Power District v. Eldred* 926

Pledges.

In the case of a pledge, the rights of the parties with respect to the property involved remain within the control of the pledgeor to the extent that he may terminate the pledgee's lien and right of possession by payment of the secured obligation. *Glissmann v. Bauermeister* 197

Principal and Agent.

A principal cannot defeat right of real estate broker to commission by inability to convey good title to real estate arising from failure to obtain joinder in conveyance by a third person who has an interest. *Peters v. Dreger* .. 670

Process.

1. Service by publication upon a resident of the state may be made in certain actions when, after diligent investigation and inquiry, the whereabouts, if in this state, or the residence of such person cannot be ascertained and is not known. *County of Douglas v. Feenan* 156
2. Where an affidavit for constructive service in an action to quiet title contains no venue, and does not show whether the notary public was a resident of, or commissioned for, the county, such affidavit is fatally defective. *Northouse v. Torstenson* 187
3. Upon notice and sufficient showing a court may permit an amendment to be made to the return of process to conform to the facts. *State Furniture Co. v. Abrams* 342
4. Generally a judgment may be taken by default where it appears that the process has been duly served as required by statute, although it is the fact of service rather than the proof of service that gives the court jurisdiction. *State Furniture Co. v. Abrams* 342
5. A nonresident attorney who voluntarily, and in the performance of his business as an attorney, comes into the state to conduct litigation on behalf of a client, is not privileged from service of summons. *State v. Tautges, Rerat & Welch* 439
6. Where the members of a partnership reside in another state and are not within this state, service of summons upon the firm, as a firm, cannot be made in a county where it has no place of business. *State v. Tautges, Rerat & Welch* 439
7. Where service by publication is had, the notice published must contain a summary statement of the object and prayer of the petition, mention the court in which it is filed, and notify the person or persons thus to be served when they are required to answer. *Coffin v. Maitland* 477
8. In providing for service by publication, the form of the notice to be published, and what it shall contain, rest in the legislative discretion, subject to the restriction that it will have a tendency, in a reasonable degree, to convey information to interested parties that the action affects their rights. *Coffin v. Maitland* 477
9. Notice of publication must contain all things required by statute and absence of any of them is fatal to the jurisdiction, but need contain nothing not required by statute. *Coffin v. Maitland* 477
10. An amendment may be made to the return of a process or other writ to conform to the facts. *De Lair v. De Lair* 771

11. The district court, on application of one of the parties, has power to amend a sheriff's return on a process to conform to the facts, upon proper showing and notice to the parties interested. *De Lair v. De Lair* 771
12. A sheriff's return on a summons is prima facie proof of the service therein indicated. *De Lair v. De Lair* 771
13. The return of an officer cannot be impeached except by clear and convincing evidence. *De Lair v. De Lair* 771

Quieting Title.

Where pleading alleges that the pleader is in possession of real estate, and the court finds from the evidence that such allegation is true, a court of equity has jurisdiction of the subject matter and may quiet title. *Miller v. Knight* 207

Railroads.

1. Where land is subject to overflow from natural causes, burden of proof rests upon party claiming damages arising from negligent construction of railroad embankment to show that construction complained of either caused such overflow or increased the same, together with the extent thereof. *Goodhart v. Chicago, B. & Q. R. R. Co.*.. 290
2. In an action under the Federal Employers' Liability Act, the employer is required to respond in damages for negligence where such employer has failed to provide and maintain for an employee a reasonably safe place to work and in consequence and as the proximate cause thereof such employee receives injuries. *Ellis v. Union P. R. R. Co* 397
3. The requirement of the Federal Employers' Liability Act that an employer shall furnish employees with a reasonably safe place to work means a reasonably safe place within which they are required to work. *Ellis v. Union P. R. R. Co* 397
4. Last clear chance doctrine must be proved by a preponderance of the evidence, and it is facts, not probabilities, that must be established. *Loudy v. Union P. R. R. Co*..... 676
5 Under stop, look, and listen doctrine, if plaintiff without reasonable excuse fails to look where he could see and fails to listen where he could hear, he is guilty of more than slight contributory negligence and cannot recover for crossing collision. *Loudy v. Union P. R. R. Co*..... 676
6. Traveler upon public highway who attempts to cross railroad track in front of approaching train is guilty of contributory negligence as a matter of law barring recovery if he knew or should have known that the approaching train was in such close proximity to the

crossing that a reasonably prudent person could not fairly expect to cross in safety. *Loudy v. Union P. R. R. Co.* 676

7. Where traveler is guilty of violation of stop, look, and listen rule, his contributory negligence will defeat recovery for damages resulting from collision with train at crossing even though no signal by locomotive bell or whistle was given as required by statute. *Loudy v. Union P. R. R. Co*..... 676
8. A ramp constructed on railroad property for the general use of the public in carrying on its business with the railroad company, even though the license to the public to use it could be terminated at any time by the railroad company, is a highway. *Nygaard v. Stull*..... 736
9. Negative testimony of plaintiff that she did not hear the bell or whistle of an approaching train, without further explanation, is not sufficient to overcome positive testimony of reliable and competent witnesses that bell was ringing and whistle blowing. *McIntosh v. Union P. R. R. Co*..... 844
10. Traveler on highway, when approaching railroad crossing, has duty to look and listen for approach of trains, and if he fails without reasonable excuse to exercise such precautions, he is guilty of contributory negligence more than slight as a matter of law and cannot recover damages arising from collision with a train. *McIntosh v. Union P. R. R. Co*..... 844
11. A traveler upon a public highway who attempts to cross a railroad track in front of an approaching train, if he knew or ought to have known of its approach, is guilty of such contributory negligence as will bar recovery if the approaching train was in such close proximity to the crossing that a reasonably prudent person could not fairly expect to cross in safety. *McIntosh v. Union P. R. R. Co*..... 844
12. Where railroad company, in ordinary conduct of its business leaves freight cars on yard track which partially obstruct view of persons passing over a crossing, this does not of itself render company liable for accidents, but merely imposes duty of greater care, both upon the company and those who use the highway. *McIntosh v. Union P. R. R. Co*..... 844

Rape.

1. In a prosecution for rape, the prosecutrix may testify in chief to the fact and nature of complaint made within a reasonable time after act was committed, but not as

to its details. Person to whom complaint was made may likewise so testify. *Jump v. State* 501
2. In prosecution for rape, lack of relationship between prosecutrix and accused may be shown by circumstantial evidence, and a conviction will not be reversed because no witness testified in direct language to such fact. *Jump v. State* 501
3. Evidence of resistance by prosecutrix was sufficient to sustain verdict. *Jump v. State* 501
4. Sentence for forcible rape was excessive and reduced from sixteen to ten years. *Jump v. State* 501

Receivers.

Appointment of receiver is ancillary to main action, and in mortgage foreclosure receiver is appointed for the purpose of conserving the mortgaged property and applying rents and profits to satisfaction of the debt secured thereby. *Federal Farm Mortgage Corporation v. Ganser* 635

Registration of Land Titles.

Under statute, instruments required to be recorded take effect and are in force from and after delivery to the register of deeds for recording as to creditors and subsequent purchasers without notice, and are void as to such creditors and purchasers whose instruments are first recorded. *Omaha Loan & Bldg. Assn. v. Turk* 859

Replevin.

In the absence of evidence showing special damages, the measure of damages in replevin suit is interest upon the adjudicated value of the property from the time of its seizure until it is paid for or returned. *North American Acceptance Corporation v. Meeks* 546

Sales.

1. Seller's refusal to warrant is not repugnant to, nor avoided by, the provisions of the Uniform Sales Act relative to implication of warranty. *Kennedy v. Cornhusker Hybrid Co* 230
2. Where seller has refused to warrant goods sold in certain particulars, there can be no implied warranty covering those particulars. *Kennedy v. Cornhusker Hybrid Co* 230
3. A disclaimer of warranty may be operative when used upon containers in which goods are sold or appearing upon invoices for the price of the goods. *Kennedy v. Cornhusker Hybrid Co* 230
4. The buyer's lack of notice or knowledge of a disclaimer

of warranty does not avoid its effect, in the absence of fraud or concealment, if the disclaimer is so expressed that the buyer ought to be aware of it. *Kennedy v. Cornhusker Hybrid Co.* 230

5. Whether a conditional sale contract is legally effective to keep title in vendor of chattels depends upon the law of the place where the chattel was at the time of the sale. The requirements of acknowledgment and registration are controlled by the law of the state of the situs of the chattel. *North American Acceptance Corporation v. Meeks* 546
6. If, after a valid conditional sale in another state, the chattel is taken into this state, the vendor's title to the chattel will be recognized in this state. *North American Acceptance Corporation v. Meeks* 546
7. Under the law of Illinois a conditional sale contract need not be recorded. *North American Acceptance Corporation v. Meeks* 546
8. Under the Uniform Sales Act, Illinois recognizes the validity of a conditional sale with reservations of title in the seller, and where there is no basis for estoppel no title can be passed by the buyer of such goods, although he has possession of the goods and the purchaser has no notice of the reservation. *North American Acceptance Corporation v. Meeks* 546
9. Under the Uniform Sales Act of Illinois, buyer acquires no better title than the seller had unless owner of goods is by his conduct precluded from denying the sellers authority to sell. *North American Acceptance Corporation v. Meeks* 546
10. Under Uniform Sales Act, determination of question of estoppel depends upon the facts and circumstances attending the sale. *North American Acceptance Corporation v. Meeks* 546

Specific Performance.

1. Unless minds of the parties have met, specific performance of a contract will not be decreed. *Horn v. Stuckey* 625
2. In order to establish a contract capable of specific performance it must be shown that there was a definite offer and an unconditional acceptance. *Horn v. Stuckey* 625
3. In an action for specific performance of an oral contract within the statute of frauds, the evidence of the alleged contract and its terms must be clear, satisfactory, and unequivocal. *Caspers v. Frerichs* 740
4. A party defendant in an action in ejectment may plead facts showing an equitable right to a conveyance from

plaintiff, and if he proves himself the equitable owner and entitled to possession, he will not only defeat the action but entitle himself to a decree of specific performance. *Williams v. Beckmark* 814
5. Specific performance of an oral agreement will be enforced by a court of equity where one party has wholly and the other has partly performed it, and its nonfulfillment would amount to a fraud on the party who has fully performed. *Hackbarth v. Hackbarth* 919
6. Evidence necessary to establish an oral agreement which will be enforced by a court of equity because of part performance must be clear, satisfactory, and unequivocal. *Hackbarth v. Hackbarth* 919
7. Courts of equity may grant specific performance of an oral agreement to transfer title to personal property as well as real estate. *Hackbarth v. Hackbarth* 919

Statute of Frauds.
1. Resulting trust is not affected by the statute of frauds. *Reetz v. Olson* 621
2. To be enforceable a contract for sale of real estate or some memorandum must be in writing and signed by the seller. *Horn v. Stuckey* 625
3. In an action for specific performance of an oral contract within the statute of frauds, the evidence of the alleged contract and its terms must be clear, satisfactory, and unequivocal. *Caspers v. Frerichs* 740
4. Where a contract is void under the statute of frauds, it is unenforceable unless there has been such performance as will take the case out of the statute. *Caspers v. Frerichs* 740
5. Acts constituting performance which will take a case out of the statute of frauds must be such as are referable solely to the contracts sought to be enforced, and not such as might be referable to some other and different contract or relation. Such acts must be something that the claimant would not have done unless and on account of the contract and with the direct view to its performance so that nonperformance by the other party would amount to fraud upon him. *Caspers v. Frerichs* 740
6. Nothing will be considered as part performance which does not put the party into a situation which is a fraud upon him unless the contract is fully performed. *Caspers v. Frerichs* 740
7. When contract of sale of real estate is oral and there has been no part performance, such contract is void under the statute of frauds and no right, equitable or

otherwise, accrues to the purported purchaser. *Williams v. Beckmark* 814
8. Where owner of an interest in land transfers it to another upon oral trust in favor of the transferor or upon an oral agreement to reconvey, and the trust is unenforceable because of the statute of frauds, the transferee holds the interest upon a constructive trust for the transferor, if at the time of the transfer a confidential relationship existed. *Box v. Box* 826
9. An oral contract to convey real estate is unenforceable under the statute of frauds unless there has been part performance which is solely referable to the contract sought to be enforced and not such as might be referable to any other contract or hypothesis. *Hackbarth v. Hackbarth* 919

Statute of Limitations.

1. Notice or knowledge of ouster need not be actual but may be inferred from acts and circumstances attending adverse possession which are open, notorious, and unequivocal in character, and where this is shown, ignorance or mistake of cotenants as to their rights will not prevent running of statute of limitations. *Unick v. Saint Joseph Loan & Trust Co* 789
2. Where a cotenant substantially improves real estate beyond that ordinarily proper for the full enjoyment or use of the estate as a tenant in common, takes all the rents and profits, pays all the taxes, makes it his home, and openly claims the whole for more than the period of the statute of limitations, an ouster of his cotenants will be presumed. *Unick v. Saint Joseph Loan & Trust Co.* 789
3. Devisee of real estate may require mortgage indebtedness to be paid out of personal estate, and action is controlled by statute of limitations relating to filing of claims against estates. *Lienhart v. Conway* 821

Statutes.

1. Legislature may make reasonable classification for purposes of legislation, but classification must rest upon real differences in situations and circumstances surrounding the members of the class and must operate uniformly and alike upon every member of the class so designated. *Thorin v. Burke* 94
2. If portions of an act are unconstitutional and the remainder is so connected with the invalid portions that it cannot be upheld without doing violence to the legislative intent, the entire act must fall. *Thorin v. Burke* 94

3. Resort to contemporaneous construction by administrative body is not proper where language of statute is clear, or its meaning can be ascertained by intrinsic aids alone. *City of Lincoln v. First National Bank* 221
4. When court of last resort has construed a statute, rule permitting recourse to contemporaneous construction by administrative officials is inapplicable. *City of Lincoln v. First National Bank* 221
5. Where title to amendatory act indicates the nature of changes and additions made, it is sufficient to meet constitutional requirement that no bill shall contain more than one subject and the same shall be clearly expressed in the title. *Sullivan v. City of Omaha* 297
6. Where requirements of constitution as to title to amendatory legislative act have been met, it is immaterial that other provisions are contained in the title of the act supplemented or amended. *Sullivan v. City of Omaha* 297
7. The simultaneous repeal and re-enactment of a statute in terms or in substance is a mere affirmance of the original act and not a repeal in the strict or constitutional sense. *Sullivan v. City of Omaha* 297
8. Where it appears from the purpose of an amendatory act that there was no legislative intent to in any manner change the effect of the amended statute in the respects in which it was not modified or amended, the portion of the statute retained will be given the same effect as it had before the amendatory act was enacted. *Sullivan v. City of Omaha* 297
9. Amendatory act did not have the effect of occupying the field relating to firemen's pensions in metropolitan cities, but retained the identical effect that it had before the act was enacted. *Sullivan v. City of Omaha* 297
10. The conditions and restrictions of the Constitution and statutes relative to a bicameral legislature, so far as they may be applicable, attach to the unicameral legislature. *Mekota v. State Board of Equalization and Assessment* .. 370
11. A legislative act passed by a majority but less than a three-fifths vote providing an appropriation for an executive state office not in being at the commencement of the session at which the act is passed is not violative of the Constitution. *Mekota v. State Board of Equalization and Assessment* 370
12. An act which assumes to vest a new board or department of state with executive powers and jurisdiction throughout the state creates an executive state office. *Mekota v. State Board of Equalization and Assessment* 370
13. The Department of Industrial Development was an ex-

ecutive state office within the meaning of the Constitution. *Mekota v. State Board of Equalization and Assessment* 370
14. The legislative act purporting to create a Department of Industrial Development was unconstitutional for the reason that it failed to receive the votes of two-thirds of the members elected to the Legislature. *Mekota v. State Board of Equalization and Assessment*..... 370
15. A legislative act will be upheld against the claim of unconstitutionality because of defective title where the provisions thereof, though not specifically expressed in the title, are germane to the subject matter and comprehended within the objects and purposes of the act. *County of Dawson v. South Side Irrigation Co.*..... 512
16. Legislature has power to create new executive state departments and executive state officers by a two-thirds vote. *State ex rel. Howard v. Marsh*..... 750
17. The Department of Agriculture and Inspection is a creature of statute created by authority of the Constitution. *State ex rel. Howard v. Marsh*..... 750
18. The functions of the Department of Agriculture and Inspection are executive in the main and while not designated in the act creating the department, they are found in preexisting statutes and are incorporated, by reference, from such statutes. *State ex rel. Howard v. Marsh* 750
19. Where the words of a statute are plain, direct, and unambiguous, no interpretation is needed to ascertain their meaning. *Mook v. City of Lincoln*..... 779
20. Where a legislative act is complete in itself but is repugnant to, or in conflict with, a prior law, which is not referred to or in express terms repealed by the later act, the earlier statute is repealed by implication. *Consumers Public Power District v. Eldred*..... 926

Streets.

The joinder of a ramp with a viaduct constituting a part of a street is an intersection. *Nygaard v. Stull*..... 736

Taxation.

1. Classification of business or property for taxation, whether the tax is a property or an excise tax, is permitted only if classification is reasonable and the tax operates uniformly upon all members of the class. *Thorin v. Burke*..... 94
2. In order to redeem from the foreclosure of a tax-sale certificate issued to a county, the person entitled to redeem is required to pay the amount of the decree, in-

terest and costs and, if sold to a person not a party to the suit, the person redeeming must pay in addition thereto interest at 12 percent per annum on the amount of the purchase price from the date of sale to the date of redemption. *County of Sarpy v. Wright* 193

3. Under statute prior to 1943 amendment, all occupation taxes against domestic corporations for profit were a lien upon all the property of the corporation from and after the time they were determined and assessed in the office of the Secretary of State. *Licking v. Hays Lumber Co.* 240
4. Under statute prior to 1943 amendment, when occupation taxes were determined and assessed in office of Secretary of State, it constituted notice to all parties having or claiming any rights in or to such property. *Licking v. Hays Lumber Co* 240
5. Where foreclosure was commenced more than two years subsequent to issuance of tax-sale certificate, owners and others interested in realty sold under decree foreclosing such certificate are barred from the right of redemption on confirmation of such judicial sale. *Coffin v. Maitland* .. 477
6. If a person claims a tax, or any part thereof, to be invalid for the reason that the property upon which it was levied was not liable for taxation, he is required to pay same under protest. *International Harvester Co. v. County of Douglas* 555
7. Legislature is not authorized by the Constitution to exempt intangible property in this state from taxation. *International Harvester Co. v. County of Douglas* 555
8. Under 1921 Revenue Act, Legislature included intangible property within classification of property that shall be taxed. *International Harvester Co. v. County of Douglas* 555
9. Under 1921 Revenue Act, all intangibles in this state not exempt are required to be returned, assessed and taxed in this state, without regard to whether the owner is a resident or nonresident of this state. *International Harvester Co. v. County of Douglas* 555
10. The situs of intangible property controls except in those cases where the situs of the property is in one county and the domicile of the taxpayer in another county in Nebraska. *International Harvester Co. v. County of Douglas* 555
11. Substantially increased offers made in open court before confirmation for property sold at tax foreclosure are sufficient to support a finding of trial court that confirmation should be denied and a new sale ordered. *County of Nance v. Thomas* 640

12. State Board of Equalization and Assessment has no power or authority except as specifically conferred upon it by statute. *County of Antelope v. State Board of Equalization and Assessment* 661
13. Notice required by statute to be given to counties of meeting of State Board of Equalization and Assessment is to enable legal representatives of each county affected to appear and show cause why valuations of their county should not be changed. *County of Antelope v. State Board of Equalization and Assessment* 661
14. Without giving of statutory notice, State Board of Equalization and Assessment has no authority to decrease assessed valuation of a class of property in every county in the state. *County of Antelope v. State Board of Equalization and Assessment* 661

Tenancy in Common.

1. In a tenancy in common, an ouster is the wrongful dispossession or exclusion by one tenant in common of his cotenants from the common property of which they are entitled to possession. *Unick v. Saint Joseph Loan & Trust Co* 789
2. Possession of real property by a tenant in common is possession of all, and before ouster arises notice or knowledge of acts causing ouster must be brought home to cotenants in some plain and unequivocal manner. *Unick v. Saint Joseph Loan & Trust Co* 789
3. Notice or knowledge of ouster need not be actual but may be inferred from acts and circumstances attending adverse possession which are open, notorious, and unequivocal in character, and where this is shown, ignorance or mistake of cotenants as to their rights will not prevent running of statute of limitations. *Unick v. Saint Joseph Loan & Trust Co* 789
4. Where a cotenant substantially improves real estate beyond that ordinarily proper for the full enjoyment or use of the estate as a tenant in common, takes all the rents and profits, pays all the taxes, makes it his home, and openly claims the whole for more than the period of the statute of limitations, an ouster of his cotenants will be presumed. *Unick v. Saint Joseph Loan & Trust Co* ... 789
5. Possession by one claiming under a disseizing tenant in common, if there is privity between them and the possession of both are adverse, may be tacked to the disseizor's title so as to perfect title as against the cotenants disseized. *Unick v. Saint Joseph Loan & Trust Co* ... 789

Torts.

In order to charge one as a continuing wrongdoer, he must have a legal right and be under a legal duty to terminate the cause of injury. *Vana v. Grain Belt Supply Co*..... 132

Trial.

1. Where instructions as a whole correctly state the law, verdict of jury, if supported by sufficient evidence, will not be set aside because particular instructions, considered separately, contain mere informalities or omissions which are not misboding or confusing. *Shiman Bros. & Co. v. Nebraska National Hotel Co*..... 47
2. Where instructions are not inconsistent and contradictory but, considered together, correctly state the law, a judgment will not be reversed because one instruction does not state the entire law on the subject, unless it appears that the jury was thereby misled. *Webb v. Platte Valley Public Power & Irrigation District*..... 61
3. Evidence admitted generally is in the case for any legal purpose, although, when introduced, it was intended for a particular purpose. *Kucaba v. Kucaba*..... 116
4. Evidence which is offered and admitted for a limited purpose cannot be used for another and totally different purpose. *Kucaba v. Kucaba*..... 116
5. The burden of proof never shifts nor changes, but remains throughout the trial where it is placed by the pleadings or the substantive law of the case. *Kucaba v. Kucaba*..... 116
6. The plaintiff may offer sufficient evidence to make a prima facie case, or he may be aided by a presumption of law which, if nothing further appeared, would entitle him to a judgment, and when this happens the burden of evidence devolves upon the adverse party. *Kucaba v. Kucaba*..... 116
7. Misconduct of counsel in argument to the jury cannot be properly shown by affidavit, but to preserve such error the statements must be taken by the official court reporter at the trial, together with the objections made thereto and the court's ruling thereon. *In re Estate of Inda*..... 179
8. A party may not complain of the misconduct of counsel, if, with knowledge of such misconduct, he does not ask for a mistrial. *In re Estate of Inda*..... 179
9. Trial court must instruct the jury upon the issues presented by the pleadings and the evidence, whether requested so to do or not. *In re Estate of Inda*..... 179
10. Where a reversal and remand of the Supreme Court

necessitates the taking of additional evidence to ascertain the status of amounts due from an estate to parties who have pledged their interest therein, the lower court may proceed, if desirable, to appoint a master to take evidence and make findings therefrom, from which the court may enter a proper judgment to conform to the mandate reversing the judgment. *Glissmann v. Bauermeister* 197

11. An instruction which sets out a state of facts, and authorizes a verdict for one of the parties upon such finding of facts, is erroneous unless it includes every controverted fact necessary to sustain a verdict. *Lamberth v. Omaha & C. B. St. Ry. Co* 213
12. Where an erroneous instruction authorizing a verdict upon finding of certain facts is complete in itself, error therein is not cured by the giving of other instructions which correctly state the law or the facts essential to recovery. *Lamberth v. Omaha & C. B. St. Ry. Co* 213
13. It is proper for a trial court to instruct a jury as to the legal effect of facts in proof, and where, under the theory upon which a case is tried by the parties, the determination of a single fact requires a verdict, it is proper for the court to so instruct. *Lamberth v. Omaha & C. B. St. Ry. Co* 217
14. Where evidence is insufficient to support judgment in favor of plaintiff, it is the duty of trial court to direct a verdict for defendant. *Goodhart v. Chicago, B. & Q. R. R. Co* 290
15. 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 the party against whom the motion is directed, and such party is entitled to have every controverted fact resolved in his favor, and to have the benefit of every inference that can reasonably be deduced from the facts in evidence. *Kline v. Metcalfe Construction Co* 389
Ellis v. Union P. R. R. Co 397
16. Presumption is not evidence, and will not prevent a directed verdict when the evidence rebutting it is convincing and undisputed. *Witthauer v. Paxton-Mitchell Co* ... 436
17. When the facts are such that reasonable minds can draw but one conclusion, it is the duty of the court to decide the question, and not require the jury to deliberate thereon. *Witthauer v. Paxton-Mitchell Co* 436
18. An assignment of error in a motion for new trial to the effect that the trial court erred in giving a group of in-

structions does not require a consideration of such assignment further than to ascertain that any one of the instructions was properly given. *Anderson v. Neb. Defense Corporation* 466

19. An assignment of error in a motion for new trial to the effect that the trial court erred in refusing to give a group of tendered instructions does not require a consideration of such assignment further than to ascertain that any one of the tendered instructions was properly refused. *Anderson v. Neb. Defense Corporation* 466
20. When the defendant in a jury trial moves for a directed verdict at the close of plaintiff's evidence, such motion shall be treated as an admission of the truth of all material and relevant evidence favorable to the plaintiff and of all proper inferences to be drawn therefrom, and if it tends to sustain plaintiff's cause of action, the case should be submitted to the jury. *Gohlinghorst v. Ruess* .. 470
21. When plaintiff offers other evidence that contradicts the evidence of the plaintiff and demonstrates to the extent that reasonable men cannot differ thereon, that the evidence of plaintiff is incapable of belief, a directed verdict may properly be granted. *Gohlinghorst v. Ruess* 470
22. Where a plaintiff, without reasonable explanation, testifies to facts materially different upon a vital issue than had previously been testified to by him under oath in another action, and it appears that the change was made to meet the exigencies of the pending action, the evidence is discredited as a matter of law and should be disregarded. *Gohlinghorst v. Ruess* 470
23. A trial court is not required to helplessly sit by and permit a litigant to toy with the processes of the court by insisting under oath at different times on the truth of each of two contradictory stories according to the exigencies of the particular occasion presenting itself. *Gohlinghorst v. Ruess* 470
24. A motion for judgment on the pleadings admits the truth of all well-pleaded facts in the pleadings of the opposing party, together with all reasonable inferences to be drawn therefrom. The party moving for judgment on the pleadings admits, for the purposes of the motion, the untruth of his own allegations insofar as they have been controverted. *International Harvester Co. v. County of Douglas* 555
25. It is the duty of trial court to instruct jury on those issues which are raised by the pleadings and are supported by evidence. *Franks v. Jirdon* 585
26. In stating issues to jury, trial court should make clear

and concise statement thereof and not substantially copy the pleadings of the parties. If, by doing the latter, prejudice results to the complaining party, it is sufficient ground for reversal. *Franks v. Jirdon* 585
27. The jury are the judges of the credibility of witnesses who testify before them, and unless the decision of the jury is clearly wrong, it will not be set aside. *Morrow v. State* 601
28. Last clear chance doctrine must be proved by a preponderance of the evidence, and it is facts, not probabilities, that must be established. *Loudy v. Union P. R. R. Co* 676
29. Under stop, look, and listen doctrine, if plaintiff without reasonable excuse fails to look where he could see and fails to listen where he could hear, he is guilty of more than slight contributory negligence and cannot recover for crossing collision. *Loudy v. Union P. R. R. Co* 676
30. Where facts adduced are such that reasonable minds can draw but one conclusion therefrom, it is the duty of trial court to decide the question as a matter of law rather than to submit it to a jury for determination. *Loudy v. Union P. R. R. Co* 676
31. Statute requiring instructions to the jury to be in writing has no application to a mandatory instruction to return a verdict in favor of one of the parties to the litigation. *Alloway v. Aiken* 714
32. Where the evidence is insufficient to sustain a verdict for the plaintiff, the dismissal of an action is not erroneous. *Campbell v. C & C Motor Co* 721
33. If there is competent evidence before the jury by which a finding in favor of the plaintiff can be upheld, the trial court is not at liberty to disregard it and direct a verdict against him. *Herman v. Firestine* 730
34. An instruction defining an intersection as being in the nature of a private way and fixing the degree of care required in turning across the main highway into the ramp as that required in turning into a private way, is prejudicially erroneous. *Nygaard v. Stull* 736
35. Evidence not directly contradicted is not necessarily binding on the triers of fact, and may be given no weight where it is inherently improbable, unreasonable, self-contradictory, or inconsistent with facts or circumstances in evidence. *Teresi v. Filley* 797
36. Triers of fact are not compelled to accept as true every statement of a witness not contradicted by direct testimony, but circumstantial evidence is equally competent with direct testimony for that purpose and the relative convincing powers of the two classes of evidence are for

the determination of the triers of fact. *Teresi v. Filley*.. 797
37. A substantial conflict in testimony may arise even though all the evidence is produced by one party. *Teresi v. Filley* 797
38. Motion for directed verdict must be treated as an admission of the truth of all material and relevant evidence submitted on behalf of party against whom motion is directed, and such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the evidence. *McIntosh v. Union P. R. R. Co*..... 844
39. Where facts adduced are such that reasonable minds can draw but one conclusion therefrom, it is the duty of the court to decide the question, as a matter of law rather than to submit it to a jury for determination. *McIntosh v. Union P. R. R. Co*..... 844
40. The rule requiring agreement between pleadings and proof is not applicable where the issue was tried without objection by either party. *Hackbarth v. Hackbarth*..... 919

Trusts.

1. Where legal title to real estate is obtained by fraud, actual or constructive, a court of equity will impress a constructive trust upon the property. *Tuttle v. Wyman*..... 146
2. An allowance may not be made out of a trust estate for the services of an attorney not employed by the trustee, unless the services redounded to the benefit of all persons interested in the estate and were beneficial thereto. *In re Estate of Sullivan*..... 283
3. Where facts pleaded fail to show that acquisition or retention of property is wrongful and person acquiring the property would be unjustly enriched if permitted to retain it, a constructive trust is not established. *Kozina v. Watkins Lumber Co*..... 594
4. Where all payments necessary to secure school land lease are to be made by one party and lease is taken in name of another party until such payments are made, a resulting trust is created. *Reetz v. Olson*..... 621
5. Resulting trust is not affected by the statute of frauds. *Reetz v. Olson*..... 621
6. Attorney's fees and expenses will ordinarily be allowed a trustee where incurred for benefit of the estate. *Linn v. Linn*..... 666
7. Whether attorney's fees and expenses were for benefit of trust estate or trustee personally is ordinarily a question of fact. *Linn v. Linn*..... 666
8. A constructive trust is a relationship with respect to

property which arises where acquisition or retention of property is wrongful and person holding title to property would be unjustly enriched if permitted to retain it, and subjects such person to an equitable duty to convey it to person entitled thereto. *Box v. Box* 826

9. If a party obtains title to property by virtue of a confidential relationship, under such circumstances that he ought not be permitted to hold and enjoy the benefits, a court of equity will raise a constructive trust and convert the party into a trustee of the legal title. *Box v. Box* 826
10. Where owner of an interest in land transfers it to another upon oral trust in favor of the transferor or upon an oral agreement to reconvey, and the trust is unenforceable because of the statute of frauds, the transferee holds the interest upon a constructive trust for the transferor, if at the time of the transfer a confidential relationship existed. *Box v. Box* 826
11. Promise to hold property or to reconvey need not be express in order to raise a constructive trust, as actual cooperation and acquiescence on the part of the transferee is sufficient where he had knowledge of the grantor's intention and understanding of the transaction. *Box v. Box* 826

Vendor and Purchaser.

1. A merchantable title is one which a man of reasonable prudence, familiar with the facts and the questions of law involved, would accept as a title which could be sold to a reasonable purchaser. *Northouse v. Torstenson* 187
2. The term "marketable title" generally means a title which consists of both the legal and equitable title, and is free from reasonable doubt in law or in fact; not merely a title valid in fact, but one which can be readily sold to a reasonably prudent purchaser, or mortgaged to a person of reasonable prudence as a security for the loan of money. *Northouse v. Torstenson* 187
3. To be enforceable a contract for sale of real estate or some memorandum must be in writing and signed by the seller. *Horn v. Stuckey* 625
4. Contract for sale of real estate may be made by correspondence if all of the elements of a valid and binding contract are contained in the correspondence passing between the parties. *Horn v. Stuckey* 625
5. Where a real-estate broker, while his brokerage contract is in force, obtains a purchaser and no sale is made during the existence of the contract but sale is thereafter made by owner to person procured by the agent on sub-

stantially same terms, the broker is entitled to a commission. *Peters v. Dreger* 670
6. Where subsequent sale is made to person procured by agent but not on substantially the same terms that had been offered through the broker's efforts, he is not entitled to a commission. *Peters v. Dreger* 670
7. Notice of acceptance of an option to purchase real estate contained in a lease is not required to be in writing or in any particular form in the absence of a requirement to that effect in the lease. *Mauzy v. Elliott* 865
8. Option to purchase contained in lease binds only the lessor until accepted by the lessee, but when accepted the option is merged in a completed contract of purchase which is thereafter binding upon both parties, vesting equitable title in the lessee. *Mauzy v. Elliott* 865
9. Where option to purchase contained in a lease is exercised, the relation of landlord and tenant ceases to exist and that of vendor and purchaser arises. Lessor cannot thereafter declare option forfeited for failure to pay rent. *Mauzy v. Elliott* 865

Waters.

1. It is the duty of those who build structures across natural drainways to provide for the natural passage of all waters that may be reasonably anticipated to drain there, and this is a continuing duty. *Webb v. Platte Valley Public Power & Irrigation District* 61
2. If evidence shows that all damages were caused by overflow and wrongfully diverted floodwaters, without any commingling of waters from other sources, it is sufficient to support a verdict. *Webb v. Platte Valley Public Power & Irrigation District* 61
3. In order for a flood to come within the term "act of God," it must have been so extraordinary and unprecedented a manifestation of nature as could not have been reasonably anticipated or foreseen. *Webb v. Platte Valley Public Power & Irrigation District* 61
4. Party engaged in a public work which involves the change or restraint of the flow of surface waters in a natural drainway is negligent if he fails to make reasonable provision for the consequences that will result from such extraordinary rainfalls as experience shows are likely to occur. *Webb v. Platte Valley Public Power & Irrigation District* 61
5. It is the duty of those who build structures across natural drainways to provide for the natural passages through such obstruction of all waters which may be

reasonably anticipated to drain there. This is a continuing duty. *Faught v. Dawson County Irrigation Co...* 274

6. Application of the rule of allocation of damages is clarified in opinion. *Faught v. Dawson County Irrigation Co.* 274
7. Where land is subject to overflow from natural causes, burden of proof rests upon party claiming damages arising from negligent construction of railroad embankment to show that construction complained of either caused such overflow or increased the same, together with the extent thereof. *Goodhart v. Chicago, B. & Q. R. R. Co.....* 290
8. The flood channel must be considered as a part of the channel of the stream and no structures or other obstructions can be placed in its bed which will have a tendency to dam the water back upon the property of upper riparian or adjacent owners. *Cooper v. Sanitary District No. 1*..... 412
9. Where damage would have occurred whether or not the works of a drainage district had been constructed, such damages are not chargeable to a drainage district organized in the upper reaches of the stream. *Cooper v. Sanitary District No. 1*..... 412
10. Where the construction of an artificial channel by a drainage district does not dam or retard the flow of the stream to the damage of upper owners, or make the position of owners of land downstream more hazardous, the artificial channel cannot be said to be negligently constructed. *Cooper v. Sanitary District No. 1*..... 412
11. Where some damage would have occurred even if the artificial channel had not been built, a drainage district is liable only for such damages in addition thereto as were caused by the damming or retarding of the water to a greater height or for a longer time than would otherwise have occurred. *Cooper v. Sanitary District No. 1..* 412
12. Where plaintiff fails to show the extent of the increased overflow of water arising from claimed negligent construction of a drainage district, either as to its quantity or duration, and the amount of damages arising therefrom, no basis for a judgment exists. *Cooper v. Sanitary District No. 1*..... 412
13. Liability of public power and irrigation district for "all overflow" is absolute only for such waters as flow over or escape out of its reservoirs or canals and damage another. *Robinson v. Central Neb. Pub. P. & I. Dist*..... 534
14. Where a public power and irrigation district has lawfully obtained its right-of-way, it has the same right

as any other land proprietor as to surface water. *Robinson v. Central Neb. Pub. P. & I. Dist.* 534

15. A proprietor of land may defend himself against the encroachments of surface water by embankment or dike and will not be liable in damages from the deflection and repulsion of waters defended against provided he exercises ordinary care and does not so use his property as to unnecessarily and negligently injure another. *Robinson v. Central Neb. Pub. P. & I. Dist.* 534
16. Where water appears upon the surface of the ground in a diffused state with no permanent source of supply or regular course, it is regarded as surface water. Where such waters flow into and become a part of a stream, they cease to be surface waters and are then a part of the running water of the stream. *Mohatt v. Olson.* 764
17. A stream which is accustomed to extend itself beyond its banks in times of high water and to flow over the adjacent lands in its flood plane in a broader stream, retains its character as a live stream and the law relating to floodwaters applies. *Mohatt v. Olson.* 764
18. It is the duty of those who build structures across natural drainways to provide for the natural passage through such obstruction of all waters which may be reasonably anticipated to drain there. This is a continuing duty. *Mohatt v. Olson.* 764
19. Where a substantial amount of water from another source or sources has been added to the water for which defendant is liable, and the combined waters have caused the damage, it is incumbent upon the plaintiff to establish either that his damages would have occurred from the waters for which defendant is liable, or to establish the amount of his damage that has been caused by the waters for which defendant is liable. *Mohatt v. Olson.* 764
20. Waters carried in a watercourse across land for more than ten years give rise to an easement. *Born v. Keil.* 912
21. Waters flowing in a well-defined watercourse may not be diverted and cast upon the lands of an adjoining landowner where it did not run in the natural course of drainage. *Born v. Keil.* 912
22. Where an obstruction in a natural watercourse constitutes a permanent and continuing injury to an adjoining landowner, he is not confined to an action for damages but may obtain a decree ordering the removal of the obstruction. *Born v. Keil.* 912
23. Equity will afford relief by injunction against a continuing injury to land caused by an unlawful discharge of

flood or surface waters by an adjoining landowner. *Born v. Keil* 912

Wills.

1. If, at the time he executed his will, a testator knows the extent and character of his property, the natural objects of his bounty, and the purposes of his devises and bequests, he is mentally competent to make a will. *In re Estate of Goist* 1
2. A testator, even though aged and infirm, may dispose of his property by will as he pleases, and is not required to recognize his relatives therein as long as his mentality conforms to the accepted tests at the time of execution thereof. *In re Estate of Goist* 1
3. Elements necessary to constitute undue influence are: (1) That testator was subject to such influence; (2) that the opportunity to exercise it existed; (3) that there was a disposition to exercise it; and (4) that the result appears to be the effect of such influence. *In re Estate of Goist* 1
4. In order to invalidate a will, undue influence must be such as to destroy the free agency of the testator and substitute another person's will for his own. *In re Estate of Goist* 1
5. While the mere existence of confidential relations between the testator and a beneficiary under his will does not raise a presumption of undue influence, the relationship between the two may be considered with all of the other facts and circumstances in determining that issue. *In re Estate of Goist* 1
6. Where collateral relatives had never seen or visited with testatrix, and did nothing to merit an inheritance, while a woman companion cared for testatrix under an agreement that it would be worth her while, such collateral relatives were not the natural recipients of the bounty of the testatrix. *In re Estate of Goist* 1
7. The elements necessary to constitute undue influence are (1) that the testator was subject to such influence; (2) that the opportunity to exercise it existed; (3) that there was a disposition to exercise it; and (4) that the result appears to be the effect of such influence. *In re Estate of Inda* 179
8. The burden of proving that a will resulted from undue influence is on the contestants. It cannot be inferred alone from motive or opportunity, and mere suspicion is insufficient to require submission of the question to the jury. *In re Estate of Inda* 179

9. A person is competent to make a will who understands (1) the nature of his acts, (2) the extent of his property, (3) the proposed disposition of it, and (4) the natural objects of his bounty. *In re Estate of Inda* 179
10. The question of testamentary capacity relates exclusively to the time when the will was made and although competent evidence of testator's condition of mind at other times is admissible, it is received only to assist in revealing his state of mind at that time and the jury should be so instructed. *In re Estate of Inda* 179
11. In giving an opinion as to mental capacity of a testator to make a will, the witness, whether lay or expert, must have in mind the quality of mental capacity essential to the making of a valid will. *In re Estate of Inda* 179
12. The burden is on the proponent of a will to prove its execution and the testamentary capacity of the testator. If the proponent makes a prima facie case, it then devolves upon the contestant to overcome the presumption arising therefrom, after which the burden of going ahead and proving testamentary capacity by preponderance of the evidence devolves upon the proponent. *In re Estate of Inda* 179
13. In order that a will may be rejected on the ground of mental incompetency, the evidence of the objector must be sufficient to sustain a reasonable inference that the testator was incompetent to make a will. *In re Estate of Inda* 179
14. In a will contest, if the evidence is insufficient to sustain a verdict either on the ground of mental incompetence or undue influence, a verdict upon either of such issues in favor of the contestant should be directed by the court. *In re Estate of Inda* 179
15. A party concerned who may contest a will is one who has a direct pecuniary interest in the estate, which will be defeated or impaired if the instrument in question is held to be a valid will. *In re Estate of Sexton* 618
16. Statute precludes anyone but a party concerned from contesting a will. *In re Estate of Sexton* 618
17. An administrator of an intestate estate as such does not have a right to contest a purported will presented for probate in the estate that he is administering. *In re Estate of Sexton* 618
18. An interest in the fees of administration is not sufficient to entitle an administrator to contest a purported will. *In re Estate of Sexton* 618
19. When the intention of testator can be ascertained from the will, it is the duty of the court to give it effect. *Hiatt v. Hiatt* 652

20. All advancements and charges against a devisee, not saved by a will, are extinguished. *Hiatt v. Hiatt* 652
21. The debt of a devisee to the testator cannot be retained from or charged on lands devised to him in the absence of language in the will making such debt a charge. *Hiatt v. Hiatt* 652
22. A decree of final settlement by county court which construes a will so as to deprive a devisee of an interest in real property devised to him and gives it to other devisees to satisfy a claim against him for a debt to the testator is void for want of jurisdiction. *Hiatt v. Hiatt* 652
23. By statute, if a testator makes provision in his will for payment of debts, expenses of administrator, or family expenses, they are required to be paid accordingly to the provisions of the will. *Lienhart v. Conway* 821
24. Courts will give effect to the true intent of the testator so far as it can be collected from the whole instrument, if such intent is consistent with established rules of law. *Lienhart v. Conway* 821
25. Where encumbered real estate is devised by will without expressing any intent with regard to an encumbrance thereon, it will be presumed that encumbrance is to be paid out of the personal estate if sufficient for that purpose. *Lienhart v. Conway* 821
26. Personal estate of a deceased person is primarily liable for all debts created or assumed by him, whether secured by mortgage on real estate or not, and heirs and devisees have the right to require the payment of such debts out of the personal estate. *Lienhart v. Conway* 821
27. A mortgage indebtedness against real estate contracted or assumed by a testator is a debt within meaning of statute requiring debts to be paid out of personal estate. *Lienhart v. Conway* 821
28. Devisee of real estate may require mortgage indebtedness to be paid out of personal estate, and action is not controlled by statute of limitations relating to filing of claims against estates. *Lienhart v. Conway* 821

Witnesses.

1. A nonexpert witness who is shown to have had an intimate acquaintance with a person may be permitted to state his opinion as to his mental condition, if the condition becomes a material subject of inquiry, by giving the facts and circumstances upon which the opinion is based. *In re Estate of Inda* 179
2. The value of the opinion of an expert witness is dependent on the facts on which it is predicated, and has no

probative force unless the premises upon which it is based are shown to be true. *Hamilton v. Huebner* 320
3. In a prosecution for rape, the prosecutrix may testify in chief to the fact and nature of complaint made within a reasonable time after act was committed, but not as to its details. Person to whom complaint was made may likewise so testify. *Jump v. State* 501
4. Triers of fact have the right to test credibility of witnesses by their self-interest, and to weigh undisputed parol testimony against facts and circumstances in evidence from which a conclusion may be drawn that the parol testimony is false. *Teresi v. Filley* 797

Workmen's Compensation.

1. An award of compensation cannot be sustained if based upon possibilities, probabilities, conjectural or speculative evidence. *Hamilton v. Huebner* 320
2. Mere exertion, which is not greater than that ordinarily incident to the employment, does not constitute a compensable accidental injury, even though combined with preexisting disease which produces disability. *Hamilton v. Huebner* 320
3. Under the Workmen's Compensation Act, the employer is not an insurer of the well-being of his employee. *Hamilton v. Huebner* 320
4. The burden of proof is upon the claimant in a compensation case to establish by a preponderance of the evidence that personal injury was sustained by the employee by an accident arising out of and in the course of his employment. *Hamilton v. Huebner* 320
5. The rule of liberal construction of the Workmen's Compensation Act applies to the law, not to the evidence offered to support claim, and does not permit a court to award compensation where the requisite proof is lacking. *Hamilton v. Huebner* 320
6. In a compensation case the Supreme Court is required to consider the cause de novo upon the record where it is found that the findings of fact are not conclusively supported by the evidence. *Hamilton v. Huebner* 320
7. Claimant has burden of proof in a case under the Workmen's Compensation Act to establish by a preponderance of the evidence that personal injury was sustained by the employee by an accident arising out of and in the course of his employment. *Hassman v. City of Bloomfield* 608
8. A compensation award cannot be based on possibilities or probabilities, but must be based on sufficient evidence. *Hassman v. City of Bloomfield* 608

9. Statute requiring liberal construction of Workmen's Compensation Act applies to the law, not to the evidence offered to support a claim, and does not dispense with the necessity of proving right to compensation or permit a court to award compensation when requisite proof is lacking. *Hassman v. City of Bloomfield* 608
10. Award by single judge of Workmen's Compensation Court is conclusive when no appeal is taken therefrom except as otherwise provided by statute. *Gilmore v. State* 647
11. An employer is liable for reasonable medical and hospital services and medicines when award provides for further medical, surgical, and hospital care and the same are approved by the compensation court. *Gilmore v. State* 647
12. Where employer appeals to Supreme Court from an award of the district court in a workmen's compensation case and fails to obtain any reduction in the amount of the award, Supreme Court will allow a reasonable sum for attorneys' fees in Supreme Court. *Gilmore v. State* 647
13. Where an employee, with full knowledge of his injury, fails to make a claim for compensation within six months after the injury, and fails to file a petition therefor within a year from the date of the accident, his claim is barred. *Surratt v. Otoe Food Products Co* 854