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REPORTS OF CASES

IN THE

Supreme Court of Nebraska

JANUARY TERM, 1941

VOLUME CXXXIX

HENRY P. STODDART
OFFICIAL REPORTER

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By HENRY P. STODDART. REPORTER OF THE SUPREME COURT,

For the benefit of the State of Nebraska

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CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1941

CHARLES L. GOWE, GUARDIAN, APPELLANT, V. MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, APPELLEE.

296 N. W. 163

FILED FEBRUARY 4, 1941. No. 30869.

1. **Insurance.** One who is able to lease property, and to collect rents from month to month from several tenants, and to attend to other business matters in a businesslike way, even though she is suffering increasing nervousness and irritability, cannot be held to have been totally and permanently disabled during the period from March, 1933, to July, 1933, when an insurance policy lapsed, even though a year later she was declared to be insane by the authorities.
2. ———. Where the evidence was insufficient to sustain a judgment in favor of the plaintiff as guardian of an insured, who was alleged to be insane, it was the duty of the trial court at the close of the evidence to sustain a motion to discharge the jury and find for the defendant no cause of action.

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

Clinton Brome, for appellant.

Brown, Fitch & West, contra.

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE and MESSMORE, JJ., and HASTINGS and KROGER, District Judges.

PAINE, J.

This is an action by the plaintiff as guardian of Catherine G. Bewsher, incompetent, to recover a judgment against

defendant and appellee in the sum of $1,200 with interest and attorney's fees. Trial was had to a jury, and at the conclusion of all the evidence the court sustained a motion for a directed verdict, discharged the jury, and entered judgment for the defendant, from which judgment plaintiff appeals.

In the petition Charles L. Gowe alleged that he was the duly appointed guardian of Catherine G. Bewsher, an incompetent; that on March 4, 1919, the defendant company issued to the plaintiff's ward, Catherine G. Bewsher, under her maiden name of Catherine E. "Gow," a policy of insurance, No. 2585882, in the sum of $2,000. It is further alleged that she paid all the premiums due on said policy up to and including the date of her disability, and that the policy provided that if she should, before attaining the age of 60 years, and while the policy was in force, furnish proof to the company that she had become totally and permanently disabled by bodily injury or disease, and such disability should exist continuously for 60 days, the company would, during the continuance of such disability, waive the payment of each premium as it thereafter became due, and would, if the disability continued, pay one-tenth of the face amount of the policy annually upon the anniversary of the date of issue; that during the month of July, 1932, she became mentally incompetent, and has ever since that time been, and will continue to be, permanently incapacitated and disabled within the meaning of the provisions of said policy. In supplemental petitions additional annual amounts are prayed for in the sum of $200 each year, so the total recovery sought begins with March 4, 1933, and continues until March 4, 1938, making a total recovery for the six years of $1,200.

Defendant in its amended answer admits the issuance of the policy, and charges that said policy lapsed for nonpayment of the premium due on March 4, 1933, and was never reinstated, and the company expressly denies that the insured became or was totally and permanently disabled, as provided in the policy, and such provisions relat-

ing to total and permanent disability were no longer in force and effect. The company denies that the insured, or any one in her behalf, furnished due proof that she was totally and permanently disabled by bodily injury or disease, and denies that there was anything due under the terms of the policy. It is further alleged that any disability that the insured may have suffered was of a temporary nature, and was not of a permanent nature, such as is provided for and contemplated by said policy of insurance.

In the amended reply it was alleged that due notice of plaintiff's disability was furnished the company on behalf of the insured, but that the company denied liability on the ground that the policy had lapsed for failure to pay premiums, and the plaintiff alleges in said amended reply that by so doing the defendant company had waived the furnishing of notice and proof of loss, and is now estopped to deny liability upon the ground of failure to furnish proof.

A jury having been duly impaneled and sworn, trial was had, and all of the evidence taken as found in the bill of exceptions of several hundred pages. When both parties had rested, the defendant moved the court to either direct a verdict in favor of defendant or, in the alternative, to discharge the jury and enter a judgment of dismissal for the following reasons:

"1. The evidence is insufficient to support the allegations of the plaintiff's petition and the reply.

"2. The evidence is insufficient to support a verdict in favor of the plaintiff and against the defendant.

"3. The evidence fails to show that the plaintiff is entitled to recover on his cause of action.

"4. The evidence fails to show that the insured was totally and/or permanently disabled while the policy was in force.

"5. The evidence fails to show that the insured was totally and/or permanently disabled during the time when all past due premiums had been duly paid.

"6. The evidence fails to show that due proof was furnished of any total and permanent disability while the

policy was in force, or within the grace period thereafter, and the evidence is insufficient to excuse the furnishing of said proof. For the further reason the evidence shows that notice and proof were not given until December, 1934, and that the policy lapsed for nonpayment of the premium due March 4, 1933."

After argument the court decided that there was no sufficient evidence about her condition that would warrant a finding, or sustain a finding, for the plaintiff by the jury, and that, if the court submitted the case to the jury and they found for the plaintiff, the court would then have to grant a new trial as a matter of law. The jury were discharged, and the court found for defendant, and directed that it go hence without day.

The plaintiff set out six errors relied upon for reversal. Among them, it is charged that the court erred in finding that the evidence was insufficient to sustain a verdict for the plaintiff, that the insured was not mentally incapacitated during the months of March, April, and May, 1934, and that the court erred in discharging the jury and dismissing plaintiff's petition.

There is very little dispute as to the law governing the case, the solution of the case resting entirely upon the evidence. It is, therefore, necessary to set out the important portions of the evidence.

Exhibit No. 1 was the policy of insurance, dated March 4, 1919, No. 2585882, upon the life of Catherine E. "Gow." In the application for insurance, dated at Omaha March 4, 1919, and attached to the policy received in evidence, it shows that insured was born September 5, 1886, at Lincoln, Nebraska; that her occupation at the time she was insured was saleswoman for the defendant life insurance company; that the premiums were $74.92, due on the 4th day of March until 20 annual premiums have been paid; that a grace of 31 days is granted for the payment of all premiums after the first; that the policy is a participating policy, and that there shall be an annual distribution of surplus at the end of the second and each policy year

thereafter, which may be used in cash, or toward the payment of premiums.

The policy also provides that she shall pay an additional $2.70 a year for total and permanent disability benefits, making a total of $77.62 for the annual premium, and it appears that she paid premiums semiannually.

In the testimony of Carl M. Syvertsen, agency cashier of the defendant company, he states that the last premium was paid on September 3, 1932, which was the premium due September 4, 1932; that it was a semiannual premium of $38.96, and that the next premium, which was due March 4, 1933, has never been paid, although there was a grace period after said date of 31 days allowed by the policy, and in addition thereto a further extension, by reason of the Nebraska bank moratorium, for an additional 31 days. Therefore, the policy lapsed on or about May 5, 1933, and it was so reported to the New York office, in exhibit No. 30, under date of May 20, 1933.

Exhibit No. 26 is a note, signed by the insured, showing that she borrowed $696.90 on this policy on September 30, 1932, although the note was dated back to September 4, as the company requires interest paid from date premium was due. This loan took up an old loan, paid the interest at 6 per cent. and the premium of $38.96 due September 4, 1932.

Now, the next premium was due March 4, 1933, and the cash value of the policy was then $723.14, and a cash dividend was declared of $21.50, making its value $744.64. However, the insured could not have paid the premium by making another new loan, for the old loan with interest thereon would have left a balance of only $26.84 to apply on the premium, leaving $12.12 which the insured would have had to advance in cash to pay the premium, the nonpayment of which lapsed the policy.

Exhibit No. 32 is a letter written the insured at her request, under date of May 26, 1933, telling her how she can surrender policy in suit in case at bar, and how much additional she will have to add to pay the premium on her other policy, being No. 2742206.

The plaintiff alleges in the petition that during the month of July, 1932, the insured became mentally incompetent, and ever since said time she has been totally and permanently incapacitated.

We will now examine the evidence offered in support of this claim. Mrs. Arthur Blakely, a neighbor, who lived for years across the street from the insured, and who was a practical nurse, had helped out when the insured's mother was sick, and was again engaged as a nurse when the insured had a baby, which lived only about a day, and immediately thereafter she started to have nervous spells and cried a good deal of the time, both night and day. Mrs. Blakely testified that this was entirely different from her conduct prior to that time, for then she had been of a very happy disposition, used to go down town to dinner and be with her friends, and after she had the nervous breakdown she did not want company, and did not want any of her friends around. She states that in 1932 she noticed a change in her manner towards her husband, at a time when she came over to the Colbert apartment and criticized her husband, saying he was irritable and cross. Witness testified that in years prior to that "they got along just perfect," but on this occasion when she visited their apartment she ran through the rooms of their apartment, tore her hair and cried, and said she was going to end her life, and witness tried to get her settled down, but could not do anything with her. This visit occurred in September, 1932. Witness testified that the insured did not come to her home again, but would call her as many as 20 times a day, until they just would not answer the telephone. Sometimes she would just scream into the telephone. She said these telephone calls began in 1929, and got more and more frequent from 1932 up to the day that the insured was taken to the hospital; that the witness went over to the house again on the day they took her to the hospital and gave her two hypodermics under the direction of the doctor. She testified that the insured had been a very fine housekeeper up to about 1932, and that there was a decided change about that

time, and after that she had a very dirty house; the sink would be full of dirty dishes, the beds were not made; that prior to that time the insured dressed very neatly, and beginning in 1932 her clothes were dirty, her skin was dirty, her hair was not combed, and it gradually got worse and worse.

The only medical testimony in this case is that of Dr. G. Alexander Young, a specialist in nervous and mental diseases, and who had been in the practice for 38 years. After graduating from a medical school and serving as house physician and surgeon in the Cook County Hospital, he became assistant physician at the Norfolk State Hospital for the Insane for one year, then served four years at the Lincoln State Hospital for the Insane as assistant superintendent. He then was transferred to Norfolk, and became superintendent of the Norfolk State Asylum, in which capacity he served for two years. He then spent a year and a half abroad in the study of mental diseases, since which time he has practiced as a specialist in nervous and mental diseases in Omaha, taking postgraduate work during that time, both abroad and in this country. Since 1915 he has been the physician for the board of insanity of Douglas county.

He first met the insured on January 12, 1934, when she was brought before the board of insanity in Douglas county upon an information filed against her. He had her under observation from January 13 to March 19, 1934, and testified that she was emotionally very unstable and tense, did not sleep, lost weight, was uncooperative and headstrong. She had paranoid ideas of persecution. During those months he had had her removed from the county hospital to the psychiatric department of the Methodist Hospital, where she could be given better treatment, and where there were proper and excellent facilities for the treatment of her nervous condition. As the result of these months of treatment, he gave as his opinion that she was suffering from depressive psychosis with paranoid trend, which appeared to be due to a glandular deficiency associated with a change of life.

Many objections were made to questions relating to the course of her disease, as learned from the patient and from statements of her relatives, but finally Dr. Young was allowed to answer, and gave his understanding of the history of her case. He said that there had been increasing nervousness, emotional tension which had been developing for three or four years. He testified that when he first treated her she weighed around 140 to 145 pounds; that she has developed obesity, or overweight, until her present weight is around 220 pounds.

Dr. Young testified that at a session of the board of insanity of Douglas county on July 3, 1934, she was found to be insane; that she was kept in the Douglas County Hospital until July 31, 1934, after returning from the Methodist Hospital; that the transcript of proceedings before the board of commissioners of insanity of Douglas county, introduced as exhibit No. 5, shows that the information was filed against her by her husband. It is shown in this transcript that she has become increasingly nervous and seclusive, with occasional bursts of temper, and just before filing the complaint had become violent, unmanageable, screaming, cursing, kicking and biting those who tried to restrain her.

The record shows that she had been married to her husband some 10 or 12 years previously; that he was 20 years older than she was; that when married they were in well-to-do circumstances, but her husband had lost his position and property, and that for two or three years past she had grown increasingly seclusive, refusing to see a physician or to leave the house. The transcript states that she presents an emotional attitude of marked rigidity, is very set in her ideas and self-willed, and takes suggestions poorly.

On cross-examination Dr. Young said that she had been an active and an alert type of woman, with considerable intellectual capacity; that she had been a business woman practically all of her adult life; that she was discharged on March 17, 1934, the transcript of the proceeding in that regard showing: "This patient is suffering from a depressive

psychosis with paranoid features. She should be found insane but I question the advisability of her being committed to the State Hospital. It is possible that she might be able to make a social adjustment either in Grand Island or in California where two sisters reside. I would recommend that she be held under observation for the time being."

On redirect examination it was brought out that Dr. Young had reported on the first occasion that "the patient's condition seems to be one of emotional instability, consequent upon a long continued history of domestic maladjustment and recent financial stress," and that the final conclusion that he reached, when she was brought to him for subsequent observation, was that she was suffering from a true psychosis, which means that it was a definite mental disease.

The husband of the insured, Augustus H. Bewsher, testified on direct examination for some 60 pages. He sometimes failed to answer definite questions, and frequently argued with the court and both attorneys over the form and meaning of his answers, and at the end of the 60 pages of his direct examination, the cross-examination was waived.

To give a synopsis of his evidence would extend this opinion beyond all reasonable length; however, a few of his statements will be presented. He said they were married in the winter of 1923; that his wife had been in charge of the women's department of the defendant company; that they got along nicely until she had a nervous breakdown. He said this was preceded by unusual irritability, she was "picky" on her best friends, would criticize her husband, manifested a violent temper; that in the midsummer of 1932 she seemed to change in many ways, and she would go to bed immediately after dinner, and take sleeping powders; that she would start shouting so that he had to close the windows to keep the neighbors from hearing what was going on; that at the time he thought this was only a temporary ailment, but that it continued; that along about Christmas time in 1932 she would try to kick him out of bed, and did so on one occasion; that she would sleep until about 2 o'clock in the morning, and could not sleep

any more; that she continued to get worse, and finally he had to send her to a hospital; that she had bitten him and her sister-in-law, and was very hard to handle, and he would call up her brother, or nephew, or some one else to help him with her; that prior to March, 1933, he was in the bathroom on one occasion when she broke the panel out of the door to get into the bathroom. The husband in his evidence gives repeated instances of her violence and changed temperament, and mistreatment of neighbors, all of which he testifies was entirely different from her conduct during the former years of their married life.

Toward the end of the husband's testimony, the court decided to ask a few questions, with this result: "By the Court: Q. Now, Mr. Bewsher, you testified this morning that she became very irritable and high-tempered. Well, does she do that now? A. No; she doesn't have the opportunity to. Q. Does she shout at you? A. She never did. Q. Get angry with you? A. She never did. Q. I thought you testified this morning that she did. A. No; I did not; I said she lost her temper, but she never shouted at me. In fact, that man (referring to Mr. Fitch, defendant's attorney) has shouted at me more than any one has in my life."

We have presented at considerable length all of the pertinent evidence bearing on the question of her mental condition, and whether she was totally disabled by reason of insanity on the date the policy lapsed, which was March 4, 1933, as well as during the extension of time of 31 days' grace period allowed in the policy, and an additional extension of time allowed by law because of the bank moratorium in Nebraska.

We will now present a few brief statements from the defendant's evidence. Hale R. Bixby testified he had known the insured since 1927, when he rented from her a house, which he occupied until September, 1932. During all of this time he paid the rent to the insured, negotiated repairs with her, and after he moved out in September, 1932, he continued to make back payments of rent to her, indicating

that she transacted business matters in a satisfactory manner.

Arthur A. Breazeale testified that he rented a place on Douglas street in January, 1929, which was owned by the insured; that she came to see him about some wallpaper for the rooms, and finally arranged to buy the paper and have the renter do the work, and that he lived in her place until October, 1932, and paid her some of the payments of rent; that he had another business transaction with her in reference to some gasoline pumps that were placed in front of the property. When he moved out of the place he said that she was angry at another tenant, but he had no trouble with her, and her condition was "quite rational." On cross-examination he said she walked back and forth, was very much upset, as she was mad at another tenant, whose nickname was Jack and who had a hamburger stand, but insisted that when she came in and talked to him about moving she was all right.

The other tenant referred to, Aden F. Sheil, known as "Jack," testified that he leased some ground from the insured on Douglas street to erect a cement block building in 1930, and he paid her rent from that time up to September, 1933; that sometimes she came to collect it, and sometimes he took it to her place, and she gave him a three-year lease on the ground at $10 a month, and he put up a cement block building, 9 by 12 feet, in which he ran a hamburger stand, and he always paid his rent directly to the insured. He said that when his three-year lease expired he tried to get another three-year lease on the ground, and she tried to raise the rent to about three times what he was paying, which he refused and she became very angry, and as a result of this trouble she had him arrested, and he insisted that they take her along too, and they took both of them down to jail; that he was arrested on the charge that he was tearing down a building on her property, and he told the captain of police about it, and that was all there was to it, and both of them were turned loose.

Francis R. Payne testified that he had known the in-

sured since 1928; that he was in the rental business; that she gave him 5 per cent. for collecting the rent from a certain tenant, and he got a certain tenant for her in the spring of 1933. He was asked, "Did you notice any difference in her appearance and her actions from the time you first met her in 1928 until you last talked to her along in 1933?" and his answer was, "No; I don't know as I noticed a whole lot."

Charles Victor Wilson testified that from February 23, 1925, to March 31, 1936, he was senior clerk in the office of the defendant company in Omaha, and is still working for the company at St. Paul, Minnesota; that he knew the insured because she was a policyholder and wrote insurance policies for the company; that she telephoned him for a loan on her policy, and on April 10, 1933, he wrote her a letter, inclosing a loan note for $734, which was the maximum loan value on the policy at that time, and at the time he wrote her the letter she still had the right to reinstate the policy if she wished to.

It is also disclosed in the evidence that her brother, the plaintiff herein, who is her guardian, took a quitclaim deed from the insured and her husband to himself on April 12, 1934, of her Douglas street property, for the reason that if he made a sale of it he could better handle it as the owner. He never made the contemplated sale, so the deed was never recorded.

An examination of this evidence shows that Catherine G. Bewsher, the insured, became totally and permanently disabled by insanity on July 3, 1934. The testimony of Dr. Young is that, from the history of the case, her increasing nervousness must have been developing for three or four years prior to that date, and there is no question but that she was a nervous woman at the time this policy lapsed for the nonpayment of premium. It is equally clear that after the time the policy lapsed she had been transacting her business, collecting rents, leasing properties, and handling repairs for her property in a very thrifty and businesslike manner.

This question has been before this court many times, and we have held that, when a policy provides generally that when the insured has become wholly and permanently disabled by bodily injury or disease, so that she is and will be permanently, continuously, and wholly prevented thereby from performing any work for compensation or profit, or from following any gainful occupation, it does not mean, as its literal construction would require, a state of complete helplessness; but the total disability contemplated means inability to do all the substantial and material acts necessary to the prosecution of the insured's business or occupation in his customary and usual manner. *Rathbun v. Globe Indemnity Co.*, 107 Neb. 18, 184 N. W. 903; *Oswald v. Equitable Life Assurance Society*, 128 Neb. 173, 258 N. W. 41 ("cow case"); *Hamblin v. Equitable Life Assurance Society*, 124 Neb. 841, 248 N. W. 397; *Hemmer v. Metropolitan Life Ins. Co.*, 131 Neb. 14, 267 N. W. 153; *Woods v. Central States Life Ins. Co.*, 132 Neb. 261, 271 N. W. 850; *Hoover v. Mutual Trust Life Ins. Co.*, 225 Ia. 1034, 282 N. W. 781; *Schultz v. John Hancock Mutual Life Ins. Co.*, 134 Neb. 885, 280 N. W. 165; *Bennett v. Metropolitan Life Ins. Co.*, 136 Neb. 785, 287 N. W. 609; *Miceli v. Equitable Life Assurance Society*, 138 Neb. 374, 294 N. W. 659.

But, in the case at bar, viewing the evidence in the most liberal manner in the light of all our decisions, the plaintiff failed to produce satisfactory evidence that the insured for a period of 60 days before the policy lapsed had been totally and permanently and continuously disabled by mental disease to the extent required by our holdings.

This court held in *Redwelski v. Omaha & C. B. Street R. Co.*, 137 Neb. 681, 290 N. W. 904, that, where the evidence was insufficient to sustain a judgment in favor of the plaintiff, it was the duty of the trial court to sustain a motion directing a verdict for the defendant, and in *Most v. Cedar County*, 126 Neb. 54, 252 N. W. 465, it was held that failure to direct a verdict in favor of the defendant in such a case is reversible error.

We have reached the conclusion that the trial court was

right in discharging the jury and directing that the defendant go hence without day.

AFFIRMED.

INDIANA HARBOR BELT RAILROAD COMPANY, APPELLANT, V. ABRAHAM B. ALPIRN, APPELLEE.

296 N. W. 158

FILED FEBRUARY 4, 1941. No. 30947.

1. Carriers. Written notice of a claim for loss or damage, on the part of a shipper, as required by 49 U. S. C. A. sec. 20 (11), and in bill of lading, section 2 (b) in the instant case, is inapplicable and excused, where the carrier is chargeable with actual knowledge of all the conditions as to damages which a written notice would give.
2. ———. Any matter which tends to defeat or diminish a carrier's right of recovery, either in whole or in part, may be asserted by way of defense, provided it has been properly pleaded. Sections 20-813, 20-814, 20-816, and 20-818, Comp. St. 1929, give the defendant in such cases the right of set-off or counterclaim for any valid claim or demand against the carrier, either to defeat or reduce its recovery or to obtain affirmative relief against the carrier for any excess.
3. ———. Section 4 (b) of the bill of lading in the instant case provides, in substance, for sale by public auction and published notice, designating time and place, and that a 30-day period must elapse before publication of notice of sale, after notice that the property is refused or remains unclaimed. It is essential that strict compliance with the terms of the bill of lading in such respect be had, unless there has been a waiver of the requirements thereof by the owner of the goods. The evidence in the instant case discloses no such waiver.
4. Conversion. "Conversion is any distinct act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his rights therein." 26 R. C. L. 1098, sec. 3.
5. ———: CARRIERS. "If a carrier who has a lien on goods for freight wrongfully sells them, he is liable to an action for the conversion; and the measure of damages is the market value of the goods, deducting the amount of the lien." *Briggs v. Boston & L. R. Co.*, 6 Allen (Mass.) 246.

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

Anderson & Meissner, for appellant.

Monsky, Grodinsky, Marer & Cohen, contra.

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

MESSMORE, J.

This is an action to recover demurrage charges on a carload of scrap iron from the shipper, in the amount of $138.24. The pleadings reflect and the record discloses:

On March 20, 1937, the Chicago, Burlington & Quincy Railroad Company received from a shipper at Kleenburn, Wyoming, a carload of small scrap iron, consisting of mining wheels, mixed with 20 to 25 per cent. of hangers or scrap, made out of steel that is malleable. The car was consigned to the defendant at Omaha, Nebraska, by a uniform bill of lading, with instructions to notify him. April 14, 1937, the shipment was consigned by defendant, as shipper, to himself at Chicago, Illinois. The car, by order of the defendant, was delivered to the American Steel Foundries at Indiana Harbor over plaintiff's switching tracks, plaintiff having received the car from Chicago, Burlington & Quincy Railroad Company, as a common carrier, for switching and delivery. The car was rejected. May 3, 1937, plaintiff wired defendant by its district freight claim agent of the New York Central System, of which plaintiff is a part, showing rejection of the car and requesting that disposition thereof be made. Defendant made no disposition of the car. Subsequently, a telegram, dated May 12, 1937, was sent by plaintiff to defendant, showing charges against the car in the amount of $541.92, to increase at the rate of $5 a day for demurrage, and requesting that disposition be rushed, stating: "Wire if you (defendant) will protect charges." May 14, 1937, plaintiff wired defendant that car was rejected by the American Steel Foundries, was not ordered, impossible to use, and to "rush disposition." May 18, 1937, plaintiff wired defendant: "Failure to receive disposition on car * * * within forty-eight hours we will be

obliged to sell under bill lading conditions, involving extra auction, advertising expense and demurrage. Have we your authority to sell at private sale without prejudice to bill lading conditions? Answer promptly." May 18, 1937, defendant replied by letter to plaintiff, referring to the car of scrap iron, and asking plaintiff to contact railroad companies and foundries which might be interested in purchasing such material, to obtain best price they would pay and wire immediately, stating: "However, do not put this car up for sale as a distressed car by the claim department as this will naturally depreciate the value of the material." Pursuant to this letter, efforts were made by plaintiff to secure bids from various dealers and brokers in the scrap-iron business, but it received no bids before the date of May 20, 1937, when this fact was communicated to the defendant by telegram, which asked what action should be taken. May 22, 1937, plaintiff, by telegram, made known to defendant that an offer of $500, constituting the best offer, had been received, and showing the charges to date to be $596.92, and further stating: "Have we your authority to accept and send you balance due bill for outstanding charges?" June 8, 1937, the amount of $500 was credited to freight charges of defendant's account, leaving an amount due, for which plaintiff sues.

The defendant cross-petitioned, setting forth failure on the part of the plaintiff to comply with the terms of the bill of lading by selling the scrap iron, without authority for so doing, at private sale, and further alleging that the reasonable value of the material was $974.24, and prayed judgment accordingly.

Plaintiff's amended answer to defendant's cross-petition alleged failure of defendant to make written claim and demand on plaintiff for damages for disposition made of the shipment by plaintiff within nine months, as required by law, thus waiving the provisions of section 4 (b) of the bill of lading by ordering and requesting shipment to be sold at private sale. At the conclusion of the evidence, which was heard before a jury, the plaintiff moved for a directed

verdict, in which defendant joined, asking for judgment on his cross-petition.

The court found that there was due plaintiff from defendant the sum of $638.24, and due defendant from plaintiff on his cross-petition the sum of $800, leaving a net amount due defendant from plaintiff of $161.76. Judgment was so entered. Motion for a new trial was submitted and overruled, from which ruling plaintiff appeals.

The evidence relating to the value of the contents of the car need not be detailed. The trial court determined the fair market value thereof as a question of fact, amply supported by the record.

Plaintiff contends that defendant failed to give notice of a claim for loss or damage, as required by 49 U. S. C. A. sec. 20 (11), which reads:

"Any common carrier, railroad, * * * receiving property for transportation from a point in one State or Territory or the District of Columbia to a point in another State * * * shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered * * * *Provided further,* That it shall be unlawful for any such receiving or delivering common carrier to provide by rule, contract, regulation, or otherwise a shorter period for the filing of claims than nine months, and for the institution of suits than two years, such period for institution of suits to be computed from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice."

The bill of lading, section 2 (b), required written notice of claim under the interstate commerce act by the Cummings amendment thereto, and acts amendatory, and forming a part of the bill of lading. Plaintiff's amended answer to defendant's cross-petition alleged that said provisions had formed a part of the bill of lading and were binding on the shipper on an interstate shipment. Defendant made no written claim.

Many cases cited by plaintiff, including *Georgia, F. & A. Ry. Co. v. Blish Milling Co.*, 241 U. S. 190, 36 S. Ct. 541, affirming 15 Ga. App. 142, 82 S. E. 784; *Erie R. Co. v. Stone*, 244 U. S. 332, 37 S. Ct. 633; *Chesapeake & O. Ry. Co. v. Martin*, 283 U. S. 209, 51 S. Ct. 453, and *Gilinsky v. Illinois C. R. Co.*, 98 Neb. 858, 154 N. W. 730, establish the rule that failure to give written notice of a claim by a shipper, as required by law, after reasonable time for delivery has elapsed, is a bar to an action by the shipper.

In the case of *Chesapeake & O. Ry. Co. v. Martin, supra*, the court held: "Where a bill of lading for an interstate shipment provides that claim, in case of failure to make delivery, must be made in writing to the carrier within six months after a reasonable time for delivery has elapsed, the reasonable time meant is such time as is necessary to transport and make delivery of the shipment in the ordinary course of business, in the circumstances and conditions of the transaction."

Plaintiff contends that the reasonable time would be calculated either from and after May 5, 1937, which is 48 hours from the date of notification of rejection of the car, or a reasonable time after June 8, 1937, when the car was sold by the plaintiff. All negotiations for the disposition of the car were had between plaintiff and defendant, the latter being both consignor and consignee; therefore, any notice given by defendant would have the effect only of informing the plaintiff of that which it already knew. The loss was occasioned by a positive and affirmative act on the part of the plaintiff in selling the scrap iron at private sale. Plaintiff's action was brought in municipal court in November, 1937, which was prior to the nine-month period in which defendant would be required to file his claim, as heretofore stated. Under the circumstances, failure of defendant to give notice as required under the authorities cited is not a bar to defendant's right to recover.

The following rule announced in 9 Am. Jur. 920, sec. 803, prevails: "The general rule is that failure to give notice of a claim for damages or loss in accordance with a

stipulation in a contract for the shipment of goods is excused, or is inapplicable, where the carrier has or is chargeable with actual knowledge of all the conditions as to damages that a written notice could give."

When an action of this nature is instituted, the shipper may avail himself of the right to counterclaim or set-off, as provided in sections 20-813, 20-814, 20-816, and 20-818, Comp. St. 1929.

As announced in 13 C. J. S. 759, sec. 318 (b) : "Practically any matter which tends to defeat or diminish the carrier's right of recovery, either in whole or in part, may be asserted by way of defense, provided it has been properly pleaded. Also, it is generally held that defendant may set off, or counterclaim for, a valid claim or demand against the carrier, either to defeat or reduce its recovery, or to obtain affirmative relief against it for any excess. It is now fairly well established that this right of set-off or counterclaim is not affected or restricted by the provisions of the Interstate Commerce Act, or similar state statutes; but prior to the decision of the United States supreme court in *Chicago & N. W. Ry. Co. v. Lindell,* a number of cases, most of which may now be regarded as overruled, denied the right to maintain a counterclaim or set-off, on the theory that the allowance thereof would be to provide a means for avoiding statutory rules and restrictions against discrimination and rebates."

Obviously, the defendant followed the case of *Chicago & N. W. Ry. Co. v. Lindell,* 281 U. S. 14, 50 S. Ct. 200, in which case the rule as above quoted was settled. The opinion determined the manner of procedure under the California statutes which are, in all respects, like those of Nebraska, affecting counterclaims, set-offs and cross-claims or demands.

The adjustment of defendant's demand by cross-claim in plaintiff's action, rather than by independent suit, is favored and encouraged by law. Such practice serves to avoid circuity of action, multiplicity of suits, inconvenience, expense, unwarranted consumption of the court's time, and injustice.

Citation of authority is deemed unnecessary. The defendant followed a recognized procedure in filing his counterclaim.

Section 4 (b) of the bill of lading provides, in part, for the sale of materials by public auction and published notice of the time and place of sale, and further that a 30-day period must elapse before the publication of the notice of sale; this to occur after notice that the property is refused or remains unclaimed, as the case may be. Plaintiff's contention is that defendant waived the foregoing provisions of the bill of lading by authorizing plaintiff to sell the scrap iron at private sale. Defendant did not agree to accept the offer of $500 obtained by plaintiff, did not accept, and did not authorize the plaintiff to proceed to sell the scrap iron at private sale. During the course of the negotiations, the general attorney for the plaintiff informed defendant to dispose of the car, or it would be sold under the terms of the bill of lading. After the sale, the defendant received a letter from the same source, showing the application of the proceeds of the sale and indicating that suit would be brought to collect the balance due. The bill of lading is a creature of the plaintiff, and it is duly bound to follow its own terms. No act on the part of the defendant hindered the plaintiff from selling the scrap iron, as provided by the bill of lading, even though the defendant expressed the desire not to have it sold as a distressed car by the claim department.

In 13 C. J. S. 791, sec. 331, it is said: "By virtue of statutes which have been adopted in many jurisdictions, a carrier may be entitled to enforce his lien by a sale of the goods after a specified time if the freight remains unpaid; and especially is this true in the case of perishable goods. If the statutory provisions are strictly complied with, the carrier is not liable as for conversion. It is essential, however, that there be strict compliance with all material provisions, such as those relating to notice to the owner or advertisement of the sale; and, unless there has been a waiver of the statutory requirements by the owner of the goods, a sale of property by the carrier amounts to a conversion when it is not made in accordance with the statute authorizing it."

"Conversion is any distinct act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his rights therein." (Cases cited.) 26 R. C. L. 1098, sec. 3.

"Any unlawful interference or exercise of dominion with respect to the property by which the owner is damnified is sufficient." 26 R. C. L. 1110, sec. 20.

In the case of *Briggs v. Boston & L. R. Co.*, 6 Allen (Mass.) 246, 83 Am. Dec. 626, the court held: "If a carrier who has a lien on goods for freight wrongfully sells them, he is liable to an action for the conversion; and the measure of damages is the market value of the goods, deducting the amount of the lien."

The foregoing authorities are applicable. In the instant case the plaintiff exercised dominion over the carload of scrap iron to the exclusion of and in a manner inconsistent with the owner's rights. 26 R. C. L. 1098, sec. 3.

We have examined the plaintiff's contention that the liability of the carrier in the instant case was that of a warehouseman, and the goods, being hazardous, could be sold under section 88-138, Comp. St. 1929, and the further contention that defendant abandoned the shipment and is estopped to claim conversion. We find them to be without merit.

AFFIRMED.

IN RE ESTATE OF WILLIE C. ERWIN.
JOHN L. BARBER JR., EXECUTOR, APPELLANT, V. ROSCOE H. ERWIN ET AL., APPELLEES.
296 N. W. 330

FILED FEBRUARY 4, 1941. No. 30930.

1. **Executors and Administrators.** Where at hearing in district court on executor's application for license to sell real estate to pay debts, it appearing that there was sufficient personalty to pay the costs of administration and that every creditor of the estate with an unpaid claim filed written request that the application be dismissed, showing that sale under present economic conditions

would cause sacrifice of the land for a mere fraction of its value, the application was properly dismissed by the court, since the application was brought for the creditor's benefit.

2. ———. Where application of executor for license to sell real estate to pay debts was dismissed on written request of creditors showing that sale under present economic conditions would cause sacrifice of land for mere fraction of its actual value, the dismissal would not bar future action either by district court upon application and showing by the executor, or by the county court which has jurisdiction to require executor to apply to district court for license to sell real estate for payment of debts.

APPEAL from the district court for Burt county: JOHN W. YEAGER, JUDGE. *Affirmed.*

Chatt & Ellenberger, for appellant.

Carroll O. Stauffer, contra.

Heard before SIMMONS, C. J., EBERLY, PAINE and MESSMORE, JJ., and LANDIS and MUNDAY, District Judges.

LANDIS, District Judge.

This is an action where an executor applied to the district court for a license to sell real estate to pay debts, which was denied, and the executor appeals.

In the testate estate of Willie C. Erwin, deceased, the executor, John L. Barber, Jr., found, after the order allowing claims and barring future demands was entered, that there was insufficient personal property to pay the creditors and costs of administration.

The sole asset available for the payment of claims outside of the personalty, which amounts to enough to pay the costs and expenses of administration, was 240 acres in Burt county, Nebraska, encumbered by a real estate mortgage in the principal sum of $15,000.

The executor properly applied for a license to sell the land and subject whatever equity there might be to the payment of the creditors of the estate.

When the hearing was had on the application in the district court, every creditor of the estate, with an unpaid claim, filed in writing with the court a request that the

application be dismissed, showing the court that they were not at this time demanding that their claims be paid and that a sale had at this time under present economic conditions would cause a sacrifice of the land for a mere fraction of its actual value.

The primary object of the application is to sell the land for the payment of the claims of the creditors. It is brought for the benefit of the creditors. But the district court had the unusual condition of those for whom the benefit of the action was brought, specifically asking that the application be dismissed and that they did not want the benefits at this time sought for them by the executor. It is elemental that these creditors should have that right. The application was properly dismissed by the court.

The dismissal herein in no way bars future action either by the district court upon due application and showing by the executor, or by the county court which has jurisdiction to require the executor to apply to the district court for a license to sell real estate for the payment of debts. *In re Estate of McLean,* 136 Neb. 353, 285 N. W. 915.

AFFIRMED.

CELWYN MERVYN DOWNS, APPELLEE, V. NEBRASKA STATE BOARD OF EXAMINERS FOR PROFESSIONAL ENGINEERS AND ARCHITECTS, APPELLANT.

296 N. W. 151

FILED FEBRUARY 4, 1941. No. 30951.

1. **Licenses.** Under section 71-3309, Comp. St. Supp. 1939, providing that professional engineers who were residents of state, of good character, should be issued certificate of registration to practice engineering without written or oral examination, an applicant who had the required residence, had paid registration fee, and was a professional engineer of good character and of high scholastic standing was entitled to certificate of registration, notwithstanding the applicant, besides practicing his profession of engineer, was owner and manager of a company with which a considerable portion of his time was taken up.

2. **Mandamus.** Where application was made to the Nebraska State Board of Examiners for Professional Engineers and Architects by one entitled to certificate of registration under section 71-3309, Comp. St. Supp. 1939, bearing date of December 27, 1937, and up to hearing on December 4, 1939, on mandamus for writ directing the board to issue certificate of registration, the board had taken no action though request had been made for such and no valid excuse for the delay appeared, the delay was unreasonable and the applicant was entitled to writ of mandamus under section 20-2156, Comp. St. 1929, directing issuance of certificate of registration.

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

Walter R. Johnson, Attorney General, and *Clarence S. Beck,* for appellant.

Burkett, Wilson & Van Kirk, contra.

Heard before SIMMONS, C. J., EBERLY, PAINE, MESSMORE and YEAGER, JJ., and LANDIS and MUNDAY, District Judges.

LANDIS, District Judge.

This is an action in mandamus brought by the relator, Celwyn Mervyn Downs, wherein he seeks a peremptory writ of mandamus directing the Nebraska State Board of Examiners for Professional Engineers and Architects to issue him a certificate of registration to practice engineering without an examination as provided for by section 9 of Legislative Bill No. 14 of the 1937 session (Comp. St. Supp. 1939, sec. 71-3309). A peremptory writ was issued below, and the board of examiners appeals.

The controlling issues are: Was relator entitled to be registered, was the action of the board arbitrary, and was there an abuse of discretion of the board of examiners. Having resolved these issues in favor of relator, an action in mandamus is the proper remedy. Comp. St. 1929, sec. 20-2156; *State v. School District,* 31 Neb. 552, 48 N. W. 393; *Jackson v. State,* 57 Neb. 183, 77 N. W. 662; *State v. Lincoln Medical College,* 81 Neb. 533, 116 N. W. 294.

In 1937 there was enacted in our state a new law pro-

viding, for the first time, regulation of the practice of engineering and architecture, making it a misdemeanor to so practice without a license. The act provided that professional engineers who were residents of the state, of good character, should be issued a certificate of registration to practice engineering without written or oral examination. It defined, substantially, professional engineering as any professional service, such as consultation, investigation, evaluation, planning, design or responsible supervision of construction, when such professional service requires the application of engineering principles and data.

The record reflects that relator had the required residence, paid the fee, is and was a professional engineer within the definition of the statute, of good character, having high scholarship standing, held the degrees of Bachelor of Science in Mechanical Engineering, 1923, Master of Science in Mechanical Engineering, 1924, granted by the University of Nebraska, and had teaching experience in the Engineering Department of the University of Nebraska.

The relator was entitled to a certificate of registration under section 9 of the act.

The declaration of policy of the act and as to its construction is found in section 71-3317, Comp. St. Supp. 1939, namely: "The legislature hereby declares that this act is necessary for the public convenience and welfare, is remedial in nature and shall be construed liberally."

Within the realm of arbitrary action and abuse of discretion of the board, the record shows an unreasonable and inexcusable delay of action in this matter. Application was made to the board by the relator for registration to practice his profession of engineering bearing date of December 27, 1937, and up to the hearing on the mandamus on December 4, 1939, no action by the board had been taken, though requests had been made for such. No valid excuse appears for the delay.

Relator, besides practicing his profession of engineer, is owner and manager of a company which manufactures items made out of paper. A considerable portion of his time is

taken up with this company. Yet the board registered the Dean of the University of Nebraska Engineering Department to practice the profession of engineering where all his time was taken up with his university duties to the exclusion of the practice of his profession. The record fails to show the Dean ever practiced his profession of engineering. The board licensed two capable professional engineers, one with all his time taken by his official duties as governor of the state, and the other as member of the state board of control.

An experienced, learned trial judge carefully considered this case below and ordered the writ to issue. The record fully sustains this action; we concur therein, and the judgment of the trial court is

AFFIRMED.

U. S. TIRE DEALERS MUTUAL CORPORATION, APPELLEE, V. CHARLES B. LAUNE ET AL., APPELLANTS.
296 N. W. 333

FILED FEBRUARY 7, 1941. No. 30941.

1. **Estoppel.** "A party entitled to an estoppel need not in all cases formally plead the estoppel. If the facts constituting the estoppel are in any way sufficiently pleaded, he is entitled to the benefit of the law arising therefrom." *City Nat. Bank of Hastings v. Thomas*, 46 Neb. 861, 65 N. W. 895.
2. **Appeal.** This court will dispose of a case on the theory on which it was presented to the trial court.
3. **Corporations.** A party who contracts with a company and recognizes and deals with it as a corporation is estopped to deny its corporate existence.

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

C. S. Wortman and *Armstrong & McKnight*, for appellants.

Robert M. Armstrong, contra.

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

SIMMONS, C. J.

Plaintiff sued defendants to recover the amount alleged to be due upon a promissory note, signed "Auburn Tire & Battery Co., by A. A. Owens," and upon an open account for merchandise sold and delivered. From a judgment for the plaintiff, defendant Laune appeals.

The following questions are presented: (1) Did the court err "in rendering a judgment against this defendant on the theory of partnership by estoppel, which was never pleaded and is opposed to the theory of the petition?" (2) Does the failure of plaintiff to prove its corporate capacity require a reversal? (3) Was the evidence sufficient to sustain a judgment against the defendant Laune?

As to the first question, plaintiff alleged that the defendants, Charles B. Laune and A. A. Owens, were "associated together as a copartnership and doing business under the firm name of Auburn Tire & Battery Company." Defendant Laune by answer denied generally the allegations of plaintiff's petition as to the existence of the partnership and alleged that "he and said A. A. Owens were never associated together as partners at any time or place, or under any name;" that he "never intended to be such partner; that he never held himself out to this plaintiff or to anybody as such partner;" that he never permitted "himself to be identified as a partner;" that "plaintiff had no notice or knowledge from this defendant of any such copartnership * * * that neither was ever given or ever in fact existed;" that plaintiff never made inquiry of this defendant as to such alleged relationship, and that he "never agreed directly or indirectly to pay any part of the claims herein alleged."

Plaintiff filed a general denial for reply to this answer.

It has long been the rule that "A party entitled to an estoppel need not in all cases formally plead the estoppel. If the facts constituting the estoppel are in any way sufficiently pleaded, he is entitled to the benefit of the law

arising therefrom." *City Nat. Bank of Hastings v. Thomas*, 46 Neb. 861, 65 N. W. 895. The case was obviously tried by both parties upon the question whether or not the defendant was estopped to deny that a partnership existed. Defendant requested the court to instruct the jury that, "If you should find by a preponderance of the evidence that the defendant, Charles B. Laune, made such representation to the plaintiff or to other persons which came to the knowledge of the plaintiff that he was a copartner in the business conducted under the firm style and name of the Auburn Tire & Battery Company, then he would be estopped to deny the copartnership provided you further find that the plaintiff relied upon such representation and advanced credit to the Auburn Tire & Battery Company."

"It is a settled rule of this court that it will dispose of a case on the theory on which it was presented to the trial court." *Parker v. Knights Templars & Masons Life Indemnity Co.*, 70 Neb. 268, 97 N. W. 281. "The theory adopted at the trial as to the issues will be followed on appeal." *Norton v. Bankers Fire Ins. Co.*, 115 Neb. 490, 213 N. W. 515.

The assignment of error is not sustained.

As to the second question: Plaintiff alleged its corporate capacity; defendant by its answer denied the allegation. Plaintiff did not offer evidence directly establishing its corporate capacity. It did offer testimony to the effect that defendant Laune had dealt with the plaintiff as a corporation; that he was a party to a consignment agreement with the plaintiff wherein it is recited that plaintiff is "a Delaware corporation;" that he addressed letters to it in its corporate name which contains the word "corporation." A party who contracts with a company and recognizes and deals with it as a corporation is estopped to deny its corporate existence. *Societe Titanor v. Paxton & Vierling Iron Works*, 124 Neb. 570, 247 N. W. 356. See, also, *Retail Merchants Service v. Bauer & Co.*, 125 Neb. 61, 248 N. W. 813, for an exposition of the reason for the rule.

As to the third question: Plaintiff offered evidence that defendant Laune acknowledged his partnership connection

with the business, and that credit to the company was approved in reliance thereon. A report from defendant Laune to Dun and Bradstreet contains the following statement addressed to defendant Laune: "It is claimed, or otherwise reported, that you are a general partner in the firm of Auburn Tire & Battery doing business at Auburn, Neb., and as such general partner liable for all the debts and obligations of the said firm. Please inform us below whether you acknowledge such general partnership." To that inquiry Laune answered, "Yes, the above quotations are correct." Evidence that plaintiff relied upon this and other statements was admitted without objection. Defendant now argues that the answer to the above question of Dun and Bradstreet does not make "consistent sense." Apparently the contention is that the use of the word "quotations" renders the answer inconsistent. Clearly, the language means, "Yes, the above statements are correct." It was so interpreted by the party to whom it was sent. In *Paterson v. Mobile Steel Co.*, 202 Ala. 471, 80 So. 855, the answer to a similar inquiry was, "I acknowledge my connection as above." The statement was held sufficient "to induce a stranger, acting in good faith, to deal with the concern as if appellant was a partner therein." In addition to the above report there is substantial evidence that Laune held himself out to the plaintiff and others as a partner in the Auburn company. He signed the consignment agreement with the plaintiff (wherein the word "copartners" is used), the signature being "Auburn Tire & Battery Co., per A. A. Owens, Chas. Laune." December 10, 1938, he entered into an agreement with Owens whereby he transferred "all his rights, titles and interests" in the Auburn company to Owens, who assumed "any and all obligations" against the company. December 19, 1938, he notified the defendant he had "transferred all my interests" in the Auburn company to Owens and he was sure Owens would take care of his obligations "as per his agreement."

The court instructed the jury that, "Where a person voluntarily and knowingly holds himself out by his language and

acts to the public or third persons as the partner of another, and a third person deals with that other on the faith of an existing partnership, then the person so holding himself out will be liable as a partner to the person so dealing, nothwithstanding there was, in fact, no such partnership."

Defendant Laune's contention that this instruction was not within the issues has been determined. He does not otherwise criticize the instruction. The evidence amply supports the jury's verdict.

Reversible error is not found.

AFFIRMED.

HENRY JURGENSEN, APPELLEE, V. IRA ROGERS, DOING BUSINESS AS ROGERS CONSTRUCTION COMPANY, APPELLANT.
296 N. W. 341

FILED FEBRUARY 7, 1941. No. 31064.

Workmen's Compensation. An award of compensation benefits which is not based upon findings of fact showing it to be within the provisions of the workmen's compensation act is totally defective where it appears that the evidence upon which it is purportedly based is directly conflicting.

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

Clarke & Patterson, for appellant.

Torgeson & Halcomb, contra.

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

CARTER, J.

Plaintiff commenced this action under the workmen's compensation law to recover compensation for injuries sustained in an accident arising out of and in the course of his employment with the defendant. The trial court entered an award for plaintiff and the defendant appeals.

The record discloses that plaintiff was employed by the

defendant as a blade-machine operator on a highway construction job on the basis of a 40-hour week at 55 cents an hour. On June 26, 1939, at or about 10 o'clock a. m., and while so employed, plaintiff was standing on the platform of his machine, at which time he alleges that a sudden jerk caused him to be thrown against the machine in such a way as to injure plaintiff's back. The evidence is very conflicting as to the manner in which plaintiff's back was struck, although the incident was witnessed by the tractor operator and the foreman on the job. The foreman testifies that, although plaintiff was thrown around by the jerk of the tractor in starting, it was impossible for plaintiff to have been struck on the back by any part of the machine. Defendant paid compensation to the plaintiff for several months. We think that the circumstances shown by the record are sufficient to establish that an accident occurred which arose out of and in the course of the employment. The primary question to be determined from this record is the extent of the injuries sustained, if any, and the nature of the award, if any, to be entered under the provisions of the workmen's compensation law.

Plaintiff testified that with his left hand he was holding on to a large wheel used in operating the machine and was turning a crank on the right with his right hand when he was thrown around to his left, causing his right side and back to be injured by striking other parts on the left side of the machine. That the accident happened very suddenly is not disputed. Plaintiff continued work for the balance of the day, although he says his condition became progressively worse. No exterior marks or bruises on the person of plaintiff are shown by the record.

Plaintiff relies upon three osteopathic physicians and surgeons to establish the extent of the injury. The substance of their evidence is to the effect that plaintiff was suffering from an injury to the intervertebral discs with ankylosis of the thoracic vertebræ from the eighth to the twelfth, together with a possible fracture of the eleventh thoracic vertebra. One physician also testified that plaintiff had

traumatic neuritis of the sciatic nerve on the right side and a twisted and slightly dislocated pelvis, including an abnormal rigidity of the tissues in the sacroiliac region. The conclusion reached by plaintiff's expert witnesses is that, although further improvement may be expected, plaintiff is permanently disabled from doing any similar work in the future.

Defendant called as witnesses two local physicians; a physician and surgeon with 16 years practice in Denver, Colorado, and a member of the faculty of the Colorado University Medical School; and a physician from Denver, Colorado, who specializes in neurology. The testimony of defendant's experts is to the effect that plaintiff has suffered no injury to any vertebra through trauma, although there are evidences indicating that plaintiff is suffering from an osteoarthritic condition in no way related to an injury. They further testified that the nervous system and all reflexes were normal, no evidence of sciatica and no evidence of injury to the intervertebral discs. The general opinion of these expert witnesses was to the effect that plaintiff was exaggerating the pain in the back, was suffering from osteoarthritis of long duration and was not totally disabled and in no way disabled as a result of the accident.

The record shows that plaintiff was 59 years of age, was 6 feet in height and weighed about 220 pounds. There is evidence in the record of a previous injury to plaintiff's back, but the evidence is not sufficient to show that it contributed in any way to his present condition.

The evidence concerning the extent of the injury sustained and the resulting disability, if any, is so conflicting that we would ordinarily take into consideration the fact that the trial court, from the conduct and demeanor of the witnesses, and the manner of their testifying in his presence, has a better opportunity for determining their credibility and the weight to be accorded to their evidence than does this court. *Donker v. Central West Public Service Co.*, 134 Neb. 892, 280 N. W. 168. But in attempting to apply the foregoing rule we discover that the judgment of the trial

court merely finds that plaintiff was temporarily totally disabled and that he should receive compensation at the rate of $14.67 a week for 300 weeks. There is no finding of an accident suffered by plaintiff arising out of and in the course of the employment, or that any disability that plaintiff might have was a result thereof. For aught the findings of the trial court show, the temporary total disability may be the result of disease or some accident disconnected from the case before us. There is likewise no evidence in the record that plaintiff was temporarily totally disabled at the time the case was tried in the district court. Plaintiff contended at all times that he was totally and permanently disabled, while defendant urged that there was no disability at all which resulted from the accident. We are unable, therefore, to sustain the judgment of the trial court by applying the rules which ordinarily govern an appellate court in such cases. On the other hand, the plaintiff ought not to be deprived of benefits, if any, to which he might be entitled because of the failure of the trial court to make findings of fact on the material issues of the case.

While the workmen's compensation law is subject to liberal construction and procedural niceties ought not to be strictly adhered to, substantive requirements must be fulfilled. An award of compensation benefits without findings of fact showing that the case is one properly within the terms of the workmen's compensation law is fatally deficient where the evidence is in direct conflict as in the case at bar. We think, also, that the evidence in this case is such that an award should be entered, if the court finds plaintiff entitled to an award, fully determining the character and extent of plaintiff's disabilities, the amounts to be awarded and the time of their payment.

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

REVERSED.

J. W. FOX, APPELLEE, V. WALTER CARMAN ET AL., APPELLANTS.
296 N. W. 343

FILED FEBRUARY 7, 1941. No. 30946.

1. **Appeal.** In a law action tried to the court, its findings of fact have the same effect as findings of the jury, and cannot be set aside unless clearly wrong.
2. **Payment.** Where no specific direction is given by a debtor as to the application of a credit, the same may be applied by the creditor on any indebtedness owing by the debtor to the creditor.
3. ———. The court having found that an amount was agreed upon for pasturage on January 17, 1934, and that appellant Carman directed that he be given credit on his notes without designating any particular note, appellee had the right to apply the credit on the note in suit.

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

O. A. Drake, for appellants.

Dryden, Dryden & Jensen, contra.

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

YEAGER, J.

This is a suit on a promissory note. The case was tried to the court, jury having been waived. The judgment was in favor of plaintiff, appellee here, and against defendants, appellants here. The defendants appealed to this court for a reversal of the judgment of the district court.

On September 13, 1932, the appellants executed and delivered to appellee a certain promissory note for $125 with interest at 8 per cent. per annum after maturity. The note by its terms matured September 1, 1933. The note was given for rent owing by appellant Carman to the appellee. For some period during the year 1933, by agreement of the parties, appellee placed some calves in the pasture on the land occupied by appellant Carman, for which pasturage he was to pay Carman. Appellee contended that no agree-

ment was arrived at as to the value of the pasturage until January 17, 1934, when the amount of $5 was agreed upon. On January 17, 1934, appellee held notes of appellant other than the one in question here. On that date the notes appear to have been at the bank in Litchfield, but a short time thereafter the notes were, or at least this one was, turned over to one G. A. Engleman by appellee. Appellee testified that on January 17, 1934, when the amount of $5 was agreed on for the pasturage, appellant Carman instructed him to give him credit for the amount on his notes without designating any particular note on which the credit was to be given. Appellee testified further that on January 17, 1934, he neglected to enter the credit, but that two or three weeks later he directed G. A. Engleman, his agent, to indorse the credit of $5 on the note in suit as of January 17, 1934. Appellants in their answer filed a general denial and pleaded the statute of limitations. The appellant Carman in his evidence denied the agreement as to pasturage and also that he had directed a credit on his notes or on any note. He asserted that settlement for pasturage had been made long prior to January 17, 1934.

This suit was commenced on January 15, 1939, and service of process had on January 17, 1939, the last day of the five-year period following the claimed payment or credit of $5 on the note in question. If payment was in fact made, then action of appellee was in time and the defense of the statute of limitations is not available to appellants. This proposition must be resolved in favor of the appellee. The question was one of fact and is controlled by the often expressed rule that, in a law action tried to the court, its findings of fact have the same effect as findings of the jury, and cannot be set aside unless clearly wrong. *In re Estate of Wotke*, 133 Neb. 739, 277 N. W. 45; *Hole v. Hamp*, 134 Neb. 259, 278 N. W. 480; *Carter v. Parsons*, 136 Neb. 515, 286 N. W. 696. From an examination of the entire evidence we cannot say that the findings of the court were wrong.

Under the same rule we cannot say that the court was wrong in finding that the settlement was made on January

17, 1934, and that appellant Carman directed a credit on his notes without designating any note on which the settlement was credited.

The rule that, where no specific direction is given by a debtor as to the application of a credit, the same may be applied by the creditor on any indebtedness owing by the debtor to the creditor is applicable in this case. *Lenzen v. Miller*, 53 Neb. 137, 73 N. W. 460; *Lau v. Blomberg*, 3 Neb. (Unof.) 124, 91 N. W. 206; *State v. Security State Bank*, 116 Neb. 526, 218 N. W. 407.

It is therefore determined that the judgment of the district court should be and it is affirmed.

AFFIRMED.

IN RE ESTATE OF FRED STIEBER.
ETTA MAY VANDERLIP ET AL., APPELLEES, V. CHRISTIAN O. SCHLYTERN, ADMINISTRATOR, ET AL., APPELLANTS.

296 N. W. 336

FILED FEBRUARY 7, 1941. No. 30738.

1. **Wills.** The law of Nebraska favors the early vesting of estates, and if consistent with the intent of the testator, the court will construe a will so as to vest the estate immediately, even though the taker may be subject to being divested thereof later by some contingency.
2. ———. A devise of real estate to the testator's widow for the period of her natural life, and upon her death so much thereof as shall remain to two children of the widow, share and share alike, to them and to their heirs, creates but a life estate in the widow, even though the words "so much thereof as shall remain" are construed to give power to the widow to sell the entire fee title during her lifetime.
3. ———. The doctrine of acceleration of the time of the enjoyment of a remainder that is subject to a life estate, by the termination of the life estate by an act other than the death of the life tenant, such as an election by a widow to take by statute, will ordinarily be applied to cases in which such termination results in a diminution of the beneficial interests of the other beneficiaries in substantially the same proportion.
4. **Partition.** When a defect in a title to real estate in an action

for partition is of such a nature that it may be removed by further proceedings in such action, without injustice to a purchaser at a sale had therein, such purchaser should not be released from his bid merely on account of such defect.

5. Courts. A county court in Nebraska in the exercise of its probate jurisdiction, as a distinct and independent branch of jurisdiction, has no power to construe wills.

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

Holeman & Holeman, for appellants.

George I. Craven, contra.

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

TEWELL, District Judge.

Two separate actions were consolidated for trial in the district court for Lancaster county, and a separate final decree rendered in each cause. An appeal to this court was taken from each of such decrees, but both causes were argued and submitted to this court together. A disposition of each of such appeals is made herein. One of these actions was brought to partition real estate. It will be considered first.

Fred Stieber, sometimes herein called the testator, died testate and without issue on April 12, 1930. His last will was admitted to probate in Lancaster county on May 29, 1930. This will provided for the payment of his debts and expenses of burial and then contained paragraphs as follows:

"II

"One-third of the rest, residue and remainder of my property remaining after payment of debts and expenses as above provided, * * * I give, devise and bequeath same to my wife Almeda Stieber, for the period of her natural life, and upon her death so much thereof as shall remain, I give, devise and bequeath to her children, Etta May Vanderlip and Charles L. Ruckle, share and share alike, to them and to their heirs.

"III

"The remaining two-thirds of said residue, I give, devise and bequeath to my brother, Frank Stieber * * * my sisters, Katie Furst * * * Maggie Jensen * * * and Annie Amos, * * * share and share alike, to them or the survivors of them."

All persons whose names appear as beneficiaries in said will survived the testator. Subsequent to the death of such testator, Katie Furst, above named, died intestate while a widow, leaving six children as her only heirs. Annie Amos, named in said will, also died intestate subsequent to the death of said testator, and left surviving as her only heirs her husband, Frank Amos, and one son. Frank Stieber and Maggie Jensen, named in said will, the six children of said Katie Furst, deceased, and the husband and son of said Annie Amos, deceased, together with the spouse of such of them as are now married, became plaintiffs in the amended petition filed in this action for partition of all real estate of which said testator died seised. Almeda Stieber, named in said will as the wife of the testator, is the sole defendant in such action. Etta May Vanderlip and Charles L. Ruckle, each of them named in said will, and each of them a child of Almeda Stieber by a former marriage, were not made parties to such action. On June 27, 1930, the widow, Almeda Stieber, filed her election to take under the statutes governing descent. In the amended petition, filed in this partition action on February 11, 1936, it was alleged, in substance, that the effect of such election by said Almeda Stieber was to cause an undivided one-half of the estate of said testator plus homestead rights to pass to his widow, and an undivided one-half thereof subject to homestead rights to pass to Frank Stieber, Katie Furst, Annie Amos and Maggie Jensen, named in said will, share and share alike. On February 14, 1936, with the knowledge and consent of the attorneys for all parties to the partition action, a decree was entered therein by which the interests of the various parties in the real estate involved were fixed in the ratio alleged in said amended petition, and by which a referee was

appointed to make partition. The effect of this decree was to deny Etta May Vanderlip and Charles L. Ruckle, named in said will, any interest in said real estate, without their being parties to this action. After approval of a report of the referee to the effect that partition in kind could not equitably be made, a sale of all land involved was ordered. The real estate consisted of several tracts, a portion of which is located in each of the counties of Buffalo, Gage and Lancaster. Sale was duly made of all tracts involved, except the tract constituting the defendant Almeda Stieber's homestead, each tract being advertised for sale and sold in the county in which it is located. At the various sales Etta May Vanderlip became the purchaser of each tract sold. She paid nothing to the referee at the time of sale, although the sale notices called for 10 per cent. of the sale price at the time of sale. Report of such sales was filed by the referee on June 4, 1936, and on June 13, 1936, upon motion of the plaintiffs, and with knowledge of attorneys for all parties, all sales were confirmed by the court and the referee ordered to "complete said sales by delivering good and sufficient deeds and abstracts to said purchaser." About sixteen months later, and on October 19, 1937, Frank Stieber, who was only one of the plaintiffs, filed a motion in this action by which he asked, among other things, that the confirmation of sale be set aside, and resale had at cost of Etta May Vanderlip, the purchaser, and that such purchaser be made to pay the deficiency, if any, between the purchase price at the new sale and that at the prior sale. On April 16, 1938, an order was entered purporting to set aside the order directing sale, entered March 5, 1936, and the order of confirmation entered June 13, 1936. This order was made merely upon said motion of Frank Stieber. On April 30, 1938, Etta May Vanderlip filed a motion by which she asked that the order of April 16, 1938, above mentioned, be Vanderlip filed what she termed an answer to motion and vacated. On May 14, 1938, an order was entered vacating the order of April 16, 1938, and setting the application of Frank Stieber for hearing. On June 4, 1938, Etta May

application, and by which she alleged an ownership of an interest in the real estate involved in herself and her brother, Charles L. Ruckle, by virtue of the said will of said testator, and by which she asked to be released from her purchases at the sales held in this action, without cost or expense to herself, on account of the defect in necessary parties to the action. On February 2, 1939, after a hearing, the trial court entered an order purporting to release Etta May Vanderlip from each and all of her purchases at said sales without cost or liability to her on account of a lack of necessary parties to the partition action and inability of the referee to convey merchantable title to her. The appeal from this last mentioned order by one of the plaintiffs and by the executor of the estate of said Fred Stieber, deceased, is the matter now before this court in such partition action.

The question presented in the action for partition involves a construction of the above quoted provisions of the will of Fred Stieber, deceased, along with a consideration of the facts above stated. One contention of the appellants is that such will devised an undivided one-third interest to Almeda Stieber in fee, on account of the remainder over to Etta May Vanderlip and Charles L. Ruckle being limited in amount by the words "so much thereof as shall remain." In this contention the appellants argue that such clause gave a power of disposition or sale of the one-third given Almeda Stieber to the first taker, and thereby causes the remainder over to her children to be repugnant to the devise to the first taker and therefore void. To support this contention the appellants cite, among others, the following cases: *Hall v. Palmer*, 87 Va. 354, 12 S. E. 618; *Farish v. Wayman*, 91 Va. 430, 21 S. E. 810; *Rodenfels v. Schumann*, 45 N. J. Eq. 383, 17 Atl. 688; *Bradley v. Carnes*, 94 Tenn. 27, 45 Am. St. Rep. 696; *Young v. Hillier*, 103 Me. 17, 67 Atl. 571; *Methodist Church of Monmouth v. Fairbanks*, 124 Me. 187, 126 Atl. 823; *Spencer v. Scovil*, 70 Neb. 87, 96 N. W. 1016. Some of these cases deal with the effectiveness of a conveyance by the first taker, who was given power of sale, to cut off the rights of the remainderman. No such ques-

tion is here involved. We are unable to agree with this contention of appellants. The law of Nebraska favors the early vesting of estates, and when consistent with the intent of the testator the court will construe a will so as to vest the estate immediately, even though such estate may be subject to being divested later by some contingency. *Davis v. Davis,* 107 Neb. 70, 185 N. W. 442; *Drury v. Hickinbotham,* 129 Neb. 499, 262 N. W. 37. That the intent of the testator as disclosed from the entire will must be given effect, so far as such intent is consistent with rules of substantive law, has many times been held by this court. Plainly the intent of the testator in this case was to give one-third of his estate to his widow during her life, with power of sale, and that upon her death such part of such one-third as was then remaining should go to her two children in fee. Even though the words "so much thereof as shall remain" be construed as giving the life tenant a power to convey the estate during her life, and thereby to divest her two children of their fee, yet there is nothing in such an expressed intent of the testator that is inconsistent with any rule of law. *Abbott v. Wagner,* 108 Neb. 359, 188 N. W. 113; *Merrill v. Pardun,* 125 Neb. 701, 251 N. W. 834; *Drury v. Hickinbotham, supra.*

The appellants contend, in case the widow did not take a fee title, that the brother and three sisters of the testator, named in said will, are shown by the will to be preferred objects of the testator's bounty to such an extent as to cause the court not to apply the doctrine of acceleration of remainders, and to declare that the estate that the widow renounced by her election, namely, an estate for the life of the widow in the one-sixth interest left to the remaindermen, should go to enlarge the estate left to such brother and sisters after such election, in order to carry out the intent of the testator. The appellants cite *Meek v. Trotter,* 6 Thompson (Tenn.) 145, 180 S. W. 176; *Estate of Vance,* 141 Pa. St. 201, 21 Atl. 643; *Trustees Church Home v. Morris,* 99 Ky. 317, 36 S. W. 2. It has been held that a testator is presumed to know that his widow may renounce his will

and elect to take by descent. *In re Estate of Hunter,* 129 Neb. 529, 262 N. W. 41; *Hill v. Hill,* 90 Neb. 43, 132 N. W. 738. It has also been held that the election of a widow to renounce the provisions of the will of her deceased husband, and to take by statute, ordinarily does not render the will inoperative. *In re Estate of Grobe,* 101 Neb. 786, 165 N. W. 252; *In re Estate of Hunter, supra.* We see nothing in the record in this case to call for the application of any doctrine of sequestration such as asked by appellants. The will gave each person named therein, other than the widow, an undivided one-sixth of the estate, with the widow's life estate carved out of the shares of her two children. By the widow's election the share of each of the others was reduced to a one-twelfth interest. What may have been the social relationship between the testator and his brother or any of his sisters, or between the testator and either of the remaindermen, is not disclosed by the record. The ages of none of the parties, or how they lived with relation to each other, the record does not disclose. Neither the evidence nor the will itself discloses any sufficient reason to cause one to believe that the brother and three sisters were special objects of the testator's bounty. We do not deny the existence of a doctrine of sequestration such as contended for by the appellants, but it must not be used to defeat the acceleration of a remainder upon termination of a life estate, by an act other than the death of the life tenant, except where necessary to effectuate what is shown to be the testator's intent. The doctrine of acceleration of the time of the enjoyment of a remainder that is subject to a life estate by the termination of such life estate by an act other than the death of a life tenant, such as an election of a widow to take by statute, will ordinarily be applied to cases in which such election results in a diminution of the beneficial interests of the other beneficiaries in substantially the same proportion. *In re Povey's Estate,* 271 Mich. 627, 261 N. W. 98; *McCollum v. McCollum,* 108 Neb. 82, 187 N. W. 783. An interesting discussion of situations in which such doctrine of acceleration of remainders will not be applied, and in

which the doctrine of sequestration contended for by appellants will be applied, is found in *Sellick v. Sellick*, 207 Mich. 194, 173 N. W. 609, 5 A. L. R. 1621. It will be seen from the above that upon the death of the testator and after the widow's election to take by statute, the parties named in said will, assuming all then still living, owned the real estate involved in the following proportions, to wit: Almeda Stieber, the widow, an undivided one-half interest and whatever homestead rights existed; Frank Stieber, Katie Furst, Maggie Jensen and Annie Amos, an undivided one-third interest, under the terms of the third paragraph of said will, subject to said homestead rights, and Etta May Vanderlip and Charles L. Ruckle each an undivided one-twelfth interest in fee subject to said homestead rights.

The question now remaining is that of whether Etta May Vanderlip should be released from her purchase under the facts above stated and the holdings above made. That a defect in parties to this action exists is true. However, the purchaser herself owns one-half of the interest not owned by the plaintiffs and the defendant. The record title to the real estate involved at the time of her purchase gave full notice of all facts that make other parties to the partition action necessary. At the time of each sale she caused checks for 10 per cent. of the purchase price to be given the referee, but cash could not be procured upon them. About sixteen months elapsed after the date of sale before she complained of any defect in title. No order distributing the proceeds of the sale or fixing the amount that any person owning an interest shall receive has been made. While the whereabouts of Charles L. Ruckle is said to be unknown, such fact and other facts shown in the record do not offer any substantial barrier to such proceedings in this action as will enable the referee to convey to her a merchantable title. Nearly five years have passed since the dates of her purchases. The cost of sales in three counties are considerable. When a defect in a title to real estate in an action for partition is of such a nature that it may be removed by further proceedings in such action without injustice to a

purchaser at a sale had therein, such purchaser should not be released from his bid merely on account of such defect. *Kummer v. Kummer,* 112 Neb. 220, 199 N. W. 35. From the record before us, we can see no injustice in refusing to release the purchaser of her bid, if the plaintiffs, with reasonable promptness, by further proceedings in this action make all parties having an interest in the real estate a party hereto and cause the purchaser to be tendered the title she purchased. In this connection we desire to point out that the record shows that Frank Stieber died on November 8, 1937, and that proceedings to revive have not been had. This should be done before a resale of the property. A resale of the property after all necessary parties have been made parties hereto, to enforce the purchaser's bid, or on application of the parties in case the real estate has advanced in value, is not intended to be prevented by any statement made herein.

We come now to a consideration of the other action that was consolidated with the partition action above discussed for trial, and for presentation to this court. This action was instituted by a pleading filed in the county court in the proceedings that were being had to probate the estate of Fred Stieber, deceased. Such pleading was designated as "Application For Construction Of Will," and was filed on September 23, 1937, by Christian O. Schlytern, as the then acting executor of said estate. He was the sole applicant in such pleading. Said executor pleads the controversy existing between the devisees under the will above mentioned, that all debts have been paid, that the various parties in said partition action were making demands upon him, and in general sets up reasons for his desiring the aid and direction of the probate court. No prayer other than for a construction of the will is made. On October 21, 1937, a hearing was held upon the said application of said executor, apparently without any answer or objection being filed. The decree of the probate court recites that Etta May Vanderlip and Charles L. Ruckle and the brother and three sisters of the testator were represented by counsel. This

decree construed the will of said Fred Stieber, deceased, in such manner as to deny Etta May Vanderlip and Charles L. Ruckle any interest in the estate of the testator. Etta May Vanderlip and Charles L. Ruckle perfected an appeal to the district court for Lancaster county, and there filed their petition on appeal. Said Christian O. Schlytern filed an answer to such petition. As above set forth, this cause was consolidated with the partition action above mentioned for trial. The district court upon such appeal entered a decree by which the will was so construed as to create the same estates as the construction given by us in the partition action above discussed. The appeal to this court from such decree was by Christian O. Schlytern. Pending the appeal in this court said Schlytern was succeeded as executor by Bernard Maxey, who has been substituted in this court as a party in lieu of said Schlytern.

A county court in Nebraska in the exercise of its probate jurisdiction, as a distinct and independent branch of jurisdiction, has no power to construe wills. *Andersen v. Andersen,* 69 Neb. 565, 96 N. W. 276; *Lesiur v. Sipherd,* 84 Neb. 296, 121 N. W. 104; *Youngson v. Bond,* 69 Neb. 356, 95 N. W. 700. Under the record in this case, the construction of the will by the probate court was not incident to distribution of the estate, but solely for the benefit of the executor in advance of any distribution. Such a decree bound no one, but could only be for the guidance of the executor. No appeal from such decree would lie, and the district court acquired no jurisdiction on appeal.

For reasons above stated, the decree of the district court in the action to partition real estate is reversed for further proceedings in conformity to this opinion. Costs of appeal in said action are taxed to Etta May Vanderlip. The decree of the district court in the action, or proceedings, begun in the county court is reversed, with instructions that such proceedings be dismissed. Costs of appeal in such action taxed to Etta May Vanderlip and Charles L. Ruckle.

REVERSED AND REMANDED.

ALMA WILLIS, APPELLANT, V. ORDER OF RAILROAD TELEGRAPHERS ET AL., APPELLEES.
296 N. W. 443

FILED FEBRUARY 14, 1941. No. 30948.

1. **Witnesses.** When the insured waived all legal objections, for himself and his beneficiary, to allowing any physician consulted by him at any time to testify in any matter involving the policy of insurance, and the beneficiary in writing also authorized any physician to testify, or the examination of hospital records, in regard to the insured, it was not error to admit such evidence.
2. **Insurance.** Nonmedical application for insurance in a fraternal company is not required to be attached to the policy, but warranties therein are conditions precedent to the issuance of the policy.
3. ———. The burden of proving that the insured was not in sound health at the time of the issuance of the policy is upon the defendant.
4. ———. Such good health as insured warranted in his application was that he had no serious disease, or any ailment seriously affecting his general soundness or health. If he had a cancer of the kidney at that time, from which he later died, he was not in good health when he signed his application.
5. **Evidence.** The official charts and records, kept in the regular course of business under the rules of a reputable hospital, are admissible in evidence when a proper foundation has been laid.

APPEAL from the district court for Burt county: JOHN W. YEAGER, JUDGE. *Affirmed.*

Everett C. Pilcher, for appellant.

Crossman & Barton and *Edward A. Nelson, contra.*

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

PAINE, J.

Suit was brought by the widow and beneficiary upon a fraternal benefit department insurance policy carried by her husband. The defendant paid $1,000, which plaintiff accepted, to apply upon the policy, and plaintiff brought suit for the remaining $2,000. At the close of the evidence, the trial judge, upon motion of defendant, took the case from the jury and dismissed the action. Plaintiff appeals.

An amended petition was filed in the district court, alleging that the plaintiff was the widow of LeRoy F. Willis, who was a telegrapher for the Burlington railroad at Omaha, and who was a member of the Order of Railroad Telegraphers, which order conducted a mutual benefit department, from which in 1911 deceased secured a $1,000 life insurance policy. In September, 1936, a new policy was issued to him in the sum of $3,000 in the legal reserve class, and all premiums were paid thereon. LeRoy F. Willis died March 28, 1938, and due notice and proof of death were given to the defendant, and on June 9, 1938, the defendant mailed the plaintiff a draft for $1,000, and refused to pay the balance of $2,000 upon said policy. Because of such refusal to pay the balance, the plaintiff asked for judgment in the sum of $2,000 and interest, together with a reasonable attorney's fee.

The defendant admits in its answer the death of the insured, and that proof of death was duly made, and $1,000 paid thereon. Defendant alleges that it is an incorporated fraternal beneficiary association, with its principal office and place of business in St. Louis, Missouri, and admits to membership only persons engaged in the occupation of railroad telegrapher, which occupation is a hazardous occupation, and that the Order of Railroad Telegraphers has maintained a mutual benefit department for the issuance of certificates or policies of life insurance. Defendant further alleges that on August 14, 1911, it issued to the deceased a "Current Cost Class" certificate for $1,000 life insurance, the same being issued upon a nonmedical application as to insurability; that on August 11, 1936, the deceased, being then a member of the Order of Railroad Telegraphers, signed an application to transfer the policy of $1,000, which he had carried for 25 years, into $1,000 of insurance in the "Legal Reserve Class," and applied for an increase of $2,000 additional in that class, and submitted his written nonmedical application to the defendant for such additional amount of such insurance in the amount of $2,000, making a total policy of $3,000.

One of the provisions of the nonmedical application stated that he warranted the foregoing answers and statements as full, true and correct, and agreed that the answers and statements should be held to be warranties, and he agreed to be bound by the constitution and laws of the Mutual Benefit Department of the Order of Railroad Telegraphers then in force, or as the same might be amended or enacted, without reservation or exception. He further agreed to waive, both for himself and his beneficiary, all legal objections to allowing any physician or surgeon consulted by him at any time to testify in any matter involving his contract and the policy of insurance issued, and finally, in consideration of the issuance of the policy, he made the statement, "I warrant that I am now in sound physical and mental condition of health."

The defendant alleges that the conversion of the original $1,000 certificate did not depend upon the insurability of the insured, but was a right which he had without medical examination, but that the issuance of any additional amount of insurance in the legal reserve class was dependent upon his insurability therefor; that in his application for such additional insurance he answered that the only medical or surgical advice or attention which he had received in the last ten years was for pneumonia in the month of December, 1932; that its duration was four months; that there were no complications; that no operation was performed, and the result was a complete recovery. In addition, he stated, in answer to other questions, that he had had no other illness, and that he was in good health at that time, and that he had set forth all of his past ailments and physical impairments, and that, relying upon these answers, the defendant issued and delivered to the deceased a $3,000 legal reserve policy. Article 18 of the laws of the defendant at the time of the application provided that false or fraudulent statements made to procure the issuance of a policy should be sufficient cause for the revocation of the certificate or policy.

Defendant further alleges that, upon the submission of

the proof of death by plaintiff to defendant on April 5, 1938, it was ascertained by the defendant that the deceased had been attended by a physician other than Dr. H. J. Jenkins, as stated in his application, and that the deceased had not had a complete recovery from pneumonia in 1932, and that he had submitted to an operation on the wall of his chest on January 17, 1933, for the draining of the pus from his left lung, and never had completely recovered from the attack of pneumonia; further, that from July, 1935, the insured had hematuria, or intermittent bleeding in his urine, attributable to his left kidney, and that there was a malignant tumor, or cancer, in said left kidney, which was removed October 6, 1937, and by reason of which he died March 28, 1938.

Defendant charges that, at the time of the application and the warranties made by the insured, he was not then in good health, as warranted by him; that he did not set forth all of his past ailments and physical impairments, as warranted by him, and that the express, false and untrue warranties were material to the risk, and directly affected the insurability of the insured, and that said warranties were relied upon and acted upon by the defendant, when, if the true facts had been known, defendant would have refused to issue the policy for an additional $2,000.

The defendant further alleges that, upon ascertaining the facts, it tendered to the plaintiff its check in the amount of $174.72, representing the full amount of the two premiums paid by the deceased for the $2,000 additional insurance; that the plaintiff returned said check, but the defendant has kept its tender good, and deposited said amount with the clerk of the court at the time of filing its answer, and prays that the petition be dismissed.

The plaintiff for a reply specifically denies any fraud or misrepresentation on the part of the deceased, and that he had no knowledge of any incorrect statement, and charges that the insurance contract was inseparable and indivisible, and that the defendant admitted liability by paying $1,000 to apply on the $3,000 contract, and is estopped to deny liability for the remainder of said contract.

A jury being duly impaneled, trial was had, and at the conclusion of all the evidence the court sustained a motion of the defendant for a directed verdict and dismissed the plaintiff's action, and directed that the deposit with the clerk of the refund premiums in the amount of $174.72 be first applied to the payment of the defendant's costs and the balance paid to the plaintiff.

Plaintiff in her motion for a new trial sets out 14 errors, covering many rulings upon the admission and rejection of testimony; that the judgment entered is not sustained by sufficient evidence, is contrary to law, and because of newly discovered evidence.

In the brief, specific errors relied upon for a reversal cover the admission of evidence of Dr. Charles McMartin relative to conversations with the insured pertaining to his physical condition prior to his application, which conversations were not in the presence of the plaintiff, and she insists that such testimony was incompetent, irrelevant and immaterial, and was privileged testimony, and it was prejudicial error to permit Dr. McMartin to testify as to how long the cancerous tumor had existed, there being no sufficient foundation laid therefor, and also the testimony of Dr. Isaiah Lukens relative to his opinion as to how long the tumor had existed in the kidney.

We will therefore first consider the testimony of Dr. Charles McMartin, whose deposition was taken by the defendant, and who said that he practiced for two years in Chicago, and then 32 years in Omaha; that he was a specialist in genito-urinary diseases.

At the beginning of Dr. McMartin's testimony, the plaintiff objected to any testimony in reference to examinations made of the insured, or information gained, on the ground that it was a confidential communication, entrusted to him in his professional capacity, and was privileged under section 20-1206, Comp. St. 1929. The trial court called attention to the fact that, attached to the application for this insurance, signed by the deceased on August 11, 1936, there was a waiver of the insured, addressed to any physician or

surgeon, and asking them to furnish to the defendant upon request all information they may have as to the diagnosis, treatment and prognosis of any condition for which they may have prescribed for insured, etc., and by reason of that waiver the objection was overruled. In our judgment this ruling was correct.

Statements made to a surgeon for the purpose of receiving treatment are competent when they were necessary to an examination before treatment. 8 R. C. L. 639, sec. 181; *Cleveland, C. C. & I. R. Co. v. Newell,* 104 Ind. 264, 3 N. E. 836, 54 Am. Rep. 312. These are exceptions to the hearsay rule. 67 A. L. R. 11, Ann.; *Falkinburg v. Prudential Ins. Co.,* 132 Neb. 831, 273 N. W. 478.

Dr. McMartin testified that he was called to see the insured by Dr. H. J. Jenkins, and attended him in the hospital on September 27, 1937, and found a large palpable mass over the region of the left kidney, of the size of a large grapefruit, which was sensitive to the touch. Two days later he made a cystoscopic examination. He explained that the cystoscope was an electrical instrument for looking into the bladder, and then introducing small catheters up to each kidney. He testified that the urine that was coming down from the left kidney was bloody, while that coming down from the right kidney was clear. On October 6, 1937, Dr. McMartin performed an operation for the removal of the left kidney, and on October 19 the insured left the hospital. Dr. McMartin testified that, in taking the history of the case from the insured, he said that he had had blood in his urine intermittently for two years prior to that time. Dr. McMartin testified that this blood in the urine was the first symptom of the cancer in the left kidney, which had been there for at least that period of time.

Dr. H. J. Jenkins, his family physician, testified on direct examination to many office calls and check-ups of the insured, beginning in February, 1936, the calls that year being in February, April, July, October, and November, and testified to other calls in the following years, and when he noticed that there was quite a bit of blood in the urine of

the insured he gave some kind of a blood coagulant, either in a pill or a liquid.

On cross-examination Dr. Jenkins testified that the insured was in the habit of coming to him for a preliminary check-up prior to going down for the periodic examination by Dr. Parks, the railroad physician.

Now, it is insisted by the plaintiff that such statements made by the insured relative to his condition, not made in the presence of the plaintiff, are hearsay and privileged, and are not binding upon her. However, we find in the proof of death, signed by the plaintiff on April 5, 1938, question 9, "Do you authorize physicians and hospitals to make statements concerning the deceased's condition?" and her answer is "Yes." In our opinion, this is a definite waiver by the plaintiff of the introduction of such evidence, and this, taken in connection with the waiver of the insured attached to his application, renders this objection of the plaintiff unavailing. *Wolski v. National Life & Accident Ins. Co.*, 135 Neb. 643, 283 N. W. 381; 54 A. L. R. 412, Ann.

We will now consider the question of the warranties made by the insured as to his good health.

It was claimed by the plaintiff that the application which contained these statements was not attached to or made a part of the policy, but this is not required in policies issued by fraternal associations without medical examination.

Exhibit No. 2 was the nonmedical application for an additional $2,000 of insurance on the whole life plan, applied for on August 11, 1936, in which it was stated that the only disease he had had within ten years was pneumonia in 1932, and that no operation was performed, although it is proved by oral testimony and the hospital records that the operation of thoracotomy was performed over the ninth rib on January 17, 1933, which drained out the pus which had collected in the lung cavity. It is also stated, in his answer No. 21, that he was last examined by a physician in 1935, being the regular railroad examination by Dr. A. L. Parks at the Burlington headquarters in Omaha, and answer

No. 22 was "Yes" to the question, "Are you now in good health?" Above the signature of the deceased to this application is this statement: "I further agree that this application shall be considered a part of my policy of insurance, and that I will be bound by and governed in all respects by the Constitution, Statutes, and Laws of the Mutual Benefit Department of The Order of Railroad Telegraphers now in force or as the same may be hereafter amended or enacted, without reservation or exception. I further agree to and do waive both for myself and for my beneficiary, all legal objections to allowing any physician, surgeon or practitioner of any school consulted by me at any time to testify in any matter involving the Mutual Benefit Department of The Order of Railroad Telegraphers or my contract with it upon which a policy of insurance may be issued. *As a further consideration of the acceptance of this policy and the issuance of a policy of insurance to me, I warrant that I am now in sound physical and mental condition of health.*"

It has been held in many cases that the burden of proving that the insured was not in sound health at the time of the issuance of the policy is upon the defendant. *Aetna Life Ins. Co. v. Rehlaender*, 68 Neb. 284, 94 N. W. 129; *Pollard v. Royal Highlanders*, 128 Neb. 790, 260 N. W. 399; *Weddle v. Prudential Ins. Co.*, 130 Neb. 744, 266 N. W. 624.

In the case of *Gugelman v. Kansas City Life Ins. Co.*, 137 Neb. 411, 289 N. W. 842, this court said: "Good health is a generic expression, resting mostly in opinion. See *Hinnenkamp v. Metropolitan Life Ins. Co.*, 134 Neb. 846, 858, 279 N. W. 784. Good health 'is a comparative term, and means that the insured has no important or serious disease; in other words, that he is free from any ailment that seriously affects the general soundness or healthfulness of the system, as distinguished from mere temporary indisposition, which does not tend to weaken or undermine the constitution, though existing at the time.' 1 Couch, Cyclopedia of Insurance Law, 244, sec. 130. See, also, 37 C. J. 402."

In *Pickens v. Security Benefit Ass'n*, 117 Kan. 475, 231

Pac. 1016, it was held: "Good health in fact was required, and the requirement was not satisfied by appearance of good health or reasonable belief that the member was in good health." See, also, *Van Dahl v. Sovereign Camp, W. O. W.*, 130 Neb. 181, 264 N. W. 454.

It was definitely and positively warranted in the written application of the insured, that he was in sound physical condition, and in good health. In our opinion, this was a condition precedent to the issuance of the additional $2,000 of insurance. The warranties being untrue, that portion of the insurance fails.

As to the admission of the hospital records, the courts are in the greatest conflict. In four states, Ohio, Missouri, Texas, and Mississippi, where hospital records are required to be kept by statute, such records are admissible.

In some courts, the official records of a hospital, kept contemporaneously with the matters therein recorded, and in the regular course of business, were admissible in evidence without the assistance of any statute. *Conlon v. John Hancock Mutual Life Ins. Co.*, 56 R. I. 88, 183 Atl. 850.

Adler v. New York Life Ins. Co., 33 Fed. (2d) 827, is a case from the circuit court of appeals of our eighth circuit. The challenged evidence is the record made at the Mayo Clinic, in which the clinical history given by patient was recorded, and the court say this "Mayo record is identified by the physician who made the examination as being 'made at the time under my direction and verified by me.' No record could be more surely identified." It was held sufficiently identified to authorize its admission in suit to cancel policy on patient's life.

Many cases have held that a hospital chart is competent and admissible as to all matters proper for inclusion in a record of such a nature when the proper foundation has been laid. See citations from many states in annotation, 120 A. L. R. 1125.

In the case at bar, under the waiver of the insured in his application, and the special waiver and authorization of the plaintiff in exhibit No. 8 to the St. Joseph's Hospital, and

her authorization in exhibit No. 10 to any physician, hospital, or association to give information in connection with any illness or treatment of the insured, we hold that the admission of the hospital records, limited in their offer to the evidence that was already in the record, was a correct ruling. Without taking the time to discuss many other errors which we find to be harmless, we find that the defendant's motion for a directed verdict and for the dismissal of plaintiff's action was properly sustained.

AFFIRMED.

EDITH HILDEBRAND, APPELLEE, V. VERYL MCCAULEY ET AL., APPELLANTS.
296 N. W. 434

FILED FEBRUARY 14, 1941. No. 30964.

1. **Appeal.** It is not prejudicial error to fail to give an instruction defining proximate cause, where the legal causation is clear, obvious and unmistakable, and no evidence is introduced by the defendant to minimize defendant's negligence, or affirmatively defend as against defendant's negligence.
2. **Partnership.** Liability for a tort committed by a member of a partnership and an employee thereof, when not on a mission connected with or within the scope of the partnership business, does not attach to all members of the partnership when not present or participating therein.
3. **Automobiles.** Evidence examined and *held* insufficient to show by a preponderance thereof that at the time of the accident one of the members of the partnership and an employee thereof were engaged in a mission connected with and within the scope of the partnership business.
4. **Damages.** Amount of recovery *held* not to be excessive.

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

John C. Mullen, for appellants.

Gross & Crawford and *James J. Gleason, contra.*

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

MESSMORE, J.

Plaintiff brought this action to recover for personal injuries sustained by her through the negligence of the defendants. The case was tried to a jury, resulting in a verdict for the plaintiff in the sum of $30,000, from which verdict and judgment thereon defendants appeal.

Plaintiff, a young woman, 30 years of age, an employee of a hospital, finished her work about 9 o'clock p. m., August 30, 1938, and because of the rainy night and slippery streets waited until the rain ceased, when she left her place of employment, boarded a street car at Twenty-sixth and Farnam streets in the city of Omaha, to proceed to Twentieth and Farnam, there to transfer to a street car north-bound. Farnam street runs east and west; Twentieth street north and south. Plaintff was seated on the west side of the car, immediately behind the conductor. The street car proceeded east on Farnam street and, on arriving at Twentieth street, came to a complete stop adjacent to the place marked off as a safety zone, the regular and proper place used for loading and unloading passengers. Plaintiff arose to leave the car, one passenger preceding her, and as the right front doors of the street car, facing south, were opened, she started down the steps and had one foot on the pavement when she was struck with terrific force and knocked to the ground, a little toward the front of and south of the steps of the street car, by a Packard sedan driven by Veryl McCauley, Omer Vosges riding with him. She did not see the automobile until it struck her. She was placed in an ambulance and taken to a hospital for treatment.

The Packard sedan was approaching the intersection of Twentieth and Farnam streets at a rate of speed of 30 to 35 miles an hour. One witness, who was driving west on Farnam street, stopped for the traffic lights and, when in his favor, proceeded across the intersection, saw the street car coming to a stop, noticed the Packard sedan behind the street car, heard a crash and looked back. The sedan was skidding along the safety zone. Witness pulled his auto-

mobile to the curb and stopped. The front end of the Packard sedan was nearing the street car; the rear end nearer the sidewalk. The sedan skidded along, ran into the front end of the street car, then swinging around "made a couple of loops, and disappeared down Twentieth street." Immediately after the accident the street car was parked in the safety zone, headed east, parallel with the south curb of Farnam street. The Packard was south of the south curb of Farnam street on Twentieth. The left front door of the Packard was sprung; the front fender and side damaged. The right front entrance door of the street car was demolished; the steps leading into the car badly damaged. The back of the street car was struck on the right corner and the light thereon demolished. Other witnesses corroborated the testimony as to the occurrence of the accident, the positions of the Packard sedan and the street car after the accident, the position of the plaintiff on the pavement after she was struck, as do the exhibits. Defendants McCauley and Omer Vosges were apprehended in a tavern close by, having left the Packard sedan immediately after the accident. They were both staggering drunk and were taken to the police station.

The negligence charged in the plaintiff's petition is driving an automobile at an excessive rate of speed, failure to comply with the sections of the city ordinance with reference to the operation of motor vehicles, having regard for the traffic and condition of the streets, and in approaching a street car. The defense was contributory negligence.

Negligence on the part of defendants McCauley and Omer Vosges is amply proved by a preponderance of the evidence. The record is void of contributory negligence on the part of plaintiff. The defendants did not defend on such ground, offering no affirmative evidence of contributory negligence. Under the circumstances, the court very properly refrained from presenting the issue of contributory negligence to the jury and from instructing on the comparative negligence rule.

The defendants complain that the verdict is excessive.

The jury allowed a recovery of $30,000. The injuries sustained by the plaintiff are terrifying and horrible to contemplate. The diagnosis shows: Multiple compound fracture of both legs; cut upper lip; fracture of the anterior fossa of the skull; the left leg practically amputated to such extent that the soft tissues were hanging in shreds, beginning at a point about two inches below the knee; the remaining portion of the tibia shattered into the knee. The popliteal vessels were all severed; the leg entirely denuded of skin; several other fractures were present in the detached portion of the leg below the point of severance. The right leg was entirely skinned from the ankle to the knee on its anterior and lateral surface. This large flap of skin was about 14 inches long and 6 inches wide. There was a compound comminuted fracture, with extensive muscle laceration, just below the knee and another about four inches above the ankle. Plaintiff was hospitalized for approximately 10 months. The reasonable charge for medical services rendered is $2,600; hospitalization $1,641.55; nurse's services $250, and other expenses. She was employed as a switch-board operator, receiving $10 a week. Obviously, the severe injuries received by her have blighted all hopes for her future and caused her intense, immeasurable suffering which can never be compensated in dollars. The verdict is just.

The defendants contend that the verdict of the jury as to defendant Julian Vosges is not sustained by sufficient evidence.

The liability of members of a partnership for a tort growing out of the partnership business is joint and several. *Wiley v. National Surety Co.*, 103 Neb. 68, 170 N. W. 349. Partnerships and partners are bound and liable for the tortious acts of their servants, acting within the scope of their employment. 1 Rowley, Modern Law of Partnership, 639, sec. 504; 20 R. C. L. 914, sec. 126.

The evidence upon which plaintiff relies to establish liability against defendant Julian Vosges is, in substance, as follows: Julian and Omer Vosges were engaged in a real

estate partnership business. The Packard sedan used in the business was in the name of Julian Vosges and was purchased with partnership funds. Veryl McCauley, a personal friend of the Vosges for nearly five years, was employed by Omer Vosges and had been working for him for approximately a month, with no definite hours, but averaging ten hours a day. His salary was $14 a week, room and board. He lived with the Vosges and their parents.

On the day of the accident Julian and Omer Vosges and McCauley used the car for the purpose of looking at some material incident to McCauley's work. Upon returning to the apartment, Julian left the car and went on upstairs. Omer Vosges and McCauley drove away. They proceeded to the vicinity of 3010 Mason street, where McCauley had previously lived. He saw two women whom he knew, left the car, and Omer Vosges drove away, returning shortly and picking up McCauley. They later stopped and drank some intoxicating liquor, and McCauley took over the driver's duties without objection. They stopped at a filling station, where each had another drink of liquor. McCauley continued to drive. During the course of the trip they passed a house about which McCauley had inquired a few days previously and which had been advertised in a newspaper by Vosges. The latter called McCauley's attention to the house and said: "That is it; how much is it worth?" He stated that his object was to educate McCauley in the business; that McCauley had asked him questions of this kind off and on. He further stated that he had no set or definite hours to work, but looked at houses any time he deemed it necessary, to keep a check on the value of real estate, and considered it a part of his business; that McCauley had driven the car on occasions, to relieve Omer when he was tired, and when on a business trip; that on the night of the accident they had no particular destination in mind.

The record is void of evidence that McCauley, at any time during the course of his employment, solicited or listed real estate for the partnership, or showed any pro-

spective customers thereof real property listed with the partnership for sale, trade, or exchange, or that he was licensed by the state as a realtor, to perform any of the functions of a real estate dealer. See sections 76-901, 76-903, 76-904, 76-905, Comp. St. Supp. 1939. It is true that he inquired about a piece of property; that Omer Vosges pointed it out to him and asked him the value of it. Neither McCauley nor Vosges had been or were engaged in any mission connected with and within the scope of the business of the partnership at the time of the accident.

Doubtless, the conduct of McCauley and Omer Vosges was grossly negligent and reprehensible under the circumstances, but we are compelled to hold that, under the evidence in this case, there is no basis for fixing the liability of Julian Vosges, since it is not shown by the evidence that a tort was committed in the course of and within the scope of the business of the partnership on the night of the accident. The trial court should have dismissed the action as against Julian Vosges. Other assignments of error need not be discussed.

The judgment of the trial court entered against Julian Vosges is reversed and the case as to her dismissed. In all other respects the judgment is affirmed.

AFFIRMED AS MODIFIED.

SAM KIELLEY, APPELLEE, V. VERYL MCCAULEY ET AL., APPELLANTS.

296 N. W. 437

FILED FEBRUARY 14, 1941. No. 30965.

1. **Appeal.** It is not prejudicial error to give an instruction defining the term "proximate cause," under the circumstances of the instant case, where such definition has no materiality, the legal causation being clear, obvious and unmistakable.
2. **Partnership.** Liability for a tort committed by a member of a partnership and an employee thereof, when not on a mission connected with or within the scope of the partnership business, does not attach to all members of the partnership when not present or participating therein.

3. **Automobiles.** Evidence examined and *held* insufficient to show by a preponderance thereof that at the time of the accident one of the members of the partnership and an employee thereof were engaged in a mission connected with and within the scope of the partnership business.
4. **Damages.** Amount of recovery *held* not to be excessive.

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

John C. Mullen, for appellants.

Gross & Crawford and *James J. Gleason, contra.*

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

MESSMORE, J.

Plaintiff brought this action to recover damages sustained by him to his person, caused by the negligence of the defendants. The jury returned a verdict for $12,500, from which the defendants appeal.

The plaintiff, a resident of Omaha, 51 years of age, married and having two children, employed by McInnch Motor Company in its salesroom, located on Harney street west of Twentieth, had been engaged in selling automobiles for 18 or 19 years. August 30, 1938, he left his place of business at about 9:10 p. m. to go home. It was rainy and drizzling. When he arrived at the corner of Twentieth and Farnam streets, he waited for a street car on the curb at the southwest corner of the intersection, which was well illuminated. The street car came along and stopped at its designated and proper place for the purpose of permitting passengers to alight from and board the car. He noticed automobiles which had stopped for the traffic lights and that the lights directing the traffic east and west were red. Before leaving the curb to board the street car, he looked both ways, to ascertain if any automobiles were approaching. Passengers alighted from the street car, and plaintiff proceeded to board it at the regular entrance in front. He noticed a woman step off the car and proceed over to the curb and heard her scream. He hesitated, turned around to see what

the trouble was, and was immediately struck with terrific force by a Packard sedan, which he did not see until it hit him. At the time, he was just inside of the safety zone and heard a crash. When struck, he was facing generally north and a little west, toward the back of the street car. He realized that he was going to be struck and extended one arm, in an effort to take hold of the sedan and succeeded in doing so, but when the sedan struck him it swung around with such force that he was compelled to loosen his hold. He was knocked about four feet from the south curb toward Farnam street and about even with the curb on the west side of Twentieth street. He was struck on his left side, receiving a compound fracture of the right leg. His foot was crushed in the instep and ankle. He remained conscious at all times, did not realize that any bones were broken until he sought to get up, looked down and discovered his injuries.

Plaintiff's wounds consisted of a hematoma of the left arm; that is, a hemorrhage from broken blood vessels into the tissues; a contusion with a hemorrhage in the left thigh; a large laceration on the left foot, extending from the inner malleolus to the base of the second toe; this wound being a compound fracture of a proximal portion. In the right leg he had a compound fracture of both bones, the tibia and fibula; such a compound fracture communicates with the exterior and designates a break through the skin and soft tissues which normally cover the bone. The flesh was cut from the left foot. The reasonable value of the medical service was $360; hospital $150.90; nurse's services $20, ambulance $5, and rental of a wheel chair.

The most graphic picture of the accident is disclosed by the following testimony of one witness: He had started across the intersection of Twentieth street, driving west on Farnam street. The street car was approaching from the west and coming to a stop. The Packard sedan was following the street car. Just as the witness passed the rear end of the street car he heard a loud crash, looked back, slowed down, saw the sedan skidding through the safety

zone at an angle, heard another crash and saw the sedan spin around on the slippery street. He then saw the plaintiff's body lying on the pavement in the position as testified to by the plaintiff. After the accident, the sedan was on Twentieth street, about the middle of the street car tracks, facing northwest. The street car was parked in its original position, parallel with the safety zone, facing east. When he first observed the sedan, it was immediately back of the street car, straddling the outside rail, and proceeding at a rate of speed of 30 to 35 miles an hour.

Other evidence pertinent to this case has been set out in more detail in the case of *Hildebrand v. McCauley, ante,* p. 55, 296 N. W. 434, and reference is made thereto, as both cases developed from the same accident.

The defendants contend that the trial court erred in giving an instruction defining the term "proximate cause," as follows: "By the term proximate cause is meant the primary or moving cause or fault where no other and independent cause disconnected therewith and self-operating intervenes to produce the result," and cite *Wagner v. Watson Bros. Transfer Co.,* 128 Neb. 535, 259 N. W. 373, holding such an instruction to constitute prejudicial error. In the case of *Hildebrand v. McCauley, supra,* the term "proximate cause" was not defined in any manner or presented to the jury. Therefore, it is defendants' contention, both cases must be reversed, as set forth in *Wagner v. Watson Bros. Transfer Co., supra,* in which this court held: "Negligence is not actionable unless it be the proximate cause of the injury to the complaining party." It was further held: "It becomes the duty of the trial court to submit to the jury the necessary issues of fact presented by the pleadings and the evidence, whether requested or not, and a failure to do so constitutes error."

In the instant case, no attempt is made by the defendants to in any manner minimize the negligence of the defendants, and testimony is not affirmatively shown in such respect. Such is also true in *Hildebrand v. McCauley, supra.* An instruction defining the term "proximate cause" becomes

requisite only where some real problem of immediacy of causation is raised in the case. That is to say, the definition has no materiality and no place in a trial judge's instructions where, under the facts of the case, the legal causation is clear, obvious and unmistakable. No problem of legal causation is presented to the jury by the uncontested facts. We deem further discussion of this assignment of error unnecessary.

Defendants contend that the verdict of the jury as to defendant Julian Vosges is not sustained by sufficient evidence.

The liability of members of a partnership, growing out of a partnership business, is joint and several. *Wiley v. National Surety Co.*, 103 Neb. 68, 170 N. W. 349. Partnerships and partners are bound and liable for the tortious acts of their servants, acting within the scope of their employment. 1 Rowley, Modern Law of Partnership, 639; 20 R. C. L. 914, sec. 126.

The evidence covering the foregoing assignment of error is in substance set out in *Hildebrand v. McCauley, supra*, to which we refer. From an analysis of this evidence, we conclude that at the time of the accident neither McCauley nor Omer Vosges had been or were engaged in any mission connected with or within the scope of the partnership business.

We hold that under the evidence in this case there is no basis for fixing the liability of Julian Vosges, since it is not shown by the evidence that a tort was committed in the course of and within the scope of the business of the partnership on the night of the accident. The trial court should have dismissed the action as against Julian Vosges. Other assignments of error need not be discussed.

The judgment of the trial court entered against Julian Vosges is reversed and the case as to her dismissed. In all other respects the judgment is affirmed.

AFFIRMED AS MODIFIED.

IRA N. CLARK ET AL., APPELLANTS, V. LINCOLN LIBERTY LIFE INSURANCE COMPANY ET AL., APPELLEES.

296 N. W. 449

FILED FEBRUARY 14, 1941. No. 30923.

1. **Appeal.** Where a petition is filed to which a demurrer is sustained and with leave of court an amended petition is filed containing substantially the same allegations as the original petition, together with an additional paragraph alleging that plaintiffs have no adequate remedy at law, a demurrer to the amended petition will not raise the question of *res adjudicata* or previous adjudication upon the allegations set forth in the amended petition, and against which a demurrer to the original petition had been sustained.
2. **Pleading.** The appropriate procedure to adopt when an amended petition filed with leave of court contains substantially the same allegations as the original petition is, before demurrer, to call the matter to the attention of the court by motion.
3. **Constitutional Law.** The district court is a creation of the Constitution as is also its common-law and equity power and jurisdiction. This power and jurisdiction are not limited by terminology and, further, the terminology does not admit of legislative limitation, but only of legislative extension.
4. **Insurance.** The insurance department, or, as originally termed in the statutes, the department of trade and commerce, is not an agency created by the Constitution. It is an executive department of government, created by the legislature under constitutional authority with power to exercise general control and supervision over insurance companies, their organization, and the business of insurance in the state.
5. ———. The insurance code fails, either in direct terms or by language from which such an inference may be drawn, to confer on the insurance department quasi judicial power or original exclusive jurisdiction to determine legal and equitable controversies between insurance companies and their policyholders.
6. ———. The enforcement of rights and liabilities existing between insurance companies and policyholders has received no legislative attention in the insurance code.
7. ———. In the insurance code no legislative expression is found, the language or purport of which would operate to curb or abridge any of the constitutional, common-law or equity power or jurisdiction of the district court.
8. **Constitutional Law.** Any attempt by the legislature to oust the district court of its jurisdiction over trusts and trust funds and litigation in relation thereto would be ineffective and void.

9. Insurance. The assets and surplus of participating insurance companies, and of the participating division of companies doing both a participating and a nonparticipating business, are trust funds.
10. ———. The surplus of a mutual life insurance company, and of the participating business of a company, belongs to its members, and a minority member may sue on behalf of himself and all others similarly situated.
11. ———. *Held*, that the amended petition states a cause of action, that the district court has jurisdiction of the parties and the subject-matter, and that the demurrer of the appellee should be overruled.

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

Loren H. Laughlin and *Edward T. Gardner*, for appellants.

Clinton J. Campbell, contra.

C. Petrus Peterson, J. W. Kinsinger, William M. Holt, H. J. Requartte and *James A. Doyle, amici curiæ.*

Heard before EBERLY, PAINE, MESSMORE and YEAGER, JJ., and MUNDAY, District Judge.

YEAGER, J.

This is an action instituted in the district court for Lancaster county, Nebraska, by Ira N. Clark, June Cora Hill, James William Rolls and Freida C. Selander, plaintiffs and appellants, in their own behalf and in behalf of all others similarly situated, against the Lincoln Liberty Life Insurance Company, a corporation, Ira C. Crook, Harold L. Schwenker, George L. Towne, Joseph Albin and Ralph C. Lawrence, defendants.

The plaintiffs, in a lengthy amended petition, the gist of which will be set forth herein, alleged that the Lincoln Liberty Life Insurance Company is a life insurance corporation organized on April 16, 1919, under the laws of Nebraska as a stock company and has been since said date conducting a life insurance business and as such writes both participating and nonparticipating policies of life insurance; that the other defendants are, and have been since

its organization, the managing and controlling directors and officers of the company; and that the defendants are trustees for the plaintiffs, who are participating policyholders, and for all of the other participating policyholders, of all of the surplus, earnings and accumulations arising from the participating business of the defendant company. It is alleged the defendant company on given dates between April 14, 1924, and October, 1928, issued to each of plaintiffs a participating policy or policies of insurance of one type or another; that all of said policies were in full force and effect at the date of the commencement of this action on the books and records of the defendant company except that of the plaintiff James William Rolls, whose policy was lapsed by the defendant company by reason of nonpayment of the annual premium which was due July 25, 1937. In this connection it is claimed by the plaintiffs that the policy of Rolls would not have lapsed had there been credited to it a proper apportionment of the surplus from the participating business of the defendant company.

It is further alleged that in violation of the statutes of the state and the obligation of the policies of insurance held by plaintiffs and all others similarly situated the defendants have failed, neglected and refused to keep in separate accounts the participating and nonparticipating insurance business of the defendant company, and have failed to submit to the department of insurance separate reports of the said two kinds and classes of insurance, and that they have transferred large sums of money from the participating business to the nonparticipating business with the intention of cheating and defrauding the plaintiffs and the others similarly situated, thus withholding earnings and accumulations in which plaintiffs and the others similarly situated were entitled to participate, all to the end that plaintiffs are unable to ascertain the exact conditions of the two classes of business and of the exact amount of money which has been transferred from the participating to the nonparticipating business.

It is further alleged that a conspiracy exists between the

defendants Crook, Albin, Schwenker, Towne and Lawrence as managing and controlling directors and officers of the defendant company to carry out the foregoing claimed illegal acts of the company and, in furtherance of such conspiracy, the said defendants have illegally withdrawn about $650,000 which has been allocated "special funds and thrift," about $150,000 which has been allocated to "fluctuation reserves," and an additional $350,000 has been withdrawn from time to time with no explanation and in such manner that it cannot be traced or its use determined without an examination of the books of the defendant company.

It is further alleged that the surplus and earnings from the participating business of the defendant company belong to the participating policyholders in equitable proportions, and that as to the participating business the defendant company is subject to the laws of the state governing mutual life insurance companies.

It is further alleged that the defendant company is solvent and able to afford the relief prayed, and that there is no need for a receiver.

It is further alleged that no demands have been made on the defendant company, for the reason that such demands would be of no avail and futile; also that plaintiffs have but recently discovered the alleged wrongful acts of the defendants, and that a complete examination and investigation of the books and records of the company is necessary to a complete disclosure of all of the facts and circumstances relative to the business transactions of the defendant company and the exact extent of misapplication of the resources properly belonging to the plaintiffs and the other participating policyholders.

It is further alleged that plaintiffs have no adequate remedy at law, for the reason that the department of insurance is not a court, possesses no judicial powers to render relief prayed for against the defendants; that the department of insurance has no power to authorize the plaintiffs to examine the books and records of the defendant company; that the department of insurance has no power to render a

binding judgment or decree as between the plaintiffs and defendants and is so constituted in law and in fact as to render it impossible for the plaintiffs to obtain a just and equitable accounting from the defendants; and that a court of equity has full, complete and original jurisdiction over the cause of action set forth in the petition.

The plaintiffs in their prayer in substance ask that the defendant company be ordered to submit full and complete reports of its participating and nonparticipating business in separate reports for each year it has been in business; that it be ordered to separate entirely its participating and nonparticipating business and the earnings, surplus and accumulations of each class of business; that the company submit its books and records to a complete examination by the plaintiffs; that all the surplus and accumulations of the participating business of the defendant company be adjudged to be for the use of and distribution to the participating policyholders, and that on an accounting the determined surplus shall be ordered paid out and distributed to the participating policyholders; that the defendants be enjoined from transferring surplus arising from the participating business to the nonparticipating business or to the stockholders and from withholding the surplus of the participating business from the participating policyholders; that the defendants Ira C. Crook, Harold L. Schwenker, George L. Towne, Joseph Albin and Ralph C. Lawrence be ordered to pay to the defendant company all losses or damages that it has sustained by reason of their unlawful acts, and for other equitable relief.

An original petition was filed in the case containing substantially all of the allegations of the amended petition except that it did not contain the paragraph alleging that plaintiffs did not have an adequate remedy at law.

To the original petition the defendant company separately demurred and the other defendants joined in a separate demurrer. The grounds of demurrer were the same. The demurrer of the defendant company was sustained and plaintiffs were granted leave to file an amended petition,

with which leave they complied. As already indicated, the amended petition contained only the additional paragraph alleging that plaintiffs did not have an adequate remedy at law. The defendants in separate demurrers in the same manner and substance as to the original petition demurred to the amended petition without previously having interposed any objection as to kind, character or substance of the amended petition. The demurrers set forth ten grounds of demurrer.

The demurrer of the defendant company was sustained generally, but the demurrer of the other defendants remains undisposed of in the district court, and we have no further concern with it in this case. In the light of this situation, henceforth in our discussion the plaintiffs will be referred to as appellants and the defendant company as the appellee.

To reverse the ruling of the district court in sustaining the demurrer of the appellee to their amended petition on which they elected to stand, the appellants have prosecuted this appeal.

Before proceeding to a discussion of the merits of the amended petition, a technical objection to the right of the court now to consider the case will be disposed of. Appellee contends that, since the amended petition is identical with the original petition except as to one paragraph, the ruling on the demurrer to the original petition not having been appealed from was a bar to the right of the district court to rule on the demurrer to the amended petition except as to the added paragraph and in consequence a bar to the right of this court in the same particulars.

This position of the appellee cannot be sustained on the record presented. No objection to the proceedings as had appears in the records of the district court, and objection not having been there presented and properly brought here for review, and being a matter of pure technicality relating to procedural rule, cannot be presented in this court. *Yates v. Jones Nat. Bank,* 74 Neb. 734, 105 N. W. 287; *Trainor v. Maverick Loan & Trust Co.,* 92 Neb. 821, 139 N. W. 666.

There can be no doubt that certain technical rules are advisable and necessary to orderly and expeditious legal processes, but to obtain the advantages offered by them proper and timely advantage must be taken. No motion to strike or other proper objection having been made, this contention of the appellee cannot now be considered. *Wheeler v. Barker*, 51 Neb. 846, 71 N. W. 750; *Loghry v. Fillmore County*, 75 Neb. 158, 106 N. W. 170; *Hoffman v. Geiger*, 134 Neb. 643, 279 N. W. 350.

As has been indicated, ten separate grounds of demurrer were enumerated, but, outside of the technical ground already discussed, two points were stressed. The first and main point stressed was that, the plaintiffs not having presented the alleged irregularity on the part of the appellee and the other defendants to the department of insurance, this action cannot be maintained in the district court. In other words, appellee insists that the department of insurance is a quasi judicial body or agency to whose jurisdiction the plaintiffs must submit the subject-matter set forth in the amended petition and there have the controversy determined, and if an adverse ruling is had, then take an appeal to the district court, or if having submitted the matter to the department of insurance with a failure to act, then they may have direct action in the district court with such failure to act as condition precedent to the commencement of direct action in the district court.

On this proposition the finding and judgment of the district court were in favor of the appellee and the demurrer of the appellee was sustained.

In order to have a proper determination of this matter, it appears necessary to set forth here the derivations of the insurance department and the district court, their jurisdiction and their constitutional and statutory functions. The district court is a creation of the Constitution as is also its common-law and equity power and jurisdiction. This power and jurisdiction are not limited by terminology and, further, the terminology does not admit of legislative limitation, but only of legislative extension. Const. art. V, sec. 9;

Matteson v. Creighton University, 105 Neb. 219, 179 N. W. 1009; *Lacey v. Zeigler*, 98 Neb. 380, 152 N. W. 792.

The insurance department, or as it was originally termed in the statutes, the department of trade and commerce, on the other hand, is not an agency created by the Constitution. Its existence, however, may be traced to the Constitution. By the terms of section 1, art. IV of the Constitution, the legislature was empowered to establish, in addition to named executive officers, such other executive departments as might be required. Section 1, art. XII of the Constitution, requires that the legislature shall provide by general law for the organization, regulation, supervision and general control of all corporations, and for the organization, supervision and general control of mutual and cooperative companies and associations, and that by such legislation the mutuality and cooperative features and functions of mutual and cooperative companies shall be insured.

Pursuant then to constitutional authority, in general terms expressed, the insurance code came into being, the design of which was to set up an executive department of the state government clothed with power to supervise and control the business of insurance in Nebraska and of local insurance companies and associations, and foreign companies and associations doing business within the state, within the supervisory limits fixed by the code. The powers of supervision and control were lodged in the department of trade and commerce and are contained in section 44-201, Comp. St. 1929. It is a portion of this section which appellee relies upon to sustain its contention that the district court was without jurisdiction to entertain the action of the plaintiffs herein, and that the insurance department has original and exclusive jurisdiction and quasi judicial power to determine the controversy set forth in the amended petition herein. The specific powers conferred are the following:

"The department of trade and commerce shall have general supervision, control and regulation of insurance companies, associations and societies and the business of in-

surance in Nebraska, including companies in process of organization. It shall have power to make all needful rules and regulations for the purpose of carrying out the true spirit and meaning of this enactment and all laws relating to the business of insurance, and to that end, may authorize and empower an assistant or employee to do any and all things that it may do, and on its behalf, and it shall see that all laws respecting insurance companies, are faithfully executed. It shall issue all certificates and licenses as provided for herein. Before granting certificates of authority to any insurance company to issue policies or make contracts of insurance in this state, it shall be satisfied by such examination as it may cause to be made, or such evidence as it may require, that such company is duly qualified under the laws of this state to transact business herein. It shall require every domestic insurance company to keep its books, records, accounts and vouchers in such manner that it may readily verify its annual statement and ascertain whether the company is solvent and has complied with the law. It shall cause to be examined, each domestic company at least once every three years, and cause to be thoroughly inspected and examined its affairs to ascertain its true financial condition, its ability to meet and to fulfil its obligation, whether it has complied with the provisions of the law, and all other facts that may be required relating to its business, methods and management, and its dealings with its policyholders. Whenever it deems it advisable, it shall cause a complete audit of the books and accounts of the company to be made by a disinterested expert accountant. When it deems it prudent for the protection of policyholders in this state, it shall, in like manner, cause to be visited and examined any insurance company incorporated or organized in any other state or country applying for admission, or already admitted to do business in this state."

The remainder of the section deals with methods of accomplishment of purposes, rather than with an outline of statutory purposes.

The next section of the code (Comp. St. 1929, sec. 44-202)

relates to steps to be taken by the department of insurance in case of impairment of capital stock of a stock company, with which this case is not concerned except that it is claimed that the appellee is a stock company engaged in the business of writing nonparticipating and participating insurance and that the stock insurance department or division has profited at the expense of the participating or mutual department or division.

The following section (Comp. St. 1929, sec. 44-203) relates to steps to be taken by the department in case of impairment of assets and resources of any domestic mutual insurance company. This section is directly applicable to the claimed cause of action set forth in the amended petition, since the allegations are that there has been an impairment of the assets and resources of the participating or mutual business of the appellee and the laws of the state require that such business shall be kept separate from the other business.

It will be seen at this point that section 44-201, *supra,* is definitive of power and in addition is remedial as an aid to discovery in investigation by the department. Sections 44-202 and 44-203, *supra,* are remedial in that they provide the first steps toward replacement where impairment of capital stock of stock companies or where impairment of assets and resources of mutual companies has taken place. For completion of remedy by the insurance department in these respects and for full remedy against insurance companies for all other violations of the code and laws governing insurance and the needful rules and regulations of the department, recourse must be had to sections 44-204 and 44-205, Comp. St. 1929.

An examination of section 44-204, *supra,* discloses that the only remedy or relief contemplated therein is that in case of insolvency of a domestic insurance company, or that it has refused to submit to reasonable inspection and examination, or has neglected or refused to observe an order of the department of trade and commerce, or to make good within the time prescribed by law any deficiency when im-

pairment has taken place, or it has by contract of reinsurance, or otherwise, transferred or attempted to transfer or merge substantially its entire property or business without first having obtained written approval of the department of trade and commerce, or is found after an examination to be in such condition that its further transaction of business would be hazardous to its policyholders, or its creditors, or to its stockholders, or to the public, or has wilfully violated its articles of incorporation or association or any law of this state, or whenever any trustee, director, manager or officer thereof has refused to be examined under oath touching its affairs, the department of trade and commerce may apply to the district court, or any judge thereof, in the county or judicial district in which the principal office of such company is located, for an order directing such company to show cause why the department of trade and commerce should not take possession of the property, records and effects of the company, and conduct or close its business, and for such other relief as the nature of the case and the interest of its policyholders, creditors, stockholders or the public may require. It becomes clearly apparent that under this section no power of adjudication or quasi adjudication is conferred on the department of insurance, but only the right to institute legal action in the district court to have determined the question of whether or not the department shall have the right to take over and conduct or liquidate the affairs of the company.

Turning now to section 44-205, Comp. St. 1929, we find that this section supplements section 44-204, *supra*. This section is ambiguous in that it is not possible to determine whether the legislature, when it referred to a hearing, had in contemplation the hearing provided for in section 44-204, *supra*, or one conducted by the department. However that be, the section provides only, and disconnected from anything else in the code, that, whenever any of the grounds mentioned in section 44-204, *supra*, are shown to exist after hearing upon notice to the company as to a domestic company, the department of trade and commerce may revoke

the certificate of authority of such company to do business, instead of applying to the court, which order shall be subject to review within 40 days thereafter in the district court.

There is just one other section of the insurance code having a bearing on the question of remedy against or available to insurance companies. It is section 44-1116, Comp. St. 1929, which provides that any person or company may appeal from any decision of the department of trade and commerce to the district court of the county in which the state capital is located, unless otherwise provided, within 20 days from the date thereof. Just what this section has reference to is not apparent, but certain it is that it can have no application here, since under section 44-204, *supra,* the action is already in the district court and under section 44-205, *supra,* the appeal may be taken within 40 days to the district court.

If the contention of the appellee and the judgment of the district court that there has been a legislative declaration that quasi judicial power and original exclusive jurisdiction to determine legal and equitable controversies between insurance companies and their policyholders exist, such declaration must be found in the sections of the statute referred to. This we are unable to find either in direct terms or in language from which such an inference may be drawn. In truth and in fact the enforcement of rights and liabilities existing between companies and policyholders in the code has received no legislative attention whatever. It becomes quite clear from a careful examination of the insurance code that the legislature never intended that the insurance department should invade the judicial field or curb or abridge any of the constitutional, common-law or equity power of the district court, and never intended to do more than to confer upon the department supervision over insurance with power to initiate proper proceedings and to take necessary administrative and executive control to the end that insurance business in Nebraska would receive proper and necessary protection.

Since by the terms of the statute itself it is apparent that no judicial or quasi judicial power or jurisdiction was conferred or sought to be conferred on the insurance department in any contended particular, a discussion of the legal questions and authorities bearing upon the power of the legislature to take such action is of no importance here, except that it may be pointed out that at least to the extent that any such attempt to oust the district court from its jurisdiction over trusts and trust funds and litigation in relation thereto would be ineffective and void. *Folts v. Globe Life Ins. Co.*, 117 Neb. 723, 223 N. W. 797; *Whaley v. Matthews*, 134 Neb. 875, 280 N. W. 159.

This rule would render invalid any action of the legislature the purpose of which would be to deprive the district court of its jurisdiction over the assets and surplus of participating insurance companies, or the participating division of companies doing both a participating and a nonparticipating business, since this court is committed to the proposition that the assets of mutual insurance companies are trust funds. *Whaley v. Matthews, supra*; *Folts v. Globe Life Ins. Co., supra.*

The only other proposition necessary to be discussed herein is the contention that the plaintiffs are without right to maintain this action for themselves and all others similarly situated. The position that this court has taken is that the surplus of a mutual life insurance company belongs to its members and a minority member may sue on behalf of himself and all others similarly situated, for misapplication thereof. *Folts v. Globe Life Ins. Co., supra; Whaley v. Matthews, supra.* On the authority of these decisions we must hold that the action as commenced by plaintiffs in their own behalf and all others similarly situated was proper.

In the light of the foregoing, we are of opinion that the amended petition of plaintiffs states a cause of action against the appellee. We are further of the opinion that the district court has jurisdiction of the parties and of the subject-matter of the action, and that the insurance depart-

ment of the state of Nebraska has no original or exclusive power or jurisdiction to adjudicate the matters presented by plaintiffs' amended petition, and the district court erroneously sustained the demurrer of the appellee to said amended petition.

The judgment of the district court sustaining the demurrer of the appellee to the amended petition of plaintiffs is reversed and the cause remanded, with directions to the district court to vacate and set aside its order sustaining the said demurrer and to overrule the same with leave to the appellee to answer.

REVERSED.

OMAR W. OTTENS, APPELLANT, V. WESTERN CONTRACTING COMPANY ET AL., APPELLEES.
296 N.W. 431

FILED FEBRUARY 14, 1941. No. 31065.

1. **Workmen's Compensation.** Where fingers are injured in an accident compensable under the workmen's compensation law, and the disability resulting therefrom is the normal, usual, logical and expected consequence of injury to the fingers, no compensation may be awarded in addition to that provided by the statutory schedule.
2. ———. If the claimant in an accident compensable under the workmen's compensation law has suffered a schedule injury to some particular member, and some unusual and extraordinary condition affecting some other member has developed as a result of the accident, an increased award should be made.
3. ———. The burden is on the plaintiff to show by a preponderance of the evidence that the disability of which he complains was caused by an accident arising out of and in the course of his employment.
4. ———. *Held*, that appellant has shown by a preponderance of the evidence that the disability of which he complains arose out of and in the course of his employment.
5. ———. *Found*, that appellant has sustained a permanent partial disability to his hand to the extent of 35 per cent. for which he is entitled to recover under the workmen's compensation law.

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

Thomas E. Dunbar, for appellant.

William P. Morse, contra.

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

YEAGER, J.

This is an action under the workmen's compensation laws of the state of Nebraska. The action was tried before one of the judges of the compensation court, and from the award and judgment appeal was taken by plaintiff to the district court. On trial in the district court award and judgment were rendered, from which plaintiff has appealed to this court. Appellant contends that the award and judgment are insufficient under the evidence and the law to compensate for the injuries he has sustained.

The evidence conclusively shows that appellant, a man of about the age 45 years, on October 5, 1938, together with three other men, was unloading a metal container or drum containing steel stakes, when two of the men stumbled, causing the drum to fall, and in falling two fingers on the right hand of appellant were caught between the drum and the curb of a concrete pavement. The weight of the drum and contents was in excess of 400 pounds. The result was that the ends of the second and third fingers on the right hand of appellant were cut off.

On trial in the district court appellant was awarded temporary total disability from October 5, 1938, to December 26, 1938. Of this portion of the award appellant does not complain. In addition to the award for temporary total disability, appellant received an award of 15 per cent. permanent partial disability for the loss of use of the second and third fingers from and after December 26, 1938, for a period of seven and one-half weeks. It is as to this latter award for permanent partial disability that appellant addresses his complaint. He complains that, as a result of the

accident, he sustained, not only injuries to the two fingers, but resulting injury and damage to the hand, which produced permanent partial disability therein of 35 per cent.

Appellees urge that there is no additional disability, and further, if such additional disability exists, it is in consequence of the injury to the fingers, and is not compensable beyond the amounts allowable under the statutory schedule for injury to fingers.

There can hardly be any question that if it be determined that the disability of which appellant complains, if it be found to exist, is a normal, usual, logical and expected consequence of the injury to the fingers, then no compensation may be awarded in addition to that provided by the statutory schedule. *Hull v. United States Fidelity & Guaranty Co.*, 102 Neb. 246, 166 N. W. 628; *Johnson v. David Cole Creamery Co.*, 109 Neb. 707, 192 N. W. 127; *Schroeder v. Holt County*, 113 Neb. 736, 204 N. W. 815; *Greseck v. Farmers Union Elevator Co.*, 123 Neb. 755, 243 N. W. 898.

On the other hand, an analysis of the decisions makes it equally clear that we are committed to the rule that where a claimant has suffered a schedule injury to some particular member, and some unusual and extraordinary condition affecting some other member has developed as a result of the accident, an increased award should be made. *Schroeder v. Holt County, supra; Greseck v. Farmers Union Elevator Co., supra; Matter of Dowling v. Gates & Co.*, 253 N. Y. 108, 170 N. E. 511; *Matter of Flicker v. Mac Sign Co.*, 252 N. Y. 492, 170 N. E. 118.

It then becomes necessary to determine whether or not appellant has suffered a schedule injury to two fingers from which an unusual and extraordinary condition has developed in his hand, resulting in disability to the hand, calling for an increased award over and above that allowable under the schedule for injury to the fingers.

From the evidence it appears that at the time of and prior to the accident no abnormal condition existed in the hand of the appellant. After the accident and for quite a period of time, except the condition resulting directly and

immediately from the accident, none manifested itself, but at some period before appellant was released by Dr. Ramacciotti, the attending physician for the appellees, or soon thereafter, appellant complained to Dr. Ramacciotti of pain in the palm of his hand. The doctor states that he made an examination, found nothing, and paid no more attention to the matter. Following this a condition developed in the hand of appellant variously described as a nodule, a fibrosis, a hard place in the palm, and a Dupuytren's contracture. The development of the condition is not clearly described, but it appears to have been progressive. It appears that the condition resulted, if subjective analysis is to be credited, in a permanent impairment in the use of the hand to the extent of from 20 per cent. to 35 per cent. Appellant's medical expert estimated that the disability was 35 per cent., and the expert called by appellees estimated it at from 20 per cent. to 25 per cent. On the part of appellees it is contended that the condition was not a result of the accident, but was a fibrosis probably coming to view as a result of the disappearance of callous on the palm of the hand by which it had been covered, and that it made no contribution to disability of hand or fingers. On the part of appellant it is described as Dupuytren's contracture, or scar tissue development of the palmar fascia, causing contracture resulting from infection in the tips of the injured fingers extended from the finger tips through the lymphatic channels to the palmar fascia. Appellees contend that Dupuytren's contracture does not exist, since, while its causes are obscure, it could not be produced by the accident and primary injury in question, and, further, because Dupuytren's contracture results in limitation of extension and not in limited contracture as is true in the hand of appellant. Appellant agrees that there is no limitation of extension, but insists that the limitation of contracture found is a concomitant of Dupuytren's contracture. Based on examination made at a recess during the trial in the district court, and subjective symptoms then found to exist which he considered feigned by appellant, the doctor called by appellees con-

cluded that there was permanent partial disability of the hand of from 20 per cent. to 25 per cent. Based on history and examination the doctor of appellant concluded that there was a permanent partial disability of 35 per cent.

Out of this maze of contradiction of opinion and deduction we must determine, first, whether the appellant has shown by a preponderance of the evidence that the disability to appellant's hand was caused by an accident arising out of and in the course of his employment (*Kuhtnick v. Carey*, 124 Neb. 762, 248 N. W. 89; *Mullen v. City of Hastings*, 125 Neb. 172, 249 N. W. 560; *Skochdopole v. State*, 133 Neb. 440, 275 N. W. 665), and, second, if we find in the affirmative, then the amount of the disability.

In the light of the foregoing review of the evidence important to a determination of the issue here presented, which shows that the condition complained of did not exist at the time of the accident but that it came about soon after the accident; in the light of the further fact that the abnormality from which it is claimed that disability flows does in fact exist; in the light of the further fact that a satisfactory explanation, if believed, has been given, and against an explanation which is for the most part negative and, where positive, without satisfactory explanation; and in the light of the further fact that both parties agree that there is, on the evidence before the court, permanent partial disability of the hand separate and apart from the injury to the fingers; we think the appellant has sustained the necessary burden of proof.

Having thus determined, it now becomes necessary to ascertain the extent of the disability of appellant. In this connection candor requires the statement that no conclusive reason exists which requires the acceptance of the estimate of one party rather than the other. However, since the view of appellant has been accepted in explanation of the existence of the disability, and the estimate of disability by the appellees depends only upon an examination made during recess of the trial in the district court, and since the examination and observation by appellant's doctor as to dis-

ability probably, though not certainly, were more exhaustive, it appears proper, logical and reasonable to accept the estimate testified to by appellant's physician. This estimate is accordingly accepted, and in consequence it is determined that appellant has sustained a permanent partial disability to his hand to the extent of 35 per cent. of its use, which includes the disability to the two fingers involved in the accident.

We, therefore, find that appellant is entitled to recover from appellees on account of temporary total disability for 11 weeks and 4 days, at the rate of $10.67 a week, the sum of $123.47, which is confirmatory to that extent of the finding of the district court; and the further sum of $439.56, on account of permanent partial disability for 63 weeks and 3 days at $6.93 a week, this being 66 2/3 per cent. of the difference between the wage of appellant at the time of the accident and his earning capacity on the basis of 35 per cent. permanent partial disability after the expiration of total temporary disability. From the aggregate of these amounts there shall be deducted the sum of $83.59, the amount previously paid to appellant on account of compensation.

The award and judgment of the district court are reversed and the cause remanded, with directions to enter award and judgment in accordance with the findings herein.

REVERSED.

The following opinion on motion for rehearing was filed July 3, 1941. *Former opinion modified.*

YEAGER, J.

On motion for rehearing by appellant it has been suggested that in the opinion this court adopted an incorrect schedule, and that appellant is entitled to recover $653.54 for 61¼ weeks at the rate of $10.67 a week for permanent partial disability. This suggestion and contention are well taken and correct.

The former opinion of this court is modified, and the finding of this court is as follows: We find that appellant is entitled to recover from appellees on account of temporary total disability for 11 weeks and 4 days, at the rate of $10.67 a week, the sum of $123.47, which is confirmatory to that extent of the finding of the district court; and the further sum of $653.54, on account of permanent partial disability for 61¼ weeks at the rate of $10.67 a week. From the aggregate of these amounts there shall be deducted the sum of $83.59, the amount previously paid to appellant on account of compensation. In no other respect is the former opinion changed or modified.

The award and judgment of the district court are reversed and the cause remanded, with directions to enter award and judgment in accordance with the findings herein.

REVERSED.

MARY GORMAN, APPELLEE, V. JOHN BRATKA, APPELLANT.
296 N. W. 456

FILED FEBRUARY 21, 1941. No. 30954.

1. **Automobiles.** Evidence outlined in opinion *held* sufficient to support a finding of the jury that the negligence of defendant was the proximate cause of a collision between automobiles and resulting injuries to plaintiff, speed and right of way at an intersection of streets being issues of fact.
2. **Trial.** The overruling of a motion to direct a nonsuit for failure of proof is not erroneous, where the evidence will support a verdict in favor of plaintiff on the controverted issues.
3. **Pleading.** An issuable fact pleaded by defendant in the answer to the petition is available to plaintiff as evidence at the trial.
4. **Negligence.** Negligence of plaintiff's married daughter, who resides in her own home independently of her parents, and who, in driving an automobile with her mother as guest, collides with a car driven by defendant, is not imputable to the mother, in absence of the latter's own negligence, unless they are engaged in an enterprise giving the mother authority to direct or to assist in the operation and management of the car.

5. **Trial.** Where instructions as a whole correctly state the law applicable to the controverted issues, the verdict of the jury, if supported by sufficient evidence, will not be set aside because particular instructions considered separately contain mere informalities or omissions which are not misleading or confusing.
6. **Appeal.** Harmless error in the admission of evidence is not sufficient ground for the reversal of a judgment.
7. **Damages.** A verdict of $2,500 for personal injuries described in the opinion *held* not excessive.

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

Crofoot, Fraser, Connolly & Stryker, for appellant.

David O. Mathews, contra.

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

ROSE, J.

This is an action to recover damages in the sum of $10,000 for personal injuries suffered by plaintiff as the result of alleged negligence of defendant in causing a collision between automobiles at the intersection of Pine and Sixtieth streets in Omaha about 9:30 a. m. November 28, 1938.

At the time of the collision Mary Gorman, plaintiff, was riding north on Sixtieth street in a Ford sedan driven by her daughter, Marie Gorman Neiman, and defendant, John Bratka, was going east on Pine street in a Ford Tudor car driven by himself.

As stated at length in the petition, the proximate cause of the collision and of resulting injuries to plaintiff was negligence of defendant in the following particulars: Excessive speed of 40 miles an hour; failure to yield the right of way to the driver of the car in which plaintiff was riding; failure to so divert the course of his car as to avoid injury; driving the Tudor into the sedan; driving with his car out of control; violation of statutes and city ordinances regulating traffic at intersections.

In the answer to the petition defendant admitted he was

driving his car at the time of the accident, but denied any negligence on his part, and alleged in substance that the accident was unavoidable as to him, that the collision was the direct and proximate result of gross negligence of plaintiff and her driver; that the Ford sedan was a family car and the driver thereof was an agent whose negligence was chargeable to plaintiff; that they failed to accord defendant the right of way, to keep a proper lookout, to have the Ford sedan under control, to divert their course on seeing defendant's peril, to comply with city ordinances regulating traffic. It is also alleged in the answer "That such negligence and want of care on the part of the plaintiff and her driver constituted more than slight negligence and directly contributed to the happening of said accident." The reply to the answer contained a general denial.

Upon a trial of the cause the jury rendered a verdict in favor of plaintiff for $2,500. From judgment therefor, defendant appealed.

On appeal the principal ground urged for reversal of the judgment is based on the following propositions asserted and argued by counsel for defendant: The Ford sedan in which plaintiff, Mary Gorman, was riding at the time of the accident was the family car of herself and her husband, Thomas Gorman. Their daughter, Marie Gorman Neiman, was their agent and driver. They were all occupants of the car when the collision occurred. The daughter was then performing for her parents a service coupled with a duty and was not in law a stranger to them. The parents were liable for their daughter's negligence to the same extent as they would have been had one of them been driving the family car. The evidence, including the physical facts, shows that the negligence of Marie Gorman Neiman as agent and driver for plaintiff was the proximate cause of the accident resulting in the latter's injuries. A motion at the close of the evidence to direct a verdict in favor of defendant was erroneously overruled. Whether defendant's position thus outlined is tenable depends on the evidence and the law applicable to the issues and the facts.

The driver of the car in which plaintiff was riding testified that she drove north on the east side of Sixtieth street toward the intersection at a speed of about 25 miles an hour and that defendant approached from the west on Pine street; that the weather was fair and the pavements dry; that when she was about a car length from the southeast corner of the intersection she saw defendant's car when possibly two car lengths from the southwest corner of the intersection; that she did what she could to get out of the way; that she drove on and defendant smashed right into her; that the collision occurred in the northeast corner of the intersection; that she observed defendant's car after she first saw it; that she would say it was going 40 miles an hour and she did not observe that it slowed down; that there was no other traffic in the intersection and nothing to prevent defendant from passing in the rear; that the car she was driving turned over and landed on its wheels after the impact and headed southwest; that it was struck at the left rear fender; that her father and mother were injured and taken to the hospital. Of similar import was the testimony of the driver's father and mother. This version of the collision was consistent with the locations of the cars when they came to rest and with the impressions made on them by the impact.

In charge of a bailiff the jury viewed the scene of the collision after they had listened to all the evidence adduced at the trial. They could properly find that the driver of the car in which plaintiff was riding was first at the crossing; that she approached and entered the intersection in her own lane of travel or on the right side of Sixtieth street and did not deviate from the proper course; that she had the right of way according to lawful regulations and was almost across Pine street when the Ford sedan was struck on the rear left side and overturned; that defendant could have passed safely in the rear on the south side of the intersection.

The version of defendant was in effect as follows: He had been going east upgrade on Pine street at 20 or 25

miles an hour. At a point where he could see southward for the distance of a block up Sixtieth street, he did not observe any car going north thereon. When his front wheels were about at the intersection, the other car, going 40 miles an hour, was 30 or 40 feet south of the intersection. He figured he had time to pass, though he had lowered his speed to 10 or 12 miles an hour, and proceeded to cross, but was unable to avoid the accident. There were no stop signs at the crossing. The streets were paved and each was 24 feet between the curbs. Defendant was first to enter the intersection. The driver of the other car did not slacken her speed or deviate her course to avoid the accident. The testimony of two other occupants of defendant's car was of similar import. Defendant admitted on the witness-stand that he signed a report of the accident November 28, 1938. It recited that he had read it and it contained the following statements:

"All of a sudden I collided with a car which was going north on Sixtieth street. I did not see this car until we collided. I could not say how fast this car was going since I did not see it until we collided."

He testified, however, to the effect that he did not knowingly make such statements. With the evidence conflicting on the proximate cause of the collision, the question was necessarily one for the jury. The evidence on that issue preponderates in favor of plaintiff as found by the jury and it follows that the trial court did not err in overruling defendant's motion for a nonsuit.

Counsel for defendant contend that evidential negligence of plaintiff's driver is necessarily attributable to plaintiff and precludes a recovery for damages; that the trial court in the instructions to the jury erroneously adopted the theory that plaintiff was a guest or passenger in the car driven by her daughter at the time of the accident, whereas the car was a family car and the driver was the agent of plaintiff.

The ownership and use of the car in which plaintiff was riding and the relationship of father, mother and daughter

are facts not in dispute. The answer to the petition pleads:

"This defendant further alleges that plaintiff's husband, Thomas Gorman, was the owner of the 1937 Ford sedan automobile involved in the accident."

The evidence shows the same fact and the rule applicable to this allegation has been stated as follows:

"A party may at any and all times invoke the language of his opponent's pleading, on which a case is being tried, on a particular issue, as rendering certain facts indisputable; and in doing this he is neither required nor allowed to offer such pleading in evidence in the ordinary manner." *Bonacci v. Cerra,* 134 Neb. 476, 279 N. W. 173.

The car driven by Marie Gorman Neiman was therefore owned by Thomas Gorman, not by plaintiff. It was registered in his name but kept at the home of his married daughter and her husband, Clark Neiman. It was never driven by the owner or his wife—the plaintiff. The Neimans generally provided gas, oil and repairs. Plaintiff was 75 years of age when injured and her husband 78. They resided in an apartment at 4718½ South Twenty-fourth street, Omaha. Their daughter and her husband had resided for 14 years at 5832 William street, the residences being perhaps seven miles apart. The Neimans maintained their own home and were not dependent on the Gormans or either of them for support. On the morning of the collision Marie Gorman Neiman called her mother by telephone, invited her parents over to spend the day and said she would be down for them. She called for them and with the mother in the front seat of the car, the father in the rear seat, and herself at the wheel, they started for 5832 William street. On this trip, one frequently made without accident, the collision occurred. The daughter had been driving automobiles for 19 years. The mother had never driven one. These facts were proved without dispute. There was no evidence that the mother and the daughter were engaged in an enterprise giving the mother authority to direct or to assist in the operation and management of the car, nor that the mother was guilty of such negligence as

would defeat a recovery, but there was evidence that the mother was the guest of her daughter. The pertinent principle of law was stated in a former case as follows:

"Negligence on the part of a husband in driving an automobile cannot be imputed to his wife, who is riding with him, unless the parties are engaged in an enterprise giving the wife the power and duty to direct or to assist in the operation and management of the car." *Stevens v. Luther*, 105 Neb. 184, 180 N. W. 87. Followed in *Dederman v. Summers*, 135 Neb. 453, 282 N. W. 261.

In view of all the evidence and the law applicable thereto, the trial court did not err in failing to instruct the jury that plaintiff's daughter, while driving, was an agent whose negligence was attributable to plaintiff.

Some of the instructions are criticized as erroneous, but they have been examined and considered together in connection with the criticisms and evidence and are found to be free from error prejudicial to defendant. Rulings permitting witnesses for plaintiff to testify to the speed of defendant's car were not prejudicially erroneous, though their testimony was challenged as inadmissible. The jury found on competent evidence that the speed of defendant's car was sufficient at the instant of the impact to overturn the car in which plaintiff was riding.

An assignment of error is directed to the verdict as excessive. There is evidence tending to prove that plaintiff, as a result of the collision, was in a hospital two weeks; was afterward confined to her home or to her bed for about eight weeks; was able to attend to her house work without help before she was injured but not afterward; that she suffered pain at intervals up to the time of the trial—more than a year. Her attending physician enumerated some of her injuries as follows: Body bruises; multiple cuts on legs; fracture of rib; brain concussion; heart shock; traumatic phlebitis; nervousness; pain; loss of sleep. In addition hospital expenses and compensation of the physician were elements of damage. There is no substantial ground for condemning the verdict as excessive. On the record in

its entirety, error prejudicial to defendant has not been pointed out or found.

Plaintiff died pending the appeal and the action was revived in the name of Marie Gorman Neiman, administratrix of the estate of Mary Gorman, deceased, plaintiff.

AFFIRMED.

STATE, EX REL. WALTER R. JOHNSON, ATTORNEY GENERAL, PLAINTIFF, V. C. E. CHILDE, DEFENDANT.
295 N. W. 381

FILED FEBRUARY 21, 1941. No. 30822.

1. **Attorney and Client.** It is the character of the act, not the person by whom or for whom or the place where it is performed, which determines whether such act constitutes the unauthorized practice of law.
2. ———. The power to define what constitutes the practice of law is an exclusive judicial function.
3. ———. The determination of the persons to be licensed to practice law is a judicial function over which the courts have exclusive control.
4. ———. One who possesses the knowledge necessary to have reasonable skill and efficiency in handling matters relating to the fixing and revision of transportation and service rates and charges of common carriers may not engage in the practice of law before the railway commission of this state without a license.
5. ———. To constitute the practice of law, acts performed while appearing before the railway commission must require the exercise of legal training, knowledge and skill.
6. ———. The supreme court has the sole power to punish for contempt any person assuming to practice law in this state without a license.

Original action for contempt by the state, on the relation of the attorney general, against C. E. Childe. *Motion for judgment on the pleadings overruled.*

Walter R. Johnson, Attorney General, and *Don Kelley,* for plaintiff.

A. G. Ellick, for defendant.

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

CARTER, J.

This is an original action brought by the state on the relation of the attorney general charging the defendant with contempt of court for practicing law in this state without a license. The matter is before the court at this time on the motion of relator for a judgment on the pleadings.

At the first hearing before the referee, and prior to the filing of the motion for a judgment on the pleadings, respondent asked leave to amend his amended answer by filing an additional paragraph thereto. We hold that respondent was entitled to amend when leave to so do was requested and, by virtue of a stipulation appearing in the record, we will consider the amendment as a part of respondent's answer in ruling upon the motion now before the court.

The record shows that respondent is a person having reasonable skill and efficiency in handling matters relating to the fixing and revision of transportation and service rates and charges of common carriers. The acts alleged to constitute the practice of law are in relation to appearances made by respondent before the state railway commission. An understanding of the situation before us requires an investigation of the powers of this court over the subject-matter of the action and a determination of the powers and functions of the railway commission in so far as they bear upon the principles of law applicable to the case and necessary to a decision thereof.

This court has heretofore held that it has the power to define and regulate the practice of law as an inherent power of the judiciary. *In re Integration of the Nebraska State Bar Ass'n*, 133 Neb. 283, 275 N. W. 265. It is likewise invested with exclusive power to admit persons to the practice of law in this state and, except for the possible right of the

legislature to make minimum requirements for the protection of the public by a proper exercise of the police power, to fix the qualifications for admission to the bar. *State v. Barlow,* 131 Neb. 294, 268 N. W. 95; *State v. Kirk,* 133 Neb. 625, 276 N. W. 380. The power to discipline those licensed to practice law is also vested with this court. *In re Disbarment Proceedings of Newby,* 76 Neb. 482, 107 N. W. 850; *State v. Goldman,* 127 Neb. 340, 255 N. W. 32. The power of this court to regulate the bar has been held to include the power to integrate the bar by rule of court. *In re Integration of the Nebraska State Bar Ass'n,* 133 Neb. 283, 275 N. W. 265. The power to define what constitutes the practice of law is likewise lodged with this court. *State v. Barlow,* 131 Neb. 294, 268 N. W. 95; *State v. Kirk,* 133 Neb. 625, 276 N. W. 380. The court has the sole power to punish for contempt any person assuming to practice law within this state without having been duly licensed to do so. *State v. Barlow,* 131 Neb. 294, 268 N. W. 95; *State v. Hinckle,* 137 Neb. 735, 291 N. W. 68.

The authority of the supreme court to define and regulate the practice of law is inherently contained in the grant of judicial power to the courts by the Constitution. Respondent contends, in view of this fact, that such inherent power is limited by the doctrine of the separation of powers and does not include the right to regulate the appearance and activity of practitioners appearing before the railway commission while it is engaged in other than judicial functions. It is argued by the relator that the character of the act and not the place where the act is performed is the controlling and decisive factor. There are many cases from foreign jurisdictions supporting each of these propositions which we will not undertake to review in this opinion. We appear to have committed ourselves to the latter view by the former decisions of this court. In *State v. Kirk,* 133 Neb. 625, 276 N. W. 380, we held: "In determining the illegal practice of law, it is the character of the act and not the place where the act is performed which is the decisive factor." See, also, *State v. Hinckle,* 137 Neb. 735, 291 N. W. 68. The

holding in *State v. Barlow*, 131 Neb. 294, 268 N. W. 95, although not expressly stated, tends to support the same conclusion. In *State v. Wells*, 191 S. Car. 468, 5 S. E. (2d) 181, the supreme court of South Carolina stated the rule as follows: "The character of service rendered, and not the denomination of the tribunal before whom such services are rendered, controls determination of whether such services constitute the 'practice of law.'" See, also, *Grand Rapids Bar Ass'n v. Denkema*, 290 Mich. 56, 287 N. W. 377; *Shortz v. Farrell*, 327 Pa. St. 81, 193 Atl. 20; *People v. Peoples Stock Yards State Bank*, 344 Ill. 462, 176 N. E. 901. We have come to the conclusion that it is the act, not the person by whom or for whom or the place where it is done, which determines whether it is unauthorized law practice.

The railway commission is a constitutional tribunal deriving its powers directly from the people. Const. art. IV, sec. 20. The legislature has, in accordance with the provisions of the foregoing section of the Constitution, authorized the railway commission to adopt rules and regulations to govern its proceedings and the mode and manner of conducting investigations. Comp. St. 1929, secs. 75-301 and 75-102; Comp. St. Supp. 1939, sec. 75-225. These sections of the statute convey broad powers upon the railway commission with reference to its procedure, but they do not authorize one not admitted to the bar to engage in the practice of law. The determination of the persons to be licensed to practice law is a judicial function over which the courts have exclusive control. The issue therefore resolves itself into the question whether the acts performed by respondent amounted to the practice of law. In this connection, we desire to point out the difficulty of stating an all-inclusive definition of what constitutes the practice of law. Any attempt to state a general and precise definition would tend toward a rigidity by judicial rule which would eventually forestall the beneficial results to be accomplished. The practice of law obviously has complexities and diversities too many and too intricate to be compressed within an exact formula. The situation is further proof

of the correctness of the statement of Mr. Justice Holmes that "general propositions do not decide concrete cases."

It is urged as a defense that to acquire and possess the knowledge necessary to have reasonable skill and efficiency in the handling of matters relating to the fixing and revision of transportation and service rates and charges of common carriers requires years of intensive and undivided study which few lawyers, if any, have undertaken. This is not a defense. We do not doubt that respondent possesses high qualifications in the transportation rate field. But the fact that he can qualify as an expert in a particular field will not permit his engaging lawfully in the profession of the law without a license to do so. In this respect he is in no better position than the physician, the accountant, and the financial adviser, each of whom has expert knowledge in excess of that of the lawyer in his respective field.

As was done in *State v. Barlow,* 131 Neb. 294, 268 N. W. 95, and *State v. Kirk,* 133 Neb. 625, 276 N. W. 380, we shall examine the facts and circumstances of each case and determine as best we can the line of demarcation, often shadowy and wavering, which defines the limits of the functions of the legal adviser from those of the layman.

The fixing and revision of transportation rates, charges and conditions of service is a legislative function which has been conferred upon the railway commission. In addition to this function it has duties of administrative and judicial character to perform. This is a further reason why, in an appearance before the railway commission, the nature of the appearance must be inquired into before it can be determined whether it constitutes the practice of law. While the fixing of transportation rates by the railway commission has been consistently held to be a legislative function, its orders are subject to review on appeal to the supreme court. *Hooper Telephone Co. v. Nebraska Telephone Co.,* 96 Neb. 245, 147 N. W. 674; *Publix Cars, Inc., v. Yellow Cab & Baggage Co.,* 130 Neb. 401, 265 N. W. 234; *Effenberger v. Marconnit,* 135 Neb. 558, 283 N. W. 223. It is held in the foregoing cases that the questions to be determined

on such an appeal are whether the railway commission acted within the scope of its authority and if the order complained of is reasonable and not arbitrarily made. It is quite apparent that the record made before the railway commission is, on appeal, the record from which the supreme court must determine these questions. We have come to the conclusion, however, that the fact that an appeal is allowed from an order of the railway commission in a purely legislative matter does not of itself make an appearance before the commission an engagement in the practice of law. The appeal from a rate fixing order of the railway commission to the supreme court as provided by our statute, Comp. St. 1929, sec. 75-505, and upheld by this court in *Hooper Telephone Co. v. Nebraska Telephone Co.*, 96 Neb. 245, 147 N. W. 674, establishes a procedure peculiar to this state in that the general weight of authority is to the effect that statutes providing for such an appeal clothe the court with legislative powers contrary to constitutional provisions. While this court has continued to follow the *Hooper Telephone Company* case, we do not think it is sufficient to justify a holding that an appearance before the railway commission in a purely legislative matter is, of itself, sufficient to constitute the practice of law.

Respondent further contends as a defense that a denial of the right of respondent to appear and practice before the railway commission would violate rights vested in and granted to the railway commission and to the respondent by the Constitution in that it would amount to an invasion of the powers of the legislative branch of the government of the state by the judicial branch thereof. There is no merit in this contention. The sole power to define and regulate the practice of law is in the judicial branch. *In re Integration of the Nebraska State Bar Ass'n*, 133 Neb. 283, 275 N. W. 265. The legislature does not have the power to admit persons to the practice of law. Any attempt on its part to so do is an invasion of the powers of the judiciary inhibited by applicable constitutional provisions. The doctrine of the separation of powers is applicable to the extent

that each branch of the government may operate within its field subject only to constitutional restrictions and reservations. The legislature has no more right to usurp the powers of the judiciary than has the judiciary to usurp the functions of the legislature. Any legislative attempt to authorize the practice of law by one not duly licensed by the supreme court is absolutely void as an attempt to exercise judicial powers by the legislative branch of the government.

It now becomes necessary to determine in the light of the foregoing discussion of the law whether relator is entitled to a judgment on the pleadings.

The first count of the information charges that respondent appeared before the railway commission in a proceeding entitled "In The Matter of the Application of Central States Motor Carriers Association for Authority to Establish Rates on Building and Fencing Materials." The nature of the proceeding is not disclosed except what may be gleaned from the foregoing title. It is charged that respondent appeared before the railway commission in said matter in a representative capacity and performed certain acts including the preparation and filing of pleadings, the examination and cross-examination of witnesses, the lodging of objections to the introduction of testimony and the making of arguments in support of the position taken by those whom he represented. While these functions are generally included in the routine duties of a practitioner of the law, they are not conclusive when performed outside of court unless it be shown that legal training, knowledge and skill were required in their exercise. As was said in the *Barlow* case, laymen may prepare simple, elementary documents of a routine character. A layman may also advise persons as to matters of business, although minor legal questions be incidentally involved where the legal training, knowledge and skill required are not beyond the range of the average man. It is not charged in count 1 that the acts performed by respondent required the exercise of legal training, knowledge and skill. Consequently, respondent

has not, by his admission of the truth of the facts pleaded, admitted that he was engaged in the practice of law. The motion as to count 1 is therefore overruled.

Count 2 of the information charges the performance of acts similar to those contained in count 1. It contains the additional allegation, however, that respondent conducted the proceedings as a duly licensed attorney at law and counseled and advised his alleged client with reference to law and procedural matters. The answer of respondent admits the doing of the acts alleged, but denies that he acted as an attorney at law, or advised as to legal or procedural matters. Relator is not therefore entitled to a judgment on the pleadings. Evidence is required to establish whether the character of respondent's actions was such as would amount to the unlawful practice of law.

Count 3 contains similar allegations as count 1. Respondent denies that he appeared at the hearing as charged. The motion is necessarily overruled as to this count.

In count 4, acts are charged which are similar in character to those charged in count 2. Respondent admits the doing of the acts charged in this count, but denies acting as an attorney at law or in any manner engaging in the practice of law. It is necessary in order to sustain a conviction for contempt that evidence be adduced showing that legal training, knowledge and skill were required in the performance of the acts with which respondent is charged, when such acts were performed outside of court. The motion for a judgment on the pleadings is therefore overruled as to this count.

In count 5, respondent is charged with doing certain acts outside of court which are alleged to constitute the practice of law. The nature of the acts and whether their doing requires legal training, knowledge and skill are not shown with such particularity that this court can say as a matter of law that they constitute illegal practice of law. Respondent denies that he acted as attorney or in any manner advised or counseled as to the law. Evidence of the nature of the acts and the necessity of legal training,

knowledge and skill in their performance is required in order to substantiate the charge. The motion for judgment on the pleadings must also be overruled as to this count.

It is true that relator alleges generally that in each of said counts respondent advised and counseled as to legal rights and conducted himself as a regularly licensed attorney. These allegations are denied by respondent and they can therefore lend no assistance in support of the motion.

The motion of relator for a judgment on the pleadings is therefore overruled as to each count contained in the information and the cause referred to the duly appointed referee of this court for the taking of evidence and the determination of findings of fact and conclusions of law necessary to a final disposition of the case.

MOTION FOR JUDGMENT ON THE PLEADINGS OVERRULED.

JOHNSEN, J., not participating.

IN RE ESTATE OF OLLIE E. BERG.
GERTRUDE BERG, APPELLANT, V. EINAR BERG, APPELLEE.
296 N. W. 460

FILED FEBRUARY 21, 1941. No. 30919.

1. **Courts.** Section 20-1903, Comp. St. 1929 (Rev. St. 1913, sec. 8177), *held* to have been legally enacted on the adoption of Revised Statutes 1913, and to provide effective procedure by "petition in error" to secure a review by the district court of a final order made by the county court in the exercise of probate jurisdiction.
2. ———. Remedy provided by sections 30-1601 *et seq.*, Comp. St. 1929, by appeal to the district court from final orders made by the county court in the exercise of probate jurisdiction *held* not exclusive.
3. **Appeal.** All parties interested in a matter heard before the county court in the exercise of probate jurisdiction, who may be affected by the modification or reversal of a final order of said court, must be made parties in a proceeding to review said matter by error proceedings in the district court.

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

Dorsey & Baldrige, for appellant.

Reed, Ramacciotti, Robinson & Hruska, contra.

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE and MESSMORE, JJ., and ELDRED, District Judge.

ELDRED, District Judge.

Ollie E. Berg died July 27, 1937, leaving a will which was admitted to probate. He left surviving his widow, Gertrude Berg, appellant herein, but no children. Certain provisions were made by the will for the widow of the deceased, a number of comparatively small bequests were made to other parties not involved herein, but the larger portion of the estate was left to Einar Berg, a nephew, appellee herein, including a store operated by decedent under the trade-name of Berg Clothing Company, together with the bank account connected therewith. The estate involved property of more than $300,000 in value. The appellant, Gertrude Berg, the widow, filed her election to take under the statute rather than under the will. The store was operated by the executor, the Omaha National Bank, under the order of the court, pending the settlement of the estate and until it was closed by the final decree February 28, 1939; and a net profit of $14,490.31 was realized therefrom during that period, said sum being the only item involved in this proceeding.

The county court, by its final decree, found that Einar Berg, appellee, was entitled to all of such profits and ordered that the same be paid to him by the executor, the Omaha National Bank. The widow, Gertrude Berg, appellant, claims that she is entitled to one-half thereof. March 8, 1939, after the rendition of the final decree, Gertrude Berg asked the county court to fix the amount of the appeal bond as provided by statute (Comp. St. 1929, sec. 30-1603) and the amount of such bond was fixed by the county court on the 9th day of March, 1939. No appeal bond was given within the 30 days provided by the statute above cited, or at any time.

On the 15th day of May, 1939, Gertrude Berg, as plaintiff

in error, filed in the district court for Douglas county her petition in error under the provisions of section 20-1903, Comp. St. 1929, against Einar Berg, defendant in error, from the final order made February 28, 1939, by the county court of Douglas county, in the matter of the estate of Ollie E. Berg, deceased. The executor of the will of Ollie E. Berg was not made a party to said error proceedings; nor was any one made a party defendant in error other than Einar Berg. On the 19th day of June, 1939, Einar Berg filed in the district court motion to dismiss such error proceedings for lack of necessary parties thereto, and on the same day filed a special appearance objecting to the jurisdiction of the court over the subject-matter and his person. November 13, 1939, the district court sustained the special appearance of Einar Berg and motion to dismiss the error proceedings for the reasons: (1) That the only method to review a county court's final decree in estate matters is by appeal as provided by sections 30-1601 to 30-1607, Comp. St. 1929, and Gertrude Berg did not take proper steps in accordance therewith; and (2) there is a lack of necessary parties or party in the proceedings brought by her, for which reasons she is not entitled to a review of the county court's order.

From the judgment of the district court Gertrude Berg has appealed.

While some other questions are raised and discussed in briefs of counsel, consisting of more than 200 pages, the only assignments of error in appellant's brief are:

"(1) The court below erred in holding that appellant, in order to obtain a review by the district court of the order of the county court in question, was required to proceed in accordance with sections 30-1601 to 30-1607, Comp. St. 1929, rather than under the provisions of sections 20-1901 to 20-1908, Comp. St. 1929, in conformity with which her proceedings in the court below were prosecuted.

"(2) The court below erred in holding that there was any lack of necessary parties or party in the proceedings instituted and prosecuted by appellant."

If it should be determined that the action of the trial court may be sustained on either of the grounds set forth in its findings and order of dismissal, its decision should be affirmed.

It is not contended that appellant made any attempt to secure a review of the judgment of the county court by appeal under the provisions of article 16, ch. 30, Comp. St. 1929, other than to have the amount of an appeal bond fixed by the county judge. But it is contended that, notwithstanding the enactment of the statute providing for appeals from final orders of the county court in probate matters (Comp. St. 1929, secs. 30-1601 *et seq.*), the jurisdiction of the district court to review such orders by proceedings in error (Comp. St. 1929, secs. 20-1901 to 20-1904) remains unimpaired; that proceedings under last designated statute are available when supersedeas is not required or desired.

Appellant cites *Rogers v. Redick*, 10 Neb. 332, 6 N. W. 413 (decided 1880). It is there held that an order of county court may be reviewed on error in the district court. But, in 1905 section 584 of the Civil Code (being same as present section 20-1903, Comp. St. 1929), providing procedure for review by petition in error, was repealed (Laws 1905, ch. 174). Appellant further cites *Engles v. Morgenstern* (1909) 85 Neb. 51, 122 N. W. 688. While that was not a case arising within the probate jurisdiction of the county court, but a civil suit for money judgment, instituted before a justice of the peace, the court considered the section involved herein and in paragraph 2 of the syllabus states:

"The right to review final orders of justices of the peace and other inferior tribunals still exists, notwithstanding the repeal of section 584 of the Code."

It further states in the opinion: "This section covered the proceedings both in the district and supreme courts, and provided for the filing of a petition in error. When in 1905 the change was made by which all civil cases brought for review to the supreme court must thereafter be brought

in the form of appeals, and the formal 'petition in error' was abolished in that court, the legislature evidently overlooked the fact that in this section was also embraced the manner of procedure applicable to proceedings in error brought to the district court. That this was an oversight is clear, for in no other respect was the right of review by error interfered with. See sections 599, 600 and 601 of the Code. Indeed, it is a matter of legislative history that at its next session an act was passed to remedy the defect, but was vetoed by the governor during the closing rush. The right of review upon error exists now as it always has in this state since the adoption of the Code, although the special form of procedure provided by section 584 has been abrogated."

In the case of *In re Hilton* (1916) 99 Neb. 387, 156 N. W. 659, the question as to the right to maintain an error proceeding from a final order of the county court in the exercise of probate jurisdiction was directly involved, and the opinion refers to *Engles v. Morgenstern, supra,* and states:

"The fair import of that decision is that an error proceeding is available for the review of a final order of the county court, made in the exercise of probate jurisdiction, notwithstanding the repeal of section 584 of the Code."

But no further consideration appears to have been given therein to that question.

In view of these holdings it would seem that this court, while recognizing that section 584, Civil Code, was repealed, has held that right of review upon error still exists, although the special form of procedure specified in said section was abrogated. The question now presented is: Was said section reenacted when it was included as section 8177, Rev. St. 1913 (Comp. St. 1929, sec. 20-1903)?

It is urged that, by including section 584 of Code in Revised Statutes 1913 as section 8177, that section was reenacted on the adoption of the report of the commission appointed to revise the statute. The statutory revision was authorized by chapter 166, Laws 1911. That act authorizes the commission to "bring together all statutes and parts of

statutes relating to the same subject-matter, omitting obsolete or repealed matter * * * but such commissioners shall have no authority to make any change in any act or part of any act which may have the effect of giving a different construction thereto from that which may have been given by the courts of this state." While such a change as was made by including the section here involved may not have been contemplated by the legislature when they appointed the commissioners to revise the statute, yet the action on the part of the commissioners in including said section in their report might have been justified, if that were necessary, on the theory that, by including that section, they did not make any change in the law governing the right of review upon error that would give the statute a different construction than had been given it by the court in *Engles v. Morgenstern, supra.* However, the action of the commissioners as prepared and reported to the legislature was adopted and approved February 14, 1913 (Laws 1913, ch. 3), said act providing:

"That the Code of Laws embodying the General Statutes, the Code of Civil Procedure and the Code of Criminal Procedure of the State of Nebraska, *as prepared and reported* to the Thirty-third General Assembly of the Legislature of Nebraska by A. M. Post, J. H. Broady, and E. L. King, pursuant to the authority of Chapter 166 of the Laws of 1911, be, and the same is hereby adopted, approved and made of force as the Revised Statutes of the State of Nebraska of 1913." (Italics supplied.)

There is no suggestion that there was any irregularity in the passage or approval of said chapter 3, Laws 1913.

By chapter 241, Laws 1913, said statutes were ordered published; section 2 of that act providing:

"The Revised Statutes shall be published in the same form and on the same plan of arrangement as the report of the commission for the revision of the laws *as contained in the report thereof* to the thirty-third session of the legislature and shall contain the matter of such report with all acts of a general nature enacted by the thirty-third session of the legislature * * *." (Italics supplied.)

Though the report included matter the commissioners were not specifically authorized to include, the formal adoption and approval of the report of the commissioners, embodying section 8177, by the legislative enactment of chapter 3, Laws 1913, was as much an expression of legislative will, as to what it should contain, as was the expression in the Act of 1911, and a later expression thereof. *Leggett v. Wardenburg,* 53 Ariz. 105, 85 Pac. (2d) 989; *State v. Davis,* 116 Kan. 211, 225 Pac. 1064; *State v. Davis,* 116 Kan. 663, 229 Pac. 757; *Chumbley v. Peoples Bank & Trust Co.,* 166 Tenn. 35, 60 S. W. (2d) 164.

"The vital question is not what the commission had authority to do, but what the Legislature intended to do with the commission's work, and such intention can only be gathered from what the Legislature itself declared when it finally passed upon the work submitted to it by the commission." *County of Washington v. Gates,* 108 Vt. 117, 183 Atl. 506.

The fact that the section in question may have been inserted by the commissioners in their report without specific authority is not material. The approval and adoption of their report by the legislature with such section included therein made such section the law. *Herndon v. State,* 16 Okla. Cr. 586, 185 Pac. 701; *Barnett v. Barnett,* 158 Okla. 270, 13 Pac. (2d) 104. Such section became the law from the time of the adoption of the Revised Statutes of 1913. *American Indemnity Co. v. City of Austin,* 112 Tex. 239, 246 S. W. 1019. Under such circumstances it was unimportant whether the commissioners were authorized to revise the law by adding new provisions. *Klingensmith v. Siegal,* 57 N. Dak. 768, 224 N. W. 680; *Brady v. Cooper,* 46 S. Dak. 419, 193 N. W. 246. The enactment by the legislature of the Revised Statutes in 1913 gave force and effect to every provision therein the same as if single chapter had been enacted making changes by adding section. *State Tax Commission v. Backman,* 88 Utah, 424, 55 Pac. (2d) 171.

While the authorities cited by appellee, *State v. Nolte,*

187 S. W. (Mo. App.) 896, and *State v. Nolte*, 203 S. W. (Mo.) 956, also *State v. American Bank & Trust Co.*, 75 Mont. 369, 243 Pac. 1093, may tend to support a contrary view, yet, after giving them careful consideration, we conclude they are not controlling in this case.

Since the adoption of Revised Statutes 1913, section 8177 thereof (Comp. St. 1929, sec. 20-1903) has been in force, and provides effective procedure for review by the district court through proceedings in error of a final order made by the county court in the exercise of probate jurisdiction.

The contention of appellee that sections 30-1601 *et seq.*, Comp. St. 1929, provide an adequate remedy by appeal to the district court from final orders of the county court in the exercise of probate jurisdiction would seem to be true, but the remedy provided is not exclusive.

The remaining question is: Did the district court err in holding that there was a lack of necessary party or parties to the error proceedings filed by Gertrude Berg in the district court to entitle her to a review by that court of final order of the county court dated February 28, 1939?

The order complained of directed the executor to pay to Einar Berg the sum of $14,490.31, profits earned by the Berg Clothing Company during the period it was operated by the executor, to one-half of which Gertrude Berg, plaintiff in error, claims to have been entitled. The executor, the one ordered to do the paying, was not only a party to the judgment or order, but was an "adverse party" under the statute. It was not made a party to the error proceedings in any manner. Einar Berg, from the records, appears to have been the only party upon whom summons in error was served. The statute provides for service of summons in error on "adverse party." Comp. St. 1929, sec. 20-1903.

Appellant in her brief states that, "When the petition in error was filed on May 15, 1939, the executor had already turned over the profits to Einar Berg who was the only person other than Gertrude Berg who could have any conceivable interest therein. The estate, as such, was not interested, and, since the order was not superseded, the

executor, who acted in obedience to it in paying over the profits, was exonerated and had no further interest;" and contends for that reason that the executor was not a necessary party. But, we are not referred to any place in the transcript of the county court filed with the petition in error where there is any record as to whether a supersedeas bond was filed in the error proceedings or as to whether the executor may have paid to Einar Berg any portion of the profits realized from the operation of the Berg Clothing Company. The petition in error recites:

"IX. As the result of the orders of said county court hereinbefore referred to, the said Einar Berg has received from said executor the sum of $14,490.31, being the whole amount of the profits of said store as aforesaid, of which one-half (½), or $7,245.15 should have been awarded and paid over to plaintiff in error, and, by reason of said guardian *ad litem's* fee allowed as aforesaid, has received $75 out of the money of said estate to which plaintiff in error is lawfully entitled, making, in all, the sum of $7,320.15 of money justly belonging to plaintiff in error which has been turned over by said executor to, and received by, said Einar Berg."

The transcript of proceedings in the county court filed in the district court with the petition in error does not show that said sum of $7,320.15 "has been turned over by said executor to, and received by, said Einar Berg." In an error proceeding in the district court, that court must look to the transcript of the proceedings of the county court filed with the petition in error to ascertain what happened there. The transcript filed with petition in error closes with final order of distribution. A supplemental transcript was filed which discloses that the appellant, Gertrude Berg, had received the amount due her under terms of final distribution, but does not disclose that Einar Berg had been paid by the executor the fund involved herein. Further, there is no showing by the record whether supersedeas bond in the error proceeding may or may not have been filed in the district court under the provisions of the statute providing

for the review by petition in error in a case of this kind. Comp. St. 1929, secs. 20-1907, 20-1908.

There is no reason for any difference in the requirements as to who are necessary parties in the proceedings for review filed in the supreme court from judgment of the district court, as distinguished from a proceeding for review by district court from final order of county court. The case of *Barkley v. Schaaf*, 110 Neb. 223, 193 N. W. 267, is analogous to this case in principle. There suit was brought by Barkley as receiver of Nebraska Hotel Company against Schaaf and wife and National Bank of Commerce, claiming that a fund of $6,000 in said bank, represented by certificate of deposit issued to Gertrude A. Schaaf, was the property of Nebraska Hotel Company. The court found that neither Schaaf nor his wife had any interest in the fund, but that it was the property of the hotel company, and the bank was ordered to pay it into court to be applied to a judgment against the hotel company. Schaaf and wife appealed, but brought no other parties to action into court on the appeal save Barkley as receiver. The National Bank of Commerce was held to be an interested party, and appeal was dismissed for failure to make said bank a party thereto. The court in disposing of the case announced the rule:

"All parties to a cause tried in the district court who may be affected by the modification or reversal of the judgment must be made parties in the proceedings to review the said cause in the supreme court."

This holding has been repeatedly followed. *Donisthorpe v. Vavra*, 134 Neb. 157, 278 N. W. 151; *Bliss v. Farmers Grain & Stock Co.*, 127 Neb. 147, 254 N. W. 725; *In re Estate of Barlow*, 127 Neb. 810, 257 N. W. 71; *Reilly v. Merten*, 125 Neb. 558, 251 N. W. 114; *Curten v. Atkinson*, 29 Neb. 612, 46 N. W. 91.

Appellant cites *In re Estate of Jones*, 83 Neb. 841, 120 N. W. 439, in support of contention that Einar Berg was only necessary party to error proceedings. That was an appeal from the county court to the district court for trial *de novo*. This case is "petition in error" from county court to dis-

trict court for hearing on transcript of the record of the lower court, filed with the petition in error. In that case the sufficiency of the bond to supersede judgment appealed from was challenged on issue formed by supplemental pleadings in the district court, on the appeal, and was held insufficient. Here there is no showing as to bond or want of bond to supersede judgment. On the appeal the court held that a party may plead and prove any facts arising since trial in county court which show that adverse party is not entitled to relief sought. In the instant case on error, showing of facts arising since proceedings in the county court, of which complaint is made, for the purpose of establishing adverse party not entitled to relief sought, was not attempted, nor permissible; case being heard on record made in lower court. On account of the marked distinction in the facts involved and the proceedings followed in the two cases, that case cannot be held decisive of the issues for determination in this case. It appearing that the executor of the will had an interest that might be affected by a modification or reversal of the final order of the county court, it was a necessary party. There being lack of a necessary party to the error proceedings filed in the district court, that court acquired no such jurisdiction of the subject-matter as would authorize a vacation or modification of the order of the county court, and the motion to dismiss such error proceedings was properly sustained. Judgment of the district court

AFFIRMED.

JOSEPH F. PIMPER, APPELLEE, V. NATIONAL AMERICAN FIRE INSURANCE COMPANY, APPELLANT.

296 N. W. 465

FILED FEBRUARY 21, 1941. No. 30904.

1. Insurance. "The term 'public conveyance' means a vehicle used indiscriminately in conveying the public, and not limited to certain persons and particular occasions or governed by special

terms. The words 'public conveyance' imply the holding out of the vehicle to the general public for carrying passengers for hire. The words 'livery conveyance' have about the same meaning." *Elliott v. Behner*, 96 Pac. (2d) 852 (150 Kan. 876).

2. ———. Where an automobile was insured against loss or damage in a collision or upset, and the policy provided that the insurer would not be liable for loss or damage while the automobile was used as a "public or livery conveyance for carrying passengers for compensation," *held*, under the facts in this case, the insured automobile was not a "public or livery conveyance" within the meaning of those terms, nor used as such at the time it was damaged in an upset.

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

Ziegler, Dunn & Becker and *D. L. Manoli*, for appellant.

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

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE and MESSMORE, JJ., and HASTINGS and KROGER, District Judges.

HASTINGS, District Judge.

The appellee, Joseph F. Pimper, doing business as the Howells Motor Company, at Howells, Nebraska, recovered a judgment for $215 against appellant, National American Fire Insurance Company, on an insurance policy issued by that company, wherein appellee was indemnified to the full extent of loss or damage, less $50, to a 1936 Willys sedan automobile, owned by the appellee, by reason of collision or upset.

After appellee had rested his case appellant moved for a directed verdict, thereupon appellee moved for a verdict in his favor. The jury were dismissed and judgment rendered in favor of appellee, as aforesaid.

The policy provides that it does not cover loss or damage to the insured automobile by reason of collision or upset "While the automobile is used as a public or livery conveyance for carrying passengers for compensation."

Counsel for appellant contend that it is shown by the evidence that the damage to appellee's automobile by an

upset was sustained while he was using his automobile "as a public or livery conveyance for carrying passengers for compensation," and that appellant was not liable for the damages sustained.

The evidence discloses that appellee had made arrangements to go to Milwaukee in his automobile on a pleasure trip to visit a cousin for two days and return to Howells. He planned to make the trip alone. A few days previous to the time set for his departure one Leonard Stecher, an old acquaintance and fellow townsman of appellee, heard of his contemplated trip and asked appellee if he and his wife and two relatives of his wife, with whom appellee was acquainted and who lived in the same town, could go along, as they wanted to visit their daughters, who were in a convent in Milwaukee. Stecher proposed if they were taken by appellee they would pay the expenses of the trip. Appellee told him that they could go with him, and that the expenses would be shared by each paying one-fifth of the amount. The expenses were to cover the costs of oil, gas and wear and tear on the tires. To avoid keeping account of the amount of the expenses of the trip to Milwaukee and return they computed the distance from Howells to Milwaukee and return at approximately 1,200 miles, and that the total expense of oil, gas, wear and tear on the tires would amount to at least 5 cents a mile. On this basis they agreed that the total expenses of the trip at 5 cents a mile would amount to $62.50. Under this arrangement they left Howells on June 12, 1936, and when near New Hampton, Iowa, a distance of about 300 miles from Howells, the car upset and was damaged so it could not be used to continue the trip. The car was put in a garage in Mason City, Iowa, for repairs, and appellee discontinued his trip and returned to Howells by train. The Stechers and their relatives went on to Milwaukee and returned to New Hampton at their own expense. Appellee told Stecher, before they left New Hampton for Milwaukee, that he would go home and get another car and come and get them at New Hampton on the following Monday. This he did and returned them to

Howells. He did this as a matter of accommodation, charged them nothing, but the Stechers and their relatives voluntarily paid a part of the expense thereof. Stecher had previously paid him $12.50 before the accident, and this, with the expense of the return trip from New Hampton, amounted to about $20.

Counsel for appellant to sustain their contention cite and rely upon the following cases: *Beer v. Beer,* 52 Ohio App. 276, 3 N. E. (2d) 702; *Jensen v. Canadian Indemnity Co.,* 98 Fed. (2d) 469; *Johnson v. Mack,* 263 Mich. 10, 248 N. W. 534; *Kerstetter v. Elfman,* 327 Pa. St. 17, 192 Atl. 663; *Myers v. Ocean Accident & Guarantee Corporation,* 99 Fed. (2d) 485; *Ocean Accident & Guarantee Corporation v. Olson,* 87 Fed. (2d) 465; *Park v. National Casualty Co.,* 222 Ia. 861, 270 N. W. 23; *Reed v. Bloom,* 15 Fed. Supp. 600; *Sleeper v. Massachusetts Bonding & Ins. Co.,* 283 Mass. 511, 186 N. E. 778.

We have carefully examined the cited cases. In these cases the exclusionary clauses involved provided that the insurer was not to be liable for loss or damage while the insured automobile was used either for carrying passengers or persons for hire, a consideration, or for compensation. The argument of counsel for appellant for a reversal is based upon the assumption that the exclusion clause in the policy under consideration has the same meaning as the exclusionary clauses in the policies considered in the cited cases. Upon that assumption it is argued that, upon the facts in this case, the Stechers and their relatives, at the time of the damage to the insured automobile, were being transported therein as passengers for compensation.

It is the general rule that each case must be determined upon the wording of the exclusionary clause in the policy and the special facts therein. Where there is any ambiguity in the provisions of an insurance policy, it is to be most favorably construed in favor of the insured and not the insurer, because the latter is the one who proposed and formulates the contract of insurance and dictates its terms.

The exclusionary clauses considered in the cited cases

are broader than that used in the policy in this case. Under such clauses, if the insured automobile is being used as a conveyance for carrying passengers either for hire, a consideration, or compensation, and loss or damage occurs, the insurer is relieved from liability, while the clause under consideration only relieves the insurer from liability for loss or damage sustained while passengers are being conveyed for compensation in a "public or livery conveyance."

"The term 'public conveyance' means a vehicle used indiscriminately in conveying the public, and not limited to certain persons and particular occasions or governed by special terms. The words 'public conveyance' imply the holding out of the vehicle to the general public for carrying passengers for hire. The words 'livery conveyance' have about the same meaning." *Elliott v. Behner*, 96 Pac. (2d) 852 (150 Kan. 876).

There is no evidence that the insured automobile was kept, used or held out for use to the public as a vehicle for carrying passengers for hire. In construing a like provision in a policy it was held in *Wood v. Merchants Ins. Co.*, 289 N. W. 259 (291 Mich. 573):

"Where insured schoolboy used his automobile to meet his own needs and as a mere incident thereof and as an accommodation transported fellow students to school, and students voluntarily paid insured 75 cents per week when transported by him, insured was not using automobile as a 'public or livery conveyance for carrying passengers for compensation' within collision policy, and hence insured was not barred from recovering on policy."

The evidence in this case shows that appellee was using his automobile at the time it was damaged for his own purposes and not as a "public or livery conveyance for carrying passengers for compensation." He would have taken the trip had the Stechers and their relatives not gone with him. The Stechers and their relatives were friends and acquaintances. It was at the solicitation of Stecher, who voluntarily offered to pay all the expenses of the journey, that appellee consented that they might go with him, under

an arrangement of a proportionate sharing of the expense. The Stechers and their relatives were to pay nothing for their transportation over and above their share of the expenses.

Under the evidence the insured automobile was not a "public or livery conveyance" within the meaning of those terms, and being used as such at the time it was damaged.

From the conclusion reached it is not necessary to decide whether the Stechers and their relatives were passengers being carried for compensation.

The judgment of the trial court is affirmed.

AFFIRMED.

PRUDENTIAL INSURANCE COMPANY, APPELLANT, V. CENTRAL NEBRASKA PUBLIC POWER AND IRRIGATION DISTRICT, APPELLEE.

296 N. W. 752

FILED FEBRUARY 28, 1941. No. 30931.

1. **Eminent Domain.** There are two elements of damage involved in a condemnation action: First, the market value of the land actually appropriated; second, the damages suffered by diminution in value of the remainder of the land, less special benefits received.
2. ———. The benefit accruing to all irrigable land within an irrigation system's area of delivery by reason of the availability of water for irrigation is a general benefit, and may not be deducted from consequential damages to land not taken.
3. ———. The appreciation in the value of the land resulting from the general expectation of the construction and successful operation of the public works may properly be considered in determining the value of the land taken or damaged in a condemnation action.

APPEAL from the district court for Phelps county: LEWIS H. BLACKLEDGE, JUDGE. *Reversed.*

Wilber S. Aten, Harold M. Peyton and *Joseph H. Sauer,* for appellant.

Ralph O. Canaday and *Paul E. Boslaugh, contra.*

Heard before SIMMONS, C. J., EBERLY, PAINE, MESSMORE and YEAGER, JJ., and LANDIS, District Judge.

SIMMONS, C. J.

Defendant is a public corporation, organized under the provisions of sections 70-701 to 70-719, Comp. St. Supp. 1939. Among other things, it has power to make appropriation of public waters, to borrow money, to construct, own and operate irrigation works, to sell water to those landowners within the area served by its distribution system, to charge a "nondiscriminatory" rate for the same, and to use and pledge its revenues for the payment of its debts. It has no power of taxation. Its relations with the landowners, who are its potential customers for water, is one of contract of sale and purchase. As to them, it is a public utility with a commodity, to wit, water, which it proposes to sell. Its main canal and distribution system are partially completed. Its storage reservoir is in process of construction. The irrigable land within the area of its distribution system is approximately 200,000 acres. It confidently expects to be able presently to sell and deliver water in sufficient quantity to the owners of said lands to meet irrigation water needs.

Exercising its power of eminent domain, it entered upon plaintiff's land (a square 160-acre tract) and appropriated a right of way diagonally across the same for a main lateral. This lateral has been constructed.

Plaintiff seeks to recover its damages. There is no question raised as to the liability of the defendant to pay for the land actually taken, and to pay damages, if any, accruing to the land not taken; nor is the trial procedure or jury's verdict questioned in that regard.

The principal question presented arises from the following situation. The evidence is uncontradicted that the benefit to the irrigable area of plaintiff's land, acre for acre, is the same as that to all other lands susceptible to irrigation from defendant's system.

The trial court instructed the jury that special benefits

were those "accruing to the land by reason of the construction and maintenance of the ditch for the purpose of irrigation," and instructed the jury to set off, against the amount of consequential damages to the lands not taken, the special benefits, if any, "accruing to the land by reason of the construction of the lateral and the irrigation system of which it is a part and the bringing of water to this land so that the landowner has because thereof, and did not have before, the ability and opportunity to any extent * * * to apply the water from said canal to the useful purposes of irrigation to a material part of the land."

Defendant in its brief states "the only special benefit to be derived from a system of irrigation is the benefit accruing by reason of the availability of water for irrigation of the land tributary to the system," and claims that it has benefited plaintiff's land in that water will be and is available to irrigate at least 106 acres thereof which is adaptable to irrigation, and that the water, if used, will increase the production of the land, and that that availability of water has increased the value of said land.

The question is: Is that increased value, if any, a special benefit which may be set off as against consequential damages or is it a general benefit which may not be so deducted? For "This court has held that there are two elements of damage involved in a case of this character: First, the market value of the land actually appropriated; and second, damages suffered by diminution in value of the remainder of the land, less special benefits received." *Stull v. Department of Roads and Irrigation,* 129 Neb. 822, 263 N. W. 148.

We conclude that this benefit is a general benefit, not deductible from the consequential damage, and that the trial court erred in his instructions to the jury.

A well-recognized authority states: "Upon the question as to whether or not the benefits arising from the proposed improvement, for which the right of way is sought, may be charged against the landowner, * * * the authorities do not agree. *Upon principle, we do not think that they should be*

so charged against him." (Emphasis supplied.) 2 Kinney, Irrigation and Water Rights (2d ed.) 1943.

Discussion as to what constitutes general and special benefits may be found in 20 C. J. 822; 18 Am. Jur. 942, sec. 298; 2 Lewis, Eminent Domain (3d ed.) 1198 *et seq.*; 2 Kinney, Irrigation and Water Rights (2d ed.) 1938 *et seq.*; 4 Sutherland, Damages (4th ed.) pp. 4106 to 4124; 2 Nichols, Eminent Domain (2d ed.) 764 *et seq.*; 2 Elliott, Railroads (3d ed.) 822; 3 Sedgwick, Damages (9th ed.) 2297 *et seq.* A large number of adjudicated cases in support are cited in the texts, but not discussed here.

The difficulty in applying many of the rules comes from the use of the words "general public," "community at large," and other similar expressions in the texts and cases defining general benefits. Defendant argues that only the irrigable land is benefited by the availability of water, and that therefore the "community" and "general public" are not benefited as a whole, and that therefore the benefit in question is not a general benefit. It must be remembered that we are dealing with *one benefit,* to wit, the potential availability of water for irrigation of all irrigable lands (including plaintiff's) within the area of defendant's system. Is that a general or a special benefit? To determine that question we must limit the inquiry to the land claimed to be benefited, to wit, irrigable land. The "general public," "community at large," and other similar expressions must therefore, for the purposes of this case, be held to be the equivalent of all irrigable areas brought within the probability of irrigation by defendant's project. The benefits to plaintiff's irrigable land must be compared, not with all other land, but with all other *irrigable* land within the area of defendant's utility. "*General* benefits (are) such as are bestowed upon other lands of *similar character* in the same vicinity." 2 Elliott, Railroads (3d ed.) 823.

"Few general rules can be laid down for ascertaining whether or not a given benefit is general or special; the question must be determined largely by the circumstances of the particular case." 20 C. J. 822.

It can more easily be determined as to what are special benefits and general benefits if we inquire: What are the reasons for the rule that general benefits may not be deducted and special benefits may be deducted from consequential damages?

Why are general benefits not deducted? "General benefits * * * may never be realized, and, if they are, it is unjust that one person should be obliged to pay for them by a contribution of property while his neighbor whose property is not taken enjoys the same advantages without price." 2 Lewis, Eminent Domain (3d ed.) 1198. See 18 Am. Jur. 944, sec. 299; *Chicago, K. & N. R. Co. v. Wiebe*, 25 Neb. 542, 41 N. W. 297; 3 Sedgwick, Damages (9th ed.) 2299.

In discussing why general benefits are not deducted from consequential damages (3 Sedgwick, Damages (9th ed.) 2299) the author points out that the landowner is given damages for the taking or injury of his property. "But the taking or injury does not of itself produce these advantages, because they are in general *shared equally by those in the neighborhood whose land is neither injured nor taken.*" (Emphasis the author's.)

If defendant's contention is sustained, then plaintiff will be compelled to pay for benefits to its irrigable land for which other owners of irrigable lands are *not* required to pay.

Why are special benefits deducted? The authorities clearly establish that one of the reasons is that those benefits are a *kind* of benefit that has been brought to and affect the particular piece of land that is not shared in by all other land within the range of the public improvement and that the landowner should pay, by a reduction in his damages, for that special benefit. 18 Am. Jur. 942, sec. 298; 2 Nichols, Eminent Domain (2d ed.) 767; 2 Elliott, Railroads (3d ed.) 822; 4 Sutherland, Damages (4th ed.) 4106.

"In order that benefits may be set off against the * * * damage to that injured in making an improvement * * * they must be special or local or such as result directly and peculiarly to the particular tract of which a part is taken."

20 C. J. 822. See, also, 2 Farnam, Water and Water Rights, 1068; 4 Sutherland, Damages (4th ed.) 4106; 3 Sedgwick, Damages (9th ed.) 2299; *City of Omaha v. Schaller*, 26 Neb. 522, 42 N. W. 721.

It is noted that some of the texts make the distinction between general and special benefits turn upon a difference *in kind* of benefit, rather than *degree*. Others make the distinction turn upon the question whether a benefit is *peculiar* to the particular land involved. The rules, when analyzed, mean the same thing, for a benefit peculiar to one or more pieces of land out of the whole is obviously a benefit differing in *kind* from that which all pieces may receive.

What *kind* of a benefit has the plaintiff's irrigable land received by the construction of this irrigation system and the probability of the availability of water that has not been received by all the irrigable land within the area of service from defendant's utility? All of said lands have the "same ability and opportunity * * * to apply water from said canal to the useful purpose of irrigation" as does the plaintiff's land. Measured by this test, the benefit to plaintiff's land is the same in kind as that that accrues to all the other irrigable land.

So far as the benefit is concerned, which may accrue to lands by virtue of the commodity which defendant proposes to sell, to wit, *water*, that benefit is the same to all lands not only *in kind* but *in degree*. All water is wet, and, if of equal quantity, it is of equal wetness. The unknown quantity in irrigation is not in the water, but in the quality of the soil, the method of handling both the water and land, the time of application, the crops to which it is applied, etc. Water, if brought to the plaintiff's land, will be of benefit, but that benefit, as water, will be no different than water delivered to any other land.

Other tests suggested by the authorities may be applied:

(1) "Benefits of two kinds may accrue to lands bounding on a way laid out, altered or widened: First, the special and direct benefit arising from its position upon the way itself; and second, the general benefit, not arising from such

location, but from the facilities and advantages caused by the way which affect all the estates in the neighborhood equally and which are shared in common with such estates." 4 Sutherland, Damages (4th ed.) 4114. Plaintiff now has two pieces of land lying on either side of "a way" (irrigation lateral) laid out across his land. Does plaintiff's land receive any special and direct benefit arising from its position on the lateral itself? The answer must be that it does not. The evidence discloses that plaintiff's land may receive the same quantity of water for the same price and under the same conditions as the other irrigable lands. The opportunity to so receive the water does not arise by virtue of the land being along the way of the lateral "but from the facilities and advantages" caused by the irrigation system which are shared in common by all the irrigable land.

(2) "The most satisfactory distinction between general and special benefits is that general benefits are those which arise from the fulfilment of the public object which justified the taking, and special benefits are those which arise from the peculiar relation of the land in question to the public improvement. * * * In other words the general benefits are those which result from the enjoyment of the facilities provided by the new public work and from the increased general prosperity resulting from such enjoyment. The special benefits are ordinarily merely incidental and may result from physical changes in the land, from proximity to a desirable object, or in various other ways." 2 Nichols, Eminent Domain (2d ed.) 765.

Applying the test suggested by Nichols, *supra*, to the benefits claimed by defendant to be conferred upon plaintiff's land, it is obvious that they are general benefits, for surely they are those "which result from the enjoyment of the facilities provided by the new public work and from the increased general prosperity resulting from such enjoyment."

(3) "A benefit may be special in respect to particular property although such benefit is shared by other property in the vicinity, as in the laying out or widening of a high-

way. But it has been held that to render a benefit special under such circumstances the different tracts must occupy a *peculiar* situation with reference to the improvement; *if the benefit attaches to all the lands in the neighborhood without regard to their situation with reference to the improvement, it is general and cannot be deducted.*" (Emphasis supplied.) 20 C. J. 824.

It is patent that plaintiff's land does not "occupy a peculiar situation with reference to the improvement," and that the same benefit attaches to every acre of land capable of being irrigated from defendant's system. The benefit is therefore "general and cannot be deducted."

Both plaintiff and defendant have cited many texts and decided cases to support their contentions. They have all been reviewed, together with many discovered by independent research. Space does not permit reference to all of them.

Plaintiff cites *Riddle v. Lodi Telephone Co.*, 175 Wis. 360, 185 N. W. 182. There the question arose as to the correct rule as to the measure of damages where a telephone company brought condemnation proceedings to acquire the right to erect and maintain a telephone line in front of the farm premises owned by the plaintiff. The language of that court is quoted, and in parenthesis are inserted the necessary factual changes to make it applicable to the present controversy. "The land of the plaintiff upon which the telephone line (irrigation lateral) is situated is no more accessible to the telephone line (irrigation lateral) than the land on the opposite side of the highway (contiguous to it on either side), which sustains no burden by reason of the erection of the telephone line (irrigation lateral). Accessibility to the line (lateral) is a general benefit which accrues to the owners of all property served by the telephone (irrigation) system and is not a special benefit to the lands of the plaintiff." No comment is necessary.

Plaintiff relies strongly on *Regouby v. Dawson County Irrigation Co.*, 126 Neb. 711, 254 N. W. 389, wherein this court said (page 718): "* * * in no case are general benefits,

such as accrue to other lands in the vicinity as well as the land in question, properly allowable as offsets against special damages. * * * Testimony was allowed on the part of the defendant to the effect that plaintiff's land was greatly increased in value because of its adaptability, along with other lands, for irrigation purposes. The court refused any special damages to the plaintiff, upon the apparent theory that the general benefits, not only to plaintiff's land, but also to other lands along the irrigation project, increased, rather than diminished, the value of plaintiff's land, and thus allowed such general benefits to be offset against special damages. In failing to apply this well-settled rule of damages to the facts, the court committed error." (Page 720): "No offset against plaintiff's special damages should have been allowed for general benefits to the land in question which are enjoyed by all the irrigable land tributary to the canal." Defendant contends that the *Regouby* case was poorly considered and is unsound. A review of the authorities supports the holding made in the above decision.

Defendant relies upon and calls particular attention to the case of *Stocker v. Nemaha Valley Drainage District*, 99 Neb. 38, 154 N. W. 862. An examination of the briefs in that case indicates that the trial court took the position that all the benefits were special, for he instructed the jury that, "If the residue of the plaintiff's land has not been depreciated, but would sell on the market for as much, or more, than the same land would have sold for, prior to the construction of the ditch, the plaintiff has suffered no consequential damages." Such an instruction can only be justified on the basis that there were no general benefits to be excluded. The appellee's brief in that case states: "There was no question of general benefits in the case. * * * The benefits and damages inquired about were the benefits and damages sustained by the particular land involved in the lawsuit." This court was there considering a case of special benefits only. The decision defined special benefits derived from drainage and compared those special benefits, which were conferred upon the particular property involved, with

general benefits which the public (not necessarily property owners) received. The decision in the *Stocker* case is consistent with the conclusion herein reached.

The defendant cites as directly in point the case of *Gallatin Canal Co. v. Lay*, 10 Mont. 528, 26 Pac. 1001, wherein the court said: "Evidence as to all damages is competent, and evidence as to all benefits is competent." That statement was made in considering a contention that a "witness must not speak of damages, unless, in the same utterance, he tells what he knows of the benefits" and that "what the damage is * * * must be a balance after deducting the benefits." The court was not considering what constituted general or special benefits, for "not a witness testified that the canal was a benefit in any sum whatever." The case is not in point.

True, as defendant contends (citing *Stocker v. Nemaha Drainage District, supra*), it may not be possible to secure exact justice in a matter of this kind. Courts should reach for the goal of exact justice. Where the application of one rule will tend toward injustice, and another rule tend toward justice, the rule that enforces the latter result should be followed. Injustice to plaintiff and other landowners similarly situated can be prevented by declaring this benefit to be, what in fact it is, a general benefit.

Defendant contends that the plaintiff waived any error in the consideration of evidence of the benefits of irrigation where it, in its case in chief, offered evidence of the extent to which the land in question was irrigable. This contention is without merit. Plaintiff was entitled to show the market value of its land at the time of the taking and to show the elements upon which the evidence of value is based. The potential availability of water for irrigation is an element that might enter into that value. If so, it is important to show the number of acres irrigable. If there was an appreciation in the value of plaintiff's land, at the time of the taking, resulting from the general expectation of the construction and successful operation of defendant's irrigation system, plaintiff, as owner, was entitled to the benefit of that appreciation. 1 Nichols, Eminent Domain (2d

ed.) 675; 18 Am. Jur. 884, sec. 246; *Lowe v. City of Omaha*, 33 Neb. 587, 50 N. W. 760. The plaintiff did not invite the erroneous instructions by the offering of such evidence.

It follows that the trial court erred in permitting the jury to deduct benefits, accruing by reason of the potential availability of water for irrigation of plaintiff's land, from the consequential damages caused by defendant's taking.

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

REVERSED.

JOHN E. COPASS, APPELLANT, V. VERDA WILBORN ET AL., APPELLEES.

296 N. W. 565

FILED FEBRUARY 28, 1941. No. 30988.

1. **Trial.** A demurrer to the evidence requires the consideration of every reasonable intendment in favor of the plaintiff to be drawn from the evidence adduced, and if from all the facts disclosed there is any substantial evidence tending to show that plaintiff is entitled to recover on the whole case, such demurrer should be overruled.
2. **Judgment.** " 'The general rule of equity pleading which is preserved by our Code is that, if there is a prayer for general relief, as well as for special relief, the court may extend the relief specially prayed for and give such other relief as the case warrants, consistent with the general frame and purpose of the petition.' *Burnham v. Bennison*, 121 Neb. 291, 236 N. W. 745." *Hilton v. Clements*, 137 Neb. 791, 291 N. W. 483.
3. **Deeds.** A consideration of the issues and evidence in the instant case requires the overruling of the demurrer to the evidence.

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

F. A. Hebenstreit and *J. C. Mullen*, for appellant.

Jean B. Cain and *C. R. Iungerich, contra.*

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

MESSMORE, J.

This is an action in equity to set aside certain deeds and conveyances to realty and transfers of personal property made to defendant Verda Wilborn. The cause was tried upon the plaintiffs' first amended petition, which contained allegations of false and fraudulent representations, made by defendant Wilborn, knowing the same to be false, and which the plaintiffs believed to be true and relied thereon to their damage. The petition further alleged lack of consideration, asked an accounting and for such other and further relief as may be just and equitable. Defendant Verda Wilborn denied the allegations of fraud and lack of consideration, admitting that the conveyances of real estate and the transfers of personal property were made to her.

Mary B. Copass departed this life, and it is stipulated that John E. Copass is the owner of all the real and personal property involved, and the only plaintiff now affected by this appeal. The defendant banks, having certain moneys on hand claimed by plaintiff John E. Copass and in the name of Verda Wilborn, were made parties defendant for the purpose of enjoining them from paying any of such moneys to her. John E. Copass and Verda Wilborn will be referred to in this opinion as plaintiff and defendant, respectively.

At the conclusion of the plaintiff's evidence, the defendant demurred thereto. The trial court sustained the demurrer and dismissed plaintiff's action. From this ruling plaintiff appeals.

The record discloses: Plaintiff John E. Copass, 79, and his semi-invalid wife, Mary, 74 years of age, through their combined efforts accumulated some considerable real estate, consisting of a small home in Dawson, Nebraska, valued at $500 to $700, and an 840-acre ranch in Custer county, Nebraska, valued from $12,500 to $20,000, and certain personal property. About four years previous to the trial of this case, plaintiff visited a brother in Kentucky, returning by way of Illinois where he visited defendant, a niece of plaintiff's wife, and whom he had known since she was a

small girl. He endeavored to persuade her to come to Nebraska, to live with him and his wife and to help take care of her aunt. After his return home he corresponded with defendant, and she finally consented to come, if he would send her money for the trip, saying that she had nothing to do for a period of 19 months, and he sent her $20. He had written her as follows, to use his own language: "We would fix her out good," "so she would have something in her older days, we would give her what we had when we was done with it." Defendant came to plaintiff's home November 1, 1937, and after she had been there for 30 days plaintiff said she could see the situation and told her if she would stay he would fix it so she would have some money and would give her one-fourth of the income from the ranch for her expenses. November 17, 1937, plaintiff and his wife transferred by warranty deed to defendant the home place located in Dawson, the consideration reciting: "For and in consideration of the sum of $1.00 dollar, love and affection, past and future care." There also appears in the deed the following: "As a part of the consideration for this conveyance, grantee agrees to keep house for grantors during their lifetime, she to do the housekeeping, cooking, washing, and nursing for both of grantors during their lifetime;" and further: "It is understood that grantors reserve a life estate in the above described property, but that upon the death of both grantors absolute fee simple title shall vest in grantee."

December 17, 1937, plaintiff and his wife conveyed by warranty deed to defendant the 840-acre ranch in Custer county, the consideration reciting: "The sum of $1.00 and other valuable consideration." The following clause is contained in the deed: "It is understood and agreed that the grantors herein are to retain possession and control of the above described premises during the lifetime of either of said grantors, and at the death of the last surviving one of the grantors above named, the entire fee simple title to the above described land shall pass to the grantee above named in absolute title."

Subsequently, defendant, fearing that the heirs at law of plaintiff might interfere, suggested such fact to him. He then stated he would make defendant safe, in that she needed spending money, and he gave her a bill of sale, reciting: "In consideration of the sum of $1.00 and other valuable consideration," and in addition, "It being the intention to convey to the said Verda Wilborn any and all personal property which we now own, either in whole or in part, located upon the above described premises, and convey to the said Verda Wilborn any and all personal property which we may own, either in whole or in part, at the date of the death of the survivor of us, belonging to us, now in our possession at the place last aforesaid." This bill of sale also included any rents due or which may become due for the rental of the ranch. There is also an interest in a chattel mortgage conveyed by plaintiff to defendant in the sum of $2,218, which defendant claims constituted a gift, while plaintiff claims that such conveyance was made with the understanding and arrangement that she was to hold title to the same for plaintiff, and that all transfers herein referred to were testamentary in character, and the property evidenced thereby was to become the property of defendant upon the death of both plaintiffs.

The record further discloses a letter directed to the Security State Bank of Broken Bow, signed by plaintiff and defendant, authorizing the division of live stock shipments made by one J. R. Griffith, tenant on the ranch, deposited to defendant's account, in accordance with a note and mortgage dated December 9, 1937, in the total amount of $2,218. This note recites: "February 28, 1941 after date," J. R. Griffith promises "to pay to Verda Wilborn" such amount. The note is supported by a chattel mortgage of even date, covering a half-interest in chattels owned by Griffith. Thus, defendant became possessed of all the property, real and personal, belonging to plaintiff. On June 1, 1939, defendant received $1,623 from the sale of cattle on the ranch, and in addition $1,500 from the tenant, to apply on the chattel

mortgage, making a total from both sources of $3,123. Out of this amount she offered to pay plaintiff $811.60, as his share of the proceeds, which he refused, contending that he made no such agreement; that he agreed to give defendant one-fourth of the rents and profits from the ranch and one-fourth of the proceeds of the Griffith mortgage. By reason of the transfers and actions on the part of defendant, plaintiff was left in the position of furnishing full support of himself and his wife and defendant, paying all of the taxes, and he had no money with which to protect the life estate in the real estate. Subsequently, defendant gave $600 to the plaintiff for such purpose. Reference is made to payment of the sum of $1,400 by defendant to plaintiff after the filing of the present action.

The object and effect of a demurrer to the evidence refer to the court the application of the law to the evidence. 26 R. C. L. 1060, sec. 68. In applying this rule, the present state of plaintiff's first amended petition, relating to fraud practiced by the defendant, in making false representations to procure plaintiff's real and personal property, and the evidence in support thereof fail to show fraud at the inception of the agreement. However, plaintiff's amended petition contains allegations, in substance: Having thus secured title to the real and personal property of the plaintiffs, the defendant immediately started a "campaign of abuse" toward plaintiff, the object of which was to "shorten his life" and bring about his death by worrying, quarreling with and calling him insulting names at various times; on one occasion menacing him with a knife and assuming a disagreeable and fighting attitude. Realizing that Mrs. Copass was sickly, delicate and frail, defendant did not treat her in the same manner, but has been reasonably kind to her, fully understanding that she would soon die. Defendant's answer denied these allegations, joining the issues thereon.

The evidence in respect of the foregoing allegations is in substance as follows: After the difficulty about the division of the money, defendant did quarrel with plaintiff and call

him names of an insulting nature, and did on one occasion make motions toward him with a knife in a menacing manner, and, on other occasions, she would shake her fist under his nose and threaten to kick him out of the house, and to "bend the stove poker" around his neck. When certain persons would call at the Copass home, or stay for a meal, the defendant would be cold and disagreeable, making the guests feel uncomfortable and unwelcome. She declined to put up fruit that plaintiff had gathered and prepared, would take food off the table before he had finished his meal, and concealed food and carried it to her room, and on occasions pulled from under Mrs. Copass, sitting in a chair, a quilt which had been placed there by her husband to make her more comfortable. Defendant indicated that a wheel chair purchased for Mrs. Copass was not a good investment. She at different times slammed doors, causing Mrs. Copass to become nervous and to cry, resulting in her being removed to another place, where she could be happier and more comfortable, and for which plaintiff paid $4 a week, he accompanying her, and when persons came to assist in moving Mrs. Copass from her home, defendant denied them admission.

In considering a demurrer to the evidence: "Every reasonable intendment in favor of the plaintiff is to be drawn from the evidence adduced, and if, from all the facts disclosed, there is any substantial evidence tending to show that plaintiff is entitled to recover on the whole case, the demurrer should be overruled." 26 R. C. L. 1061, sec. 69.

Distinction exists as between an ordinary commercial contract and a contract of the kind here considered. Contracts of the latter class are in a different classification and not subject to the ordinary rules applied by courts in other cases. *Anderson v. Reed,* 20 N. M. 202, 148 Pac. 502, L. R. A. 1916B, 862.

The disagreements and differences between plaintiff and defendant, taken separately, were not of a very serious nature, but in the present state of the record, there is uncontroverted evidence of a situation that would make it

practically impossible for plaintiff to return to his home and receive the fruits of this oral agreement. In transactions, such as exist here, an element of confidence is reposed by the old people in the grantee, sacred in its nature, a breach of and retention of the benefits of which no court should tolerate by a refinement upon technical rules and principles of law. See *Bruer v. Bruer,* 109 Minn. 260, 123 N. W. 813, 28 L. R. A. n. s. 608; *Priebe v. Sette,* 197 Minn. 453, 267 N. W. 376; *Bogie v. Bogie,* 41 Wis. 209. Persons incapacitated by the infirmities of age naturally feel a strong desire to place the fruits of their industry and enterprise where they will secure for them during the balance of their lives suitable and proper care, without further labor on their part.

This and other courts have canceled such contracts without stating any particular grounds for so doing. *Tomsik v. Tomsik,* 78 Neb. 103, 110 N. W. 674; *Humbles v. Harris,* 151 Ky. 685, 152 S. W. 797; *Peck v. Hoyt,* 39 Conn. 9.

To state that the foregoing acts of defendant, as testified to and complained of by the plaintiff, were trivial and insignificant in their nature and that she has not refused to conform to or perform the obligations of the oral contract would be to place a too-narrow construction on the contract, in that such a construction ignores a most important element of a contract of this kind, viz., that the plaintiffs were to receive the affectionate care that they fully believed the defendant could and would give to them. Defendant was bound, under the circumstances, to have anticipated the idiosyncrasies of old age. What her evidence would show in support of her answer or denial, naturally, is not included in the record. The only evidence to support her thus far on such charge is a doctor's testimony that when he visited Mrs. Copass she was kept clean and he believed defendant to be a good housekeeper. There appears in the first amended petition a statement that the defendant took care of Mary B. Copass reasonably well. The defendant, in order to comply with the agreement, still has certain duties and obligations to perform thereunder.

She agreed to take care of the plaintiffs, keep house for them, do their cooking, washing and nursing, during their lifetime.

With reference to the right of the court to grant relief in equity under a general prayer therefor, the following authorities apply:

In *Burnham v. Bennison*, 121 Neb. 291, 236 N. W. 745, this court held: "The general rule of equity pleading which is preserved by our Code is that, if there is a prayer for general relief, as well as for special relief, the court may extend the relief specially prayed for and give such other relief as the case warrants, consistent with the general frame and purpose of the petition." Followed in *Hilton v. Clements*, 137 Neb. 791, 291 N. W. 483. See, also, *Wood v. Speck*, 78 Neb. 435, 110 N. W. 1001.

We conclude the trial court should have overruled the demurrer to the evidence and heard defendant's evidence on this controverted question, to properly determine the rights of the parties in equity. Its judgment is reversed and the cause remanded for further proceedings in accordance with this opinion.

REVERSED.

UNITED STATES FIDELITY & GUARANTY COMPANY, APPELLEE, V. MERTON O. BATES, APPELLANT.

296 N. W. 560

Filed February 28, 1941. No. 30959.

1. **Officers.** "When an officer, charged with the custody of public funds, serves successive terms, the sureties upon the bond for the second term become *prima facie* responsible for such balance of the previous account as is chargeable to their principal, the presumption being that the officer has received in his new official capacity that which it was his duty to pay in his old, and that he has on hand all the funds with which he is chargeable." *Thurston County v. Chmelka*, 138 Neb. 696, 294 N. W. 857.
2. ———. Where no evidence is adduced to rebut the presumption that a public officer has received in his new official capacity

money which it was his duty to pay in his old, and that he has on hand all the funds with which he was chargeable in his old capacity, such presumption becomes absolute and must be accepted as an established fact.

3. **Judges.** Sureties on official bonds do not undertake to answer for acts done by their principal under color of office, but only for acts done by virtue of office.
4. ———. For all wrongful acts or omissions of a public officer within the limits of what the law authorizes or enjoins upon him as such officer his sureties are liable.
5. **Executors and Administrators.** A homestead exemption is in no manner a part of the assets of the estate to be administered in the probate court.
6. ———. If an order on an administrator under which he makes payment into court is void, such order affords no protection to the administrator, and receipt of payment by the county judge could not be considered as having been received by him in his official capacity.
7. ———. If the order was erroneous merely, it bound all parties until reversed, affording protection to the administrator against further liability, and the receipt of the money by the judge was an official act, performed by him in his ministerial capacity as clerk of his own court.
8. ———. The county court has general jurisdiction over the administrator and the settlement of the estate. It is the duty of the court to ascertain to whom the money should be distributed, and a direction to pay to the wrong party is a judicial error, but not an usurpation of jurisdiction.
9. **Homestead.** The county court of the county in which an estate is settled has jurisdiction to assign the homestead when the facts upon which the right of homestead depends are not in dispute.
10. **Judges.** The statute requires a county judge, upon expiration of his term of office, to pay to his successor in office all legacies, devises, or moneys due any heir or other person, in his possession, which have not been paid to the persons entitled thereto. Comp. St. 1929, sec. 27-546.
11. ———. State and county officers are liable on their official bonds for loss of any funds committed to their care, except where the loss is occasioned by the act of God or the public enemy.
12. **Principal and Surety.** A surety, having paid an obligation of a county judge which obligation had become absolute under the bond of the county judge, is entitled to recover under an indemnity agreement which obligates the judge to indemnify the surety from and against any and all loss, costs, charges, suits, damages,

counsel fees and expenses of whatever kind or nature which the surety might sustain in consequence of having entered into or executed the bond.

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

W. M. Cook, for appellant.

Davis & Stubbs and *James N. Ackerman, contra.*

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

YEAGER, J.

This is an action by plaintiff, appellee here, against the defendant, appellant here, to recover on an indemnity agreement or agreements for loss claimed to have been sustained by appellee by reason of the fact that appellee claims that it was required to respond in the principal sum of $1,250 indemnity as surety on the bond of Merton O. Bates, county judge of Dawson county, the appellant, and was required to expend the sum of $257.80 for legal services, and $14.16 court costs, in an action against the appellant and appellee, the purpose of which was to recover for default on the part of the said Merton O. Bates as county judge in the sum of $2,000.

The facts are not in dispute in any substantial particular. Appellant was county judge of Dawson county for two terms. His first term began in January, 1925, and ended in January, 1929. The second term began at the expiration of the first and ended in January, 1933. As county judge appellant was required to furnish bond with sufficient surety thereon. The appellee was surety on the bond for the first term and also for the second term. Prior to the execution and delivery of the bond for the term beginning in January, 1925, appellant executed an application wherein he agreed to indemnify and keep indemnified the appellee from and against any and all loss, costs, charges, suits, damages, counsel fees and expenses of whatever kind or nature which the appellee should or might for any cause at any

time sustain, or incur, or be put to, for or by reason or in consequence of having entered into or executed the said bond. A like agreement was entered into prior to the execution of the bond for the second term of office.

During the first term of Merton O. Bates as county judge the matter of the estate of Charlotte B. Walker was pending in the county court of Dawson county. It became necessary to sell real estate belonging to the estate in order to pay the costs of administration and debts. License was obtained from the district court to sell the real estate which was the homestead of the deceased, Charlotte B. Walker.

The deceased, Charlotte B. Walker, left surviving her husband, William P. Walker, and several children; hence, there was a homestead exemption of $2,000 necessary to be set off out of the proceeds of sale of real estate to the surviving husband.

After sale the administrator made his report of sale to the county court, whereupon appellant as county judge ordered that $2,000 be paid into the county court, the said $2,000 being the homestead right of William P. Walker, there to be held during the lifetime of the said William P. Walker, and that interest should be paid thereon semiannually as earned. The order further provided that on the death of William P. Walker, the $2,000 with interest, if any, should be paid over to the children, heirs at law or legal representatives of Charlotte B. Walker named in her will. In the same order the accounts of the administrator were approved and the estate was closed.

The money in conformity with the order was paid into the county court by the administrator. Bates, county judge, placed the money in a bank and took certificates of deposit for the same, which certificates were, from time to time, turned in and marked paid, whereupon new ones were issued to him. The last one, representing the entire sum, was issued during the last term of office of Bates.

Some time after the expiration of the second term of Bates, William P. Walker died and the heirs of Charlotte B. Walker brought suit against appellant and appellee on the

bond hereinbefore mentioned on account of the failure of appellant to pay over to them the $2,000. The bank in which Bates had placed the money had failed and he was unable on that account to obtain the money from the bank.

The appellee herein in that case by stipulation agreed to a judgment against itself for $1,250 in full settlement of the claim for $2,000, which judgment was paid. Judgment was not taken against appellant.

This action is to recover back from the appellant under the indemnity agreement or agreements the $1,250, together with attorney's fees, court costs and accrued interest.

The case was tried to a jury, and at the conclusion of the evidence, on motion of plaintiff, the court instructed the jury to return a verdict in favor of plaintiff and against the defendant. A verdict was returned in conformity with the instruction. Judgment was entered on the verdict. Motion for new trial was duly made and overruled. From this judgment and the rulings of the court defendant appealed.

Appellant sets forth several grounds of error, but they do not call for separate discussion. An analysis of the record causes us to conclude that but two propositions require consideration.

First, appellant contends that the suit should have been instituted, if ground of action existed, on the bond for the first term of office rather than the one for the second term, since the loss occurred during the first term.

This contention of appellant is not tenable. This court determined adversely to appellant on this question in the recent case of *Thurston County v. Chmelka*, 138 Neb. 696, 294 N. W. 857. In this opinion other cases on this subject are collected. In this case the court said:

"When an officer, charged with the custody of public funds, serves successive terms, the sureties upon the bond for the second term become *prima facie* responsible for such balance of the previous account as is chargeable to their principal, the presumption being that the officer has received in his new official capacity that which it was his

duty to pay in his old, and that he has on hand all the funds with which he is chargeable."

In the case at bar there is no evidence to rebut the presumption that Bates received in his new term the $2,000 in question which had come into his hands during the old. In fact the evidence shows that the last certificate of deposit representing the $2,000 was issued to appellant on May 1, 1929, which was approximately four months after the commencement of appellant's second term of office.

The second proposition is the one requiring a determination of whether or not the $2,000 was received by appellant by virtue of his office, or *ex officio,* since the obligation of the bonds signed by the appellee herein was for the purpose of guaranteeing that Bates, as county judge, would pay over to the party or parties entitled thereto, or his successor in office, all money coming into his hands by virtue of his office. Appellant contends that he did not receive the money by virtue of his office.

If the money in question herein was not received by appellant by virtue of his office there was no liability on the bonds signed by the appellee. A long line of decisions holds that sureties on official bonds do not undertake to answer for acts done by their principal under color of office, but only for acts done by virtue of office. *Huffman v. Koppelkom,* 8 Neb. 344; *Ottenstein v. Alpaugh,* 9 Neb. 237, 2 N. W. 219; *State v. Moore,* 56 Neb. 82, 76 N. W. 474; *State v. Porter,* 69 Neb. 203, 95 N. W. 769; *Snyder v. Gross,* 69 Neb. 340, 95 N. W. 636; *Stephens v. Hendee,* 80 Neb. 754, 115 N. W. 283. The same authorities also announce the rule that for all wrongful acts or omissions of a public officer within the limits of what the law authorizes or enjoins upon him as such officer his sureties are liable.

In support of the contention of appellant it is urged that the $2,000 in question, being the homestead exemption, was in no manner a part of the assets of the estate of Charlotte B. Walker, deceased, to be administered in the probate court. This is, without question, a correct statement of the law. *In re Hadsall,* 82 Neb. 587, 118 N. W. 331; *Naiman v.*

Bohlmeyer, 97 Neb. 551, 150 N. W. 829; *Dillon v. Dillon,* 103 Neb. 322, 171 N. W. 917. These cases, however, do not deal with the question of distribution of the fund representing the homestead or mechanics of distribution by the person making the sale but only with the determination of the right to the proceeds of sale.

If, instead of delivering the money to the county judge, as was done, the administrator had made the sale, paid over to William P. Walker, or some one entitled to receive it for him, the $2,000 and had properly reported the disposition to the county court, such action would have been regular. Moreover, the county court would have been without power or jurisdiction to direct any other or different action on his part. This he did not do. He reported the sale and turned the money into the county court. The county court took possession of and retained it under specific order of record in the probate proceedings.

If this order was void, then there was no liability on the bond of the county judge, and in consequence no liability on the indemnity agreement which is the basis of this suit. The rule is otherwise if the order was merely erroneous. The rule is stated in *Wheeler v. Barker,* 51 Neb. 846, 71 N. W. 750, as follows:

"The question is not, however, whether the order upon the administrator was erroneous, but whether it was void. If it was void, the payment into court afforded no protection to the administrator, and the judge did not receive the money in his official capacity. If it was erroneous merely, it bound all parties until reversed, affording protection to the administrator against further liability, and the receipt of the money by the judge was an official act, performed by him in his ministerial capacity as clerk of his own court."

In that case the county judge received moneys belonging to heirs and failed to account for them. In defense of liability on the official bond of the county judge it was urged, as in the case here, that it was the duty of the administrator to distribute funds in his hands; that he has no authority to pay into court; that the county judge has no au-

thority to receive funds; and that the money not having come into the hands of the county judge in his official capacity, there was no liability. Responding to the contention this court said:

"The county court had general jurisdiction over the administrator and the settlement of the estate. It was the duty of the court to ascertain to whom the money should be distributed, and a direction to pay to the wrong party was a judicial error, and not an usurpation of jurisdiction."

The same rule is announced in the case of *Ericsson v. Streitz*, 132 Neb. 692, 273 N. W. 17. There this court said:

"He having acted within the scope of his authority as county judge, his actions were by virtue of his office, even though he may have exercised that authority irregularly. We conclude that the funds involved herein were received by appellant Streitz in his official capacity as county judge."

That the county judge had jurisdiction to act with reference to the $2,000 involved in this case is supported by a line of decisions of this court, which specifically hold that the county court of the county in which an estate is settled has jurisdiction to assign the homestead when the facts upon which the right of homestead depends are not in dispute. *Guthman v. Guthman*, 18 Neb. 98, 24 N. W. 435; *Brandhoefer v. Bain*, 45 Neb. 781, 64 N. W. 213; *Clemons v. Heelan*, 52 Neb. 287, 72 N. W. 270; *Tyson v. Tyson*, 71 Neb. 438, 98 N. W. 1076. The facts upon which the right of homestead in this case depends are not in dispute.

We hold then that appellant herein received the $2,000 in question by virtue of his office as county judge.

The statute (Comp. St. 1929, sec. 27-546) required appellant, upon expiration of his term of office, to pay to his successor in office all legacies, devises, or moneys due any heir or other person, in his possession, which had not been paid to the persons entitled thereto. *Ericsson v. Streitz, supra.* That he failed to do so is not questioned. His bond was given to guarantee performance of this statutory duty. In his indemnity agreement he agreed to repay his surety, the appellee, any sum or sums of money which it was re-

quired to pay out by reason of his failure to fulfil his statutory duty and the obligation of his bond.

Therefore, there being no showing that the failure of appellant resulted from act of God or the public enemy (*Knox County v. Cook*, 126 Neb. 477, 253 N. W. 649; *Ericsson v. Streitz, supra*), and it being the long established doctrine of this court that state and county officials are liable on their official bonds for loss of any funds committed to their care, except where the loss is occasioned by the act of God or the public enemy (*Knox County v. Cook, supra*; *Ericsson v. Streitz, supra*; *Thurston County v. Chmelka*, 135 Neb. 342, 281 N. W. 628; *Garfield County v. Pearl*, 138 Neb. 810, 295 N. W. 820), on the failure of appellant to pay over the $2,000 to his successor or the persons entitled thereto his liability and that of his surety on his bond became absolute. In consequence then, the surety having paid $1,250, together with attorney's fees and costs, on account of the default of appellant for the loss, it is entitled to recover under the terms of the indemnity agreement.

The judgment of the district court is in all matters correct and is affirmed.

AFFIRMED.

IN RE ESTATE OF LEROY LUCHT.
EMIL LUCHT, APPELLANT, V. JOHANNA STOLLE, ADMINISTRATRIX, APPELLEE.

296 N. W. 749

FILED FEBRUARY 28, 1941. No. 30901.

1. **Death.** The amount recovered in an action under section 30-810, Comp. St. 1929, to recover damages for wrongful death, must be distributed among such of the widow, widower and next of kin as suffer a pecuniary loss by such wrongful death.
2. ———. The father of a child, from whom such child's mother has secured a decree of divorce that grants the custody of such child to such mother and makes no provision for payment by the father for such child's support, and who has contributed nothing toward the support of and received nothing from such

child, and who has lived from such child apart as if in complete abandonment from its infancy until its death at fourteen years of age, is not entitled to share in the amount recovered in an action to recover damages for the death of such child under section 30-810, Comp. St. 1929.

3. ———. What persons are entitled to share in a sum recovered as damages for wrongful death in an action under section 30-810, Comp. St. 1929, is left to the court for determination subsequent to such recovery, and such determination is made without regard to what persons may have been alleged or proved in such action to have suffered a pecuniary loss by such death, while the ratio of distribution among those entitled to receive is fixed by said statute.

APPEAL from the district court for Hall county: EDWIN P. CLEMENTS, JUDGE. *Affirmed.*

B. J. Cunningham, H. G. Wellensiek and *W. P. Lauritsen,* for appellant.

O. A. Abbott and *A. G. Abbott, contra.*

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

TEWELL, District Judge.

This cause originated in the county court of Hall county from proceedings in the estate of LeRoy Lucht, deceased. Johanna Stolle, appellee herein and mother of said deceased, as administratrix of said estate, filed her report and petition for final settlement and order of distribution, and Emil Lucht, appellant herein and father of said deceased, filed objections thereto. From an order of distribution made by the county court, both of said parties appealed to the district court. From the decree of the district court said Emil Lucht appeals.

The record discloses that Johanna Stolle and Emil Lucht were married to each other on May 15, 1918. They separated in January, 1920. To this union the deceased, LeRoy Lucht, was born on April 11, 1919. Johanna Stolle secured a divorce from Emil Lucht on May 18, 1920. By the decree granting divorce the custody of LeRoy Lucht was awarded

to his mother. No alimony, or amount for the support of said mother or of said child, was granted. By this decree the father was given permission to visit his son, and a right to aid in his support. Such decree has never since been modified. A year or so after such divorce, said Emil Lucht married his second wife, and now has several children. His former wife, now Johanna Stolle, was also remarried. Emil Lucht has never contributed anything toward the support of LeRoy Lucht, except that he gave his former wife, Johanna Stolle, the sum of $50 a few months after the decree of divorce. During the year 1920 Emil Lucht visited his son three or four times, and had him brought to him for a visit a few times. In 1925 Emil Lucht took a life insurance policy of the face amount of $1,000 upon his own life, and named the son as beneficiary. The mother or the son never knew of this until after the son's death. Subsequent to his remarriage in March, 1923, Emil Lucht never visited his son, never gave him anything, and never received anything from him. From the time the son was about one year old until his death, his father and himself were as strangers to each other. In June, 1933, LeRoy Lucht, the son, then 14 years of age, was killed in a collision between two automobiles. He left no estate whatsoever except a right of action to recover damages for his death. Johanna Stolle was appointed administratrix of the estate of her deceased son, and as such brought an action for his wrongful death. The action was brought under the provisions of section 30-810, Comp. St. 1929. In this action the mother, as such administratrix, recovered the sum of $3,261.78. The question involved in this cause is that of whether or not Emil Lucht is entitled, under the law, to a share in such recovery. The trial court ruled that he was not so entitled.

Section 30-809, Comp. St. 1929, provides in effect that, if the death of a person is caused by the wrongful act, neglect or default of another, and if such act, neglect or default is such as would have entitled the injured person to maintain an action for damages on account thereof, then the person who would have been liable in damages, if death had

not ensued, shall be liable notwithstanding such death. Section 30-810, Comp. St. 1929, prior to the year 1919, in reference to actions provided for in said section 30-809 reads as follows:

"Every such action shall be brought by and in the names of the personal representatives of such deceased person, and the amount recovered therein shall be for the exclusive benefit of the widow or widower and next of kin of such deceased person, and shall be distributed to such widow, widower and next of kin in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate, and in every such action the jury may give such damages as they shall deem a fair and just compensation with reference to the pecuniary injuries resulting from such death, to the widow or widower and next of kin of such deceased person: Provided, every such action shall be commenced within two years after the death of such person."

By chapter 92, Laws 1919, this section was amended to read as follows:

"Every such action shall be commenced within two years after the death of such person. It shall be brought by and in the name of his personal representative, for the exclusive benefit of the widow or widower and next of kin. The verdict or judgment should be for the amount of damages which the persons in whose behalf the action is brought have sustained, and the avails thereof shall be paid to and distributed among such persons in the same proportions as the personal property of an intestate under the inheritance laws. A personal representative shall not compromise or settle a claim for damages hereunder until the court by which he was appointed shall first have consented to and approved of the terms thereof."

By chapter 75, Laws 1937, said section, as amended by said chapter 92, Laws 1919, was repealed and reenacted, word for word, and the following provision added thereto:

"And the amount so received in settlement or recovered by judgment shall be reported to and paid into said court

for distribution subject to the order of such court to the persons entitled thereto: Provided, said amount shall not be subject to any claim against the estate of said decedent."

The action in which appellee recovered said sum as administratrix was begun in 1933.

Some of the decisions of this court that relate to said statutes are of aid in the solution of the questions involved. Both before and after the amendment of 1919 it has been repeatedly held that the only recoverable loss is a pecuniary loss to the widow, widower, or next of kin. *City of Friend v. Burleigh*, 53 Neb. 674, 74 N. W. 50; *Orgall v. Chicago, B. & Q. R. Co.*, 46 Neb. 4, 64 N. W. 450; *Greenwood v. King*, 82 Neb. 17, 116 N. W. 1128; *Ensor v. Compton*, 110 Neb. 522, 194 N. W. 458; *Dow v. Legg*, 120 Neb. 271, 231 N. W. 747. It has also been held that the statute requiring support of a pauper by his child does not, of itself, cause a parent to suffer a pecuniary loss by the death of his child. *Spomer v. Allied Electric & Fixture Co.*, 120 Neb. 399, 232 N. W. 767. That the personal representative as plaintiff acts merely as a trustee, and that the amount recovered is no portion of the estate of the deceased has been held. *Moore v. Omaha Warehouse Co.*, 106 Neb. 116, 182 N. W. 597; *City of Friend v. Burleigh, supra.* The appellant urges that the case of *In re Estate of Griffin*, 89 Neb. 733, 131 N. W. 1033, is decisive of the case at bar. The facts in that case were that the deceased left his widow and his mother surviving, but no children. The evidence did not show the mother to have suffered any pecuniary loss on account of the death of her son. Yet, it was held that the amount of the recovery had by the widow as administratrix must be divided between the widow and next of kin in the proportion that personal property of an intestate would be divided, which, in that case, was one-half to the widow, and one-half to the mother. The opinion of this court in that case was filed in June, 1911, prior to the 1919 amendment above quoted. The appellant's brief sets forth a copy of the bill as originally introduced in the legislature in 1919, by which an amendment to the statute that is now section 30-810 was sought.

Such original bill copied the act as theretofore existing word for word, and then added thereto a provision to the effect that the personal representative was empowered to compromise and settle his claim with the approval of the court appointing him. The bill, as it finally was passed, was amended in such manner as to change the wording of the entire act as theretofore existing, as will be seen by a comparison of the wording of the act before and after the amendment of 1919. Other holdings of this court, with relation to said statute, are to the effect that the fund recovered will be distributed to the persons entitled thereto, regardless of whether or not they were named as next of kin in the action in which such funds were recovered. *Oyster v. Burlington Relief Department,* 65 Neb. 789, 91 N. W. 699. See cases cited in annotations, 14 A. L. R. 538, under subhead III, Distribution as affected by matters of pleading and practice in death action. An interesting case is that of *Thompson v. Chicago, M. & St. P. Ry. Co.,* 104 Fed. 845. Under the facts in that case the father had deserted the mother and minor son. The boy was killed. At that time the statute made the father the only one who was next of kin of his son, and the mother, therefore, was not within the class of beneficiaries under the then Lord Campbell's Act. Judge Munger, after observing that the decisions of this court bound the federal court, held the father could not recover, as he could show no pecuniary loss.

With the decisions above cited, the history of the 1919 amendment heretofore mentioned, the amendment of 1919 itself, and also the 1937 amendment above described in mind, what was the intended effect of the said amendment of 1919? If the purpose of this amendment was merely to add the provision empowering the personal representative to compromise or settle the claim with the approval of the court, passage of the bill as originally introduced would have accomplished such purpose. Amendments recommended by the judiciary committee in the senate changed the entire body of the act. Prior to the 1919 amendment,

and at the time of the decision in *In re Estate of Griffin, supra,* a pertinent part of the statute read "and shall be distributed to such widow, widower and next of kin," etc. After such amendment a pertinent part of the statute read: "The verdict or judgment should be for the amount of damages which the persons in whose behalf the action is brought have sustained, and the avails thereof shall be paid to and distributed among such persons in the same proportions," etc. By the words "the persons in whose behalf the action is brought" can logically only be meant that portion of the class designated as "widow, widower and next of kin" as are damaged, since, if none of such class is damaged, the action cannot be maintained. In the phrase "shall be paid to and distributed among such persons," the words "such persons" can logically only mean those persons in whose behalf the action is brought, namely, that portion of the potential beneficiaries of the act as are damaged. We hold that the amount recovered by the personal representative of a deceased, under the provisions of section 30-810, Comp. St. 1929, as amended by chapter 92, Laws 1919, shall be paid to and distributed among such of the widow, widower and next of kin of such deceased as suffer a pecuniary loss by the death of such deceased. The amendment of 1937, heretofore mentioned, seems to be in harmony with this holding.

Did the appellant suffer a pecuniary loss by the death of LeRoy Lucht? We are not unmindful of the various rights of a father in relation to his son, even though he may live from the son apart. Neither are we unmindful of the meaning of the phrase "pecuniary loss" as used in the holding heretofore made. It seems that the remote possibility of the appellant regaining the custody of his son, had he not died, or of the son being compelled to support the appellant in case appellant became a pauper, is too remote and uncertain to be the basis of recovery of damages. *Spomer v. Allied Electric & Fixture Co., supra.* It has been held that a father, under the circumstances outlined above, is not entitled to the wages or earnings of his child while a minor.

Nightingale v. Withington, 15 Mass. *272, 8 Am. Dec. 101; 46 C. J. 1287, and cases cited under note 66. Loss of companionship, bereavement and other mental sufferings caused by the son's death, although these no doubt existed in the father, have been held not to be elements of recovery. *Dow v. Legg, supra.* Under the record in this case, we hold that the father is not shown to have suffered any pecuniary loss by the death of his son.

The appellant urges that he was named as one of the next of kin in the petition in the action in which appellee recovered as administratrix of her son's estate, and that in the instructions to the jury in that action the jury were permitted to include in their verdict any pecuniary loss suffered by appellant, and shown with reasonable certainty. We are not concerned with what errors may have been committed in the trial of that action. The finding of which of the surviving spouse and next of kin suffered a pecuniary loss by the death of the deceased, and the finding of the degree of kinship of the one or more suffering such loss, is left to the court, for determination subsequent to the recovery of the amount to be distributed, while the ratio of distribution is fixed by the statute, 14 A. L. R. 538, subhead III.

For reason above given, the decree of the trial court is affirmed. Costs in this court taxed to the appellant.

AFFIRMED.

MARION F. MCCLELLAND, APPELLEE, V. INTERSTATE TRANSIT LINES, APPELLANT.

296 N. W. 757

FILED MARCH 7, 1941. No. 30950.

1. **Trial.** The stating of the issues in an instruction by substantially copying the pleadings of the parties is again condemned.
2. ———. If such an instruction results in prejudice to the complaining party, it is sufficient ground for a reversal.
3. **Appeal.** In stating the issues to the jury, it is error which may be prejudicial for the trial court to include allegations of which there is no proof.

4. ———. For errors in the instructions, the judgment is reversed and the cause remanded for further proceedings.

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

George C. Holdrege, William J. Schall and *Thomas F. Hamer,* for appellant.

Kelsey & Kelsey, contra.

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

SIMMONS, C. J.

Plaintiff recovered a judgment for personal injuries and property damage resulting from an automobile accident. Defendant appeals and presents questions as to the correctness of the instructions and as to the sufficiency of the evidence to sustain the verdict. The seriousness of the injuries and the amount of the verdict are not presented for review.

The facts are not in serious dispute. A considerable part of the facts were admitted to be true by stipulation of the parties. They are to be commended for this procedure.

The accident occurred Sunday afternoon, July 2, 1939, on east and west highway No. 275, west of Omaha and opposite Father Flanagan's "Boys Town." The weather was warm, skies clear, pavement dry and visibility good. The highway at the point of the accident, and for several miles on either side, is a four lane, paved thoroughfare, constructed to accommodate two lanes of automobile traffic moving in either direction. The two center lanes are known as passing lanes and the two outer lanes as driving lanes.

There are two entrances to Boys Town from the highway. The east entrance is built at an angle so as to accommodate west-bound traffic into the home from Omaha, with the result that traffic from the west, using that entrance, must enter at an acute angle, a difficult turn for a large vehicle to make. The west entrance to Boys Town is at right angles to the highway. The entrances are several

hundred feet apart and between the two is a crest of an elevation or hill, so that the approach to the east entrance from the west is downhill.

The defendant, using five large passenger buses, had taken a party to visit Boys Town. Defendant's buses had unloaded their passengers at the home. One bus had apparently left the grounds before the events leading up to the accident. Preparing to reload, the remaining four buses had left the Boys Town grounds by the west entrance, went upon the highway, one behind the other, headed east, and intending to reenter the grounds by the east entrance. The lead bus did not succeed in making the turn. The second bus had pulled out into the east-bound passing lane and was headed into the entrance, and the last two buses occupied the driving lane. In this position, the four buses formed, roughly, a shepherd's crook, top to the east, curve to the north and blocking the two lanes of travel for east-bound traffic. Plaintiff approaching in his car from the west at a reasonable rate of speed and in the driving lane saw the rear bus at a distance of several hundred feet ahead. When about 100 feet from the rear bus, plaintiff, determining that there was no car on his left to interfere, crossed from the driving lane into the passing lane. He then noticed the driver of the rear bus giving a signal with his arm which plaintiff interpreted to mean for him to slow down, which he did, intending to drift down alongside the two rear buses, and then pass around the front buses that blocked the passing lane when west-bound traffic permitted. Both west-bound lanes were then occupied by vehicles moving west. When plaintiff was about 25 or 30 feet from the rear of the west bus, and while moving at about three miles an hour, the driver of the rear bus sounded his horn and waved "more violently up and down." Plaintiff interpreted this to mean that he was to stop and he started to do so, without giving a signal of his purpose. Almost instantly a fast moving car, which had approached from the west, struck plaintiff's car in the rear, drove it against the back end of the rear bus, with sufficient force

to overturn plaintiff's car and cause the damage for which recovery was asked.

Apparently all eyewitnesses were called to testify except the driver of the coach who gave the signals.

Plaintiff's petition sets out these facts in detail and alleged that the defendant was negligent in parking its buses on the highway; in placing its buses across both of the east-bound lanes of travel; in attempting to turn its buses into the Boys Town entrance from the west; in signaling plaintiff to stop; in not driving its buses off the highway onto the parking; in not leaving a clear and unobstructed width of not less than 15 feet upon the main portion of the highway; in blocking the highway to travel; in so driving its buses as to prevent the plaintiff from using the highway; in creating a traffic trap by said operations; in maintaining a condition upon the highway dangerous to persons using the highway and liable to cause accidents; and that defendant knowingly and negligently brought about and created the situation which resulted in the accident and plaintiff's injury.

By answer, defendant denied that any negligence or carelessness on its part caused or contributed to the accident and alleged that the accident was caused by the negligence and carelessness of the plaintiff and of the driver of the automobile which struck plaintiff's car from the rear.

By reply, plaintiff denied the allegations of the answer of his own or the other driver's negligence.

Plaintiff's petition (as set out in the transcript) is 8½ pages long. The trial court in instruction No. 1 used approximately seven pages in reciting the allegations of the petition to the jury, including a detailed recital of facts alleged, and including an almost verbatim copy of the one and one-half pages of plaintiff's allegations of negligence.

The instruction recited at the beginning: "Plaintiff for his cause of action against the defendant alleges." Three and one-half pages later in the same instruction, the language is "that the accident, injury and damage were caused by the gross carelessness and negligence of the defendant in

that it," followed by more than a page of recitals of the alleged acts of negligence, concluding with "because thereof the plaintiff has suffered the following injuries and damages." Then follow two pages of recitals of plaintiff's injuries and damages. Then approximately a page of recitals of the answer and reply. Many of these recitals are in form statements of fact without qualifying words, such as "it is alleged" or "it is claimed." The concluding paragraph (over three pages after the recital of the negligence allegations) is: "You are instructed that the allegations of the pleadings and facts are not to be considered by you as evidence, and are not to be considered or regarded by you as such; they are merely the *statement of facts* which are intended to present the issues to the court and jury and are not evidence in any particular."

The stating of the issues by substantially copying the pleadings of the parties, almost verbatim, as was done here, has been repeatedly condemned by this court. If it results in prejudice to the complaining party, it is sufficient ground for reversal. In stating the issue to the jury, it is likewise error, which may be prejudicial, for the trial court to include allegations of which there is no proof. *Hutchinson v. Western Bridge & Construction Co.*, 97 Neb. 439, 150 N. W. 193; *Spieler v. Lincoln Traction Co.*, 103 Neb. 339, 171 N. W. 896; *Hanna v. Hanna*, 104 Neb. 231, 176 N. W. 732; *Thomas v. Rasmussen*, 106 Neb. 442, 184 N. W. 104; *Culver v. Union P. R. Co.*, 112 Neb. 441, 199 N. W. 794; *Weber v. Weber*, 124 Neb. 878, 248 N. W. 642.

Plaintiff argues that instruction No. 1 was justified in the light of the decision in *Merritt v. Ash Grove Lime & Portland Cement Co.*, 136 Neb. 52, 285 N. W. 97, wherein a recital of the pleadings, three pages in length, closed with the words: "The foregoing are merely a statement of the *claims* of the parties, and, except as to admissions, are not to be taken as evidence."

There are a number of distinctions that could be pointed out in addition to the difference in the length of the recited pleadings, such as the finding that the evidence in the

Merritt case tended to support the recited allegations, and that in the *Merritt* case the allegations were referred to as statements of the *claims* of the parties, whereas in the instant case they are referred to as statement of *facts*. In the *Merritt* case the instructions contained a "synopsis" of the "simple statement of the cause of action;" here the instruction can hardly be classed as a "synopsis," but is more accurately described as a copy, substantially, of the plaintiff's petition.

By instruction No. 6 the jury were told:

"You are instructed that before the plaintiff can recover on his cause of action he must prove *one or more* of the allegations of negligence alleged therein by a preponderance of the evidence, and that such negligence was the proximate cause or concurred with the negligence of another as the proximate cause of the accident in which the plaintiff was injured, and the mere fact that the plaintiff's automobile was struck by the automobile of another, and that as a result thereof the plaintiff was injured, would not, merely of itself, warrant the jury in returning a verdict in the plaintiff's favor."

Clearly, at this point in the instructions, the jury were given to understand that, so far as acts of negligence were concerned, the plaintiff was entitled to recover, if *one or more* of the many allegations of negligence recited in the petition were proved.

However, by instruction No. 10, the court instructed the jury:

"You are further instructed that the only matter for your consideration in this case is whether or not the plaintiff has established by a preponderance of the evidence that the driver of defendant's bus waved his arm and hand in such manner as to cause the plaintiff to slow up or stop his automobile; that the waving of such arm and hand, causing the plaintiff to slow up or stop his car was, under the facts and circumstances herein established, negligence within the meaning of the rule herein defined, and, if negligence, that the same was the proximate cause of the accident in which

the plaintiff was injured, or concurred with the negligence of a third person as the proximate cause of the accident as within the rule of concurrent negligence as the same has been herein defined. If the plaintiff has sustained this burden by proving all of the above by a preponderance of the evidence, then you will find for the plaintiff."

By the above instruction, the court withdrew from the consideration of the jury all acts of alleged negligence, recited in instruction No. 1, save and except the one act of negligence recited in instruction No. 10.

"In this manner * * * allegation of which there was no proof was read to the jury from the bench." *Hanna v. Hanna, supra.* "Jurors are not lawyers, and are not always prepared to discriminate between that portion of a lengthy charge which contains statements made in pleadings, and the remainder of it." *Hutchinson v. Western Bridge & Construction Co., supra.* "It is difficult for the jury in a lengthy trial to discriminate between charges of negligence submitted to them in instructions of the court from those which have been established by the evidence, and they may think that if these were not in evidence they would not have been mentioned by the judge." *Culver v. Union P. R. Co., supra.*

Which instruction did the jury follow in reaching its verdict? This court has no way of determining that fact. "Correct instructions to the jury do not cure prejudicial error in other misleading and contradictory instructions." *Bocian v. Union P. R. Co.*, 137 Neb. 318, 289 N. W. 372.

For errors in the instructions, the judgment is reversed and the cause remanded for further proceedings.

REVERSED.

PAINE, J., dissenting.

In my opinion, there is no justifiable reason shown by the record for remanding this case for a new trial. It should be reversed and dismissed.

I am authorized to say that Mr. Justice Carter concurs with this view.

STEPHEN A. WILSON, APPELLEE, V. ETHEL L. WILSON, APPELLANT.
296 N. W. 766

FILED MARCH 7, 1941. No. 30938.

1. **Marriage.** Under the law of Minnesota it is mutual, present consent, lawfully expressed, which makes marriage.
2. ———. A common-law marriage in Minnesota may be proved by the admissions of the parties, evidence of general repute, evidence of cohabitation as married persons, and other circumstantial or presumptive evidence from which the fact of marriage may be reasonably inferred.
3. ———. Where the evidence shows that defendant entered into a common-law marriage in 1921 with a man from whom she has not been divorced or widowed, a subsequent ceremonial marriage with the plaintiff is necessarily void and of no force and effect.

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

Albert S. Johnston, for appellant.

Beghtol, Foe & Rankin and *Walter E. Nolte, contra.*

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

CARTER, J.

This is a suit in which plaintiff prays for the annulment of his purported marriage to the defendant because of its invalidity. Defendant in her answer denies the invalidity of the marriage and prays for a divorce. The only question to be determined in this court is the correctness of the district court's finding that the defendant was the common-law wife of one J. W. Alexander at the time she purported to marry plaintiff and that her marriage to plaintiff was therefore a nullity.

The evidence shows that defendant was the stepdaughter of William J. Joyce, had adopted his name and had been known as Ethel Joyce during her youth. On March 17, 1914, she was married to R. F. Zimmer, with whom she established a residence at Pipestone, Minnesota. On Janu-

ary 11, 1921, R. F. Zimmer was granted a divorce from the defendant, the petition therefor reciting among other things that defendant's conduct with a gentleman friend was such as to warrant a decree of divorce. On September 15, 1921, one Mary E. Alexander obtained a divorce from John W. Alexander, the petition therefor stating in part that "during the past eighteen months the defendant has kept company with one Ethel Zimmer to such an extent that it has caused scandal in the neighborhood * * * causing this plaintiff great mental and physical suffering and affecting her health." The evidence given by John W. Alexander reveals that he considered himself engaged to marry Ethel Zimmer prior to their leaving Pipestone in the forepart of November, 1921. The evidence of defendant is to the effect that Alexander had asked her to marry him, but that she had refused him prior to the time they left Pipestone.

The record further shows that in the early part of November, 1921, defendant went with her mother and stepfather to Stephen, Minnesota. They were accompanied by J. W. Alexander and the Joyce children. It appears that Joyce and Alexander entered into a joint business venture in the operation of the Headquarters Hotel at Stephen. The local newspaper announced that J. W. Alexander had arrived to take charge of the hotel, accompanied by his wife and the latter's parents. One Arthur C. Carlson testified that he met Alexander and the Joyces on the day they arrived in Stephen and that Alexander introduced him to defendant as his wife, with the added statement that they were there on their honeymoon. He further testified that they lived in the same apartment in the hotel for two years as man and wife and that they were generally considered as man and wife during the whole period of their residence in Stephen.

The testimony of Louis Haupt discloses that he was operating a butcher shop in Stephen at the time defendant moved there. He says Alexander introduced defendant to him as his wife and that she was considered and known as "Mrs. Alexander" during the time she lived there. Dr.

A. A. Hass testified that he knew the defendant in Stephen as Mrs. Alexander. He testifies to her participation in an amateur play under the name of Ethel Alexander, a statement borne out by the newspaper accounts of the play at the time. Mr. Herbert I. Yetter, testifying from the records of the First National Bank of Stephen, says that a loan of $300 was negotiated by J. W. Alexander and Ethel Alexander during the period of their stay in Stephen. Ira H. Burhans, a lawyer at Stephen, testifies that he knew defendant at that place as Mrs. Ethel Alexander and that she was generally known as such during the period of her stay. He further testifies that he was often around the hotel and that the Alexanders lived in an apartment in the hotel during the time they were in Stephen. Other residents of Stephen testify that defendant was generally known as Mrs. J. W. Alexander during this period.

Newspaper items in the local paper corroborate this evidence. The issue of December 7, 1922, reports that Mrs. J. W. Alexander was called to her former home because of the illness of her grandmother. Under date of December 28, 1922, the local paper reported that Mr. and Mrs. J. W. Alexander entertained a number of young people at a dancing party. The publisher of the local paper at the time testifies that neither the defendant, nor any one in her behalf, made objection to the contents of these reports.

Defendant produced evidence directly contrary to that of the plaintiff. Defendant herself denies every portion tending to show the existence of the marriage relation. In addition thereto, John W. Alexander and the members of defendant's family deny the existence of any such relationship. It might be well to point out that defendant denies the truth of the allegations contained in the petition of divorce filed by R. F. Zimmer against her. She also denies any knowledge of the contents of the petition filed by Mary E. Alexander against John W. Alexander. She also claims that she never signed a note at the bank as Ethel Alexander, and that newspaper items identifying her as Ethel Alexander were never called to her attention until she was about to move

away and for that reason she made no attempt to have the errors corrected.

Common-law marriages are recognized in the state of Minnesota. In the early case of *Hulett v. Carey*, 66 Minn. 327, 69 N. W. 31, the supreme court of that state said: "It is mutual, present consent, lawfully expressed, which makes marriage. All that is necessary to render competent parties husband and wife is that they agree in the present tense to be such, no time being contemplated to elapse before the assumption of the status."

The proof required to establish a common-law marriage in Minnesota has been a subject of legislative action in that state. The applicable statute is as follows: "When the fact of marriage is required or offered to be proved before any court, evidence of the admission of such fact by the party against whom the proceeding is instituted, or of general repute, or of cohabitation as married persons, or any other circumstantial or presumptive evidence from which the fact may be inferred, shall be competent." Mason's Minnesota Statutes 1927, vol. 2, sec. 9899.

It is apparent, therefore, that legal sanction is given by the courts of Minnesota to a common-law marriage entered into between legally competent parties by means of a contract presently operative, whether it be oral or written, express or implied. There is no evidence in the present case of an express contract. The question before us is whether the admissions of the parties, the general repute, the cohabitation as married persons, and other circumstantial or presumptive evidence from which the fact may be inferred are sufficient to sustain a finding that a common-law marriage was entered into by the parties.

In the instant case there is evidence in the record of admissions made by Alexander in the presence of defendant that they were man and wife. The evidence of cohabitation as husband and wife and the assumption openly of marital duties and obligations are such as to reasonably sustain the inference that the parties agreed to become husband and wife. The evidence is very convincing that de-

fendant was generally reputed to be the wife of J. W. Alexander during the time they resided at Stephen, Minnesota. Defendant avers that this evidence creates a mere presumption of marriage which disappears when direct evidence on the subject is produced. We will not attempt a discussion of this subject generally because a reasonable interpretation of the Minnesota statute requires us to say that such evidence in that state is substantive evidence of marriage and not an ordinary rebuttable presumption. The proof of subsequent ceremonial marriages by each of the parties is evidence to be considered in determining whether a common-law marriage was entered into, but it is not conclusive. It still remains a question of fact to be judicially determined. The subsequent denial of a common-law marriage by the parties cannot destroy its validity any more than a subsequent denial of a ceremonial marriage can change the status created by it. Public policy forbids that the permanence of the marriage relation, even though entered into under common-law rules, should depend upon any such whimsical contingency. The evidence, if believed, is sufficient to meet the well-stated rules announcd in *In re Estate of Lust,* 186 Minn. 405, 243 N. W. 443.

It is true that defendant and her relatives deny that the marriage relation existed. It is significant that every disinterested resident of Stephen, Minnesota, who testified gave evidence to the contrary. Defendant concealed from the plaintiff the fact of her previous marriage to Zimmer and did not have it shown in the application for the marriage license which authorized her marriage to him. Her venture with Alexander was likewise concealed and the explanations attempted after it was discovered do not appear to be convincing. At least, we must assume that the trial court came to this conclusion after hearing the witnesses, observing their demeanor on the stand and considering their interest in the result of the litigation. There being ample evidence in the record from which a marriage agreement can be inferred, we find no reason for this court to interfere with the judgment of the trial court.

AFFIRMED.

BEEBE & RUNYAN FURNITURE COMPANY, APPELLEE, V. BOARD OF EQUALIZATION OF DOUGLAS COUNTY, APPELLANT.
296 N. W. 764

FILED MARCH 7, 1941. No. 30973.

Evidence. A county assessor, with 22 years of experience in such office as clerk, deputy assessor and assessor, who is acquainted with and has inspected a building, its type of construction, location and the dimensions of the land on which it stands, and who is also acquainted with the value of lands and buildings in the immediate neighborhood, used for like purposes, is a competent witness to testify as to the value of the improvements and real estate for taxation purposes, and the refusal of the trial court to permit such witness to testify is an abuse of sound discretion and constitutes prejudicial error.

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

James T. English, Paul J. Garrotto and *Oscar T. Doerr,* for appellant.

Sidney W. Smith, contra.

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

MESSMORE, J.

This is a proceeding to review the action of the board of equalization of Douglas county, Nebraska, in that the value placed on plaintiff's property for assessment purposes is unjust and in excess of the legal and proper value thereof for taxation purposes.

The plaintiff owns lots 1, 2, 3 and 4, in block E, of the original plat of the city of Omaha, consisting of a warehouse of brick exterior, mill construction, six stories in height and two basement stories, containing the warehouse and offices. On part of lot 1 is a one-story building, 66 by 22 feet, used as a boiler room. The balance of said lot is vacant, used for trucking, loading and receiving freight. Comparison is made with reference to the limited purposes of use to which the building may be put, as compared with

modern construction for warehouse use. The fact that industrial properties in the city have been depreciating in value is likewise stressed. The property was assessed for the year 1939 by the county assessor; the land at $39,190 and assessed valuation of improvements at $95,010.

The plaintiff filed a complaint with the board of equalization, complaining that the assessment for the year 1939 was too high, and offered a proposed reduction as follows: Land $24,392, improvements $63,124, total $87,516. The county board of equalization dismissed the complaint. Appeal was taken by plaintiff to the district court. The evidence in the district court in behalf of plaintiff discloses that witnesses, properly qualified and experienced in the real estate business, acquainted with wholesale properties, sales and values thereof, over a period of from 21 to 34 years, fixed the valuation as follows: One witness, land $29,600, improvements $73,400, total $103,000; another witness, land $34,840, improvements $65,160, total $100,000; another witness fixed the value of the land at $34,484. Of the defendant's witnesses, properly qualified to testify, one fixed the value of the building at $125,350; another fixed the value of the land at $37,026 and the improvements at $125,640, a total of $162,666; and another, land $34,848, improvements $120,000, total $154,848. The court decreed the value of the land to be $24,393, the improvements at $67,121, total $91,514.

The defendant offered the testimony of the county assessor, who had held office since January, 1939, or for a period of about 13 months. In addition, his experience consisted of 22 years of continuous service in different capacities in the office of assessor, including deputy assessor. During the years of his service he inspected and appraised all kinds of property in Douglas county, including farm, residential, retail and wholesale business property and had kept in touch with the realtors of the city as to the market or actual value of real estate. The assessor had inspected the property in question several times, was acquainted with and knew the type of construction of the building and of

its present condition and its location, the dimensions of the land in question and the value of land and buildings, used for wholesale purposes, in the immediate neighborhood. After laying this foundation, plaintiff interposed an objection, which was sustained by the court, and the county assessor was not permitted to testify. The defendant contends that such ruling of the trial court constitutes prejudicial error. Had the assessor been permitted to testify, he would have fixed the value of the property as follows: Land $55,756, building $134,750, total $190,506. The plaintiff's objection to the assessor's qualifications to testify is that he had never bought or sold real estate, and his mere badge of office was insufficient to qualify him.

The test as to the qualifications of a witness to testify as to the market value of land, as disclosed by a multitude of cases, is that a witness is qualified to testify to such value if he has had an opportunity to form a correct opinion as to its value. It is not essential that the witness should have bought or sold land in the vicinity. See Jones, Evidence (2d ed.) 485, sec. 387.

Several sections of the Nebraska statutes, in defining the duties of a county assessor, give him direct charge and full control over the assessment of property in the county, both real and personal, by and through assessors appointed by him. Section 77-1609, Comp. St. Supp. 1939, requires the county assessor to "revise annually the real estate assessment for the correction of errors, * * * to set off and apportion to each its just and equitable portion of the assessed valuation, shall have general supervision over and direction of the assessment of all property in his county," etc.

This court in *State v. Dodge County*, 20 Neb. 595, 31 N. W. 117, said: "The assessor is required to ascertain the value of each tract of land assessed by him, not by hearsay, not by calling witnesses, but by actually viewing the land itself." The evident object of the statute is to enable the assessor to fix the true value of the land.

This court has, on several occasions, decided that the

qualification of experts to testify is largely within the sound discretion of the court. However, where an expert witness, in qualifying to testify, discloses the experience and knowledge of the subject about which he proposes to testify, as is shown by this record, the court, in refusing to permit such witness to so testify, commits an abuse of sound discretion, constituting prejudicial error.

The wide discrepancy in values in this case is obvious, ranging from $87,000 to $190,000. This court in *Eppley Hotels Co. v. City of Lincoln,* 138 Neb. 347, 293 N. W. 234, reversed and remanded the case, where the evidence with reference to values was at such variance that a fair and just assessment was impossible. In addition, in the instant case, the trial court and this court have not had the benefit of the county assessor's testimony, which should be of assistance to the court in determining a legal and proper value for assessment purposes.

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

REVERSED.

FEDERAL LAND BANK OF OMAHA, APPELLEE, V. WILLIAM T. MILLER, APPELLANT: LORETTA MILLER ET AL., APPELLEES.
296 N. W. 748

FILED MARCH 7, 1941. No. 31014.

Mortgages. "'An order confirming a judicial sale under a decree foreclosing a mortgage on real estate will not be reversed on appeal for inadequacy of price, when there was no fraud or shocking discrepancy between the value and sale price, and where there is no satisfactory evidence that a higher bid could be obtained in the event of another sale.' *Equitable Life Assurance Society v. Buck,* 138 Neb. 203, 292 N. W. 605." *Lincoln Nat. Life Ins. Co. v. Curry,* 138 Neb. 741, 295 N. W. 282.

APPEAL from the district court for Frontier county: CHARLES E. ELDRED, JUDGE. *Affirmed.*

Butler, James & McCarl, for appellant.

Frank B. Morrison, Franklin L. Pierce and *Philip M. Wellman, contra.*

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

MESSMORE, J.

This is an appeal from a confirmation of sale. The record discloses that the sale was conducted in conformity to law. The plaintiff was the highest bidder at the sale held February 5, 1940, and purchased the real estate for the amount of $6,778.10. Defendants filed objections to confirmation of the sale, oral evidence was taken on the objections, and the sale was confirmed February 28, 1940. From this confirmation, defendant William T. Miller appeals.

The testimony discloses that 440 acres of land in Frontier county, 180 acres tillable, the rest pasture land, were valued by plaintiff's witness, who was competent to testify, in the amount of $4,900. In arriving at the value, he considered 180 acres tillable and included the buildings, consisting of a good frame house, a fairly large barn and other sheds, and a windmill, which he valued at $20 an acre, and the grass land at $5 an acre. On cross-examination he testified that the land would not bring more than $10 an acre the way land was selling at that time. Witnesses for defendant Miller, including himself, placed the value of this land at $25 an acre, or a total amount of $11,000.

The contention is made that the trial court erred in confirming the sale, in that the land was sold for a much lower price than the evidence clearly showed was its true valuation, citing in support of such contention *Filley v. Mancuso,* 133 Neb. 538, 276 N. W. 157, *Redfield v. Collopy,* 133 Neb. 546, 276 N. W. 158, and *Federal Farm Mtg. Corporation v. Popham,* 137 Neb. 529, 290 N. W. 423, wherein this court set aside mortgage foreclosure sales where sale prices were disproportionately low and inadequate. In each of the cases cited, the evidence showed that the land did sell for a price less than its value; there was no positive evidence to the contrary. In the instant case, the evidence is in conflict as

to the value of the land. The trial court found that the price bid for the land was a fair and adequate price under the circumstances.

"'An order confirming a judicial sale under a decree foreclosing a mortgage on real estate will not be reversed on appeal for inadequacy of price, when there was no fraud or shocking discrepancy between the value and sale price, and where there is no satisfactory evidence that a higher bid could be obtained in the event of another sale.' *Equitable Life Assurance Society v. Buck*, 138 Neb. 203, 292 N. W. 605." *Lincoln Nat. Life Ins. Co. v. Curry*, 138 Neb. 741, 295 N. W. 282.

For the reasons given herein, the judgment of the trial court confirming the sale is

AFFIRMED.

GEORGE DICKENS V. STATE OF NEBRASKA.
296 N. W. 869

FILED MARCH 7, 1941. No. 30942.

1. **Indictment and Information.** "To charge a statutory offense, the information or complaint must contain a distinct allegation of each essential element of the crime as defined by the law creating it, either in the language of the statute or its equivalent." *Dutiel v. State*, 135 Neb. 811, 284 N. W. 321.
2. ———. An allegation that the person, firm or corporation picketed was, as a result of the picketing, induced or coerced against his, their or its will, or intimidated or threatened to do something he, they or it might legally refrain from doing, or to refrain from doing something which may be lawfully done is an essential element of a sufficient charge of crime under section 28-813, Comp. St. 1929.
3. ———. The defect in the complaint herein was not one of technical procedure, but was one involving a rule of substance.
4. **Criminal Law.** "In this state all public offenses are statutory; no act is criminal unless the legislature has in express terms declared it to be so; and no person can be punished for any act or omission which is not made penal by the plain import of the written law." *Lane v. State*, 120 Neb. 302, 232 N. W. 96.
5. **Constitutional Law.** "Before this court can rule on the question

as to whether or not an act of the legislature creating a crime invades the constitutional rights of a person, it must be presented with a case where the issues and the evidence would support a conviction if the statute is valid." *Dutiel v. State*, 135 Neb. 811, 284 N. W. 321.

ERROR to the district court for Douglas county: FRANCIS M. DINEEN, JUDGE. *Reversed.*

David D. Weinberg and *Louis T. Carnazzo*, for plaintiff in error.

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

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

YEAGER, J.

On December 9, 1939, a complaint was filed in the municipal court of the city of Omaha, Douglas county, Nebraska, wherein plaintiff in error, hereinafter referred to as the defendant, was charged as follows: "That George Dickens on or about the 8th day of December A. D., 1939, in the county aforesaid and within the corporate limits of the city of Omaha aforesaid, then and there being did unlawfully patrol, loiter about and picket by means of a banner carried by him on the street and sidewalk in front of the lawful place of business of the Central Storage & Van Company, 1101 Jackson street, Omaha, Nebraska, said sign bearing the inscription 'Central Van Unfair To Labor-General Drivers' Union Local 554 A F of L' with the intent of inducing and influencing others not to trade with, or have business dealings with said company thereby maliciously obstructing, interfering with and damaging the lawful business of said company, and said company itself with the intent of intimidating and threatening said company for the unlawful purpose of inducing and coercing said company to operate its business in a manner it may legally refrain from doing or to refrain from operating its business in the proper peaceful and lawful manner which it

may otherwise lawfully do, contrary to the statutes of the state of Nebraska, in such cases made and provided and against the peace and dignity of the state of Nebraska."

The defendant was tried in the municipal court, found guilty and sentenced to pay a fine. From the sentence so imposed he perfected an appeal to the district court for Douglas county, Nebraska.

On February 1, 1940, the defendant moved to quash the complaint, assigning various grounds in his motion. The motion was overruled. Following the ruling on the motion he demurred, assigning the same grounds as were the basis for his motion to quash. The demurrer was overruled. Following the ruling on the demurrer a motion to dismiss was made, assigning the same grounds as were set forth in the motion to quash and in the demurrer. This motion was also overruled. Thereafter on the same day the defendant was arraigned and pleaded not guilty. The case then proceeded to trial to the court, a jury having been waived, on the complaint originally filed in the municipal court, the substantial portions of which have been hereinbefore set forth.

On the trial of the case no witnesses were called to testify on behalf of either the state or the defendant. The evidence upon which the case was submitted for determination and decision was a stipulation of facts signed by the county attorney and his deputy on the one hand and the attorneys for the defendant on the other. The portion of the stipulation which is descriptive of the alleged violation of law and is the basis of the criminal prosecution herein is as follows:

"It is further stipulated and agreed that on the 9th day of December, 1939, the Central Van & Storage Company was a corporation duly organized and existing under and by virtue of the laws of the state of Nebraska, being located at 1101 Jackson street, in the city of Omaha, Nebraska, and there engaged in a lawful business and was the owner of the building in which said business was located; that prior thereto and on or about the 13th day of September, 1938, a labor dispute arose between the Central Van &

Storage Company and the General Drivers' Union Local 554, A. F. of L. and that at all times since said date said labor dispute has continued and still continues in effect; that on the 9th day of December, 1939, said company was operating its business and was using in the operation thereof nonunion men; that the defendant herein, George Dickens, a union truck driver and a member of the General Drivers' Union, Local 554, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers, and the American Federation of Labor, together with one other union member, did walk to and fro on the public sidewalk in front of the building of the Central Van & Storage Company, each carrying a banner, which banner was approximately 24x30 inches in size and which read as follows: 'Central Van & Storage Company Unfair to Labor-General Drivers' Union, Local 554, A. F. of L.,' a photostatic copy of which banner is hereto attached, marked exhibit 'A' and exhibit 'B', respectively.

"It is further stipulated and agreed that said walking to and from and bearing said banners was done at the instance of the General Drivers' Union, Local 554, a nonincorporated labor organization, the membership of which consisted entirely of local truck drivers, and some of the members of said Drivers' Union previous to the arising of said labor dispute had been employees of the Central Van & Storage Company, and other van and storage and transfer companies in the city of Omaha; that said walking to and fro and bearing said banners was for the purpose of acquainting the public with the fact that a dispute affecting labor existed between the Central Van & Storage Company and organized labor, and for the purpose of procuring said work for the union members; that previous to the labor dispute a relationship of employer and employee existed between the Central Van & Storage Company, and the defendant herein, and that there was a labor dispute in progress between the Central Van & Storage Company and its union employees.

"It is further stipulated that said walking to and fro,

bearing said banners, was done quietly, without physical force or violence and without threats thereof, nor did said defendant commit any act or acts tending thereto; that said walking to and fro, bearing banners, was maintained and carried on by said defendant and the other person named for the purpose of influencing and inducing truck drivers not to work for or deal with said company, and to advise and inform the public and persons seeking the services of the said Central Van & Storage Company, that the work being carried on by said Central Van & Storage Company was being done in a manner and under conditions deemed by said union to be unfair to organized labor and thereby seeking to influence and induce members of organized labor and the public generally to withhold their patronage from the said Central Van & Storage Company and not to trade with, buy from, sell to, work for, or have business dealings with said Central Van & Storage Company until the matters in dispute would be adjusted satisfactorily to said union.

"It is further stipulated that it was the further purpose of said defendant, and the other person named, to induce and coerce said Central Van & Storage Company to sign a collective bargaining agreement by and between the said company and said union, which agreement contained a schedule of union hours and wages; and which agreement said Central Van & Storage Company had refused to sign and was not willing to enter into; that as a result of the walking to and fro, by the defendant, in front of the business of the Central Van & Storage Company bearing said banners as aforesaid members of organized labor and other persons did withhold their patronage from the said company and did refuse to trade with, buy from, sell to, work for, or have business with said company; and the business of said company was thereby damaged and said Central Van & Storage Company and its business was thereby threatened; that the defendant and the other union member yielded peaceably to arrest."

The attempt was to charge a crime under section 28-813,

Comp. St. 1929, being one of the "picketing" provisions. This statute is the following:

"It shall be unlawful for any person or persons, singly or conspiring together, to loiter about, beset, patrol, or picket in any manner the place of business or occupation of any person, firm or corporation engaged in any lawful business or occupation, or any street, alley, road, highway or other place, in the vicinity where such person, firm or corporation may be lawfully engaged, in his, their or its work, business or occupation, for the purpose of inducing or influencing, or attempting to induce or influence, others not to trade with, buy from, sell to, work for, or have business dealings with such person, firm or corporation, so that thereby the lawful business or occupation of such person, firm or corporation will be obstructed, interefered (interfered) with, injured, or damaged and such person, firm or corporation thereby be induced or coerced against his, their or its will, intimidated, or threatened, to do something, he, they or it may legally refrain from doing, or to refrain from doing something, he, they or it may lawfully do."

The question for first consideration is as to whether or not the complaint charged a crime agreeable to the terms of this statute, since, as was well stated in *Dutiel v. State*, 135 Neb. 811, 284 N. W. 321, which was a prosecution under the statute in question in this case, "To charge a statutory offense, the information or complaint *must* contain a distinct allegation *of each essential* element of the crime as defined by the law creating it, either in the language of the statute or its equivalent."

In the opinion in that case (*Dutiel v. State, supra*) the elements necessary to a charge of crime under the statute were set forth specifically and for convenience by paragraphs. We quote them here:

"*To do certain acts,* which are: 'To loiter about, beset, patrol, or picket in any manner the place of business or occupation of any person, firm, or corporation engaged in any lawful business or occupation, or any street, alley, road, highway or other place, in the vicinity where such person,

firm or corporation may be lawfully engaged, in his, their or its work, business or occupation;'

"*With certain purposes,* which are: 'For the purpose of inducing or influencing, or attempting to induce or influence, others not to trade with, buy from, sell to, work for, or have business dealings with such person, firm or corporation;'

"*With certain results,* which are: 'So that thereby (1) the lawful business or occupation of such person, firm or corporation will be obstructed, interfered with, injured, or damaged, *and* (2) such person, firm or corporation *thereby* be induced or coerced against his, their or its will, intimidated, or threatened, (a) to do something, he, they or it may legally refrain from doing, *or* (b) to refrain from doing something, he, they or it may lawfully do.' "

An examination of the complaint and an analysis of the statute indicate that the complaint responds to that portion of the section segregated in the paragraph under the heading "*To do certain acts;*" also there was a response to that paragraph headed "*With certain purposes;*" and again there was a compliance with that portion of the paragraph headed "*With certain results*" and ending with the word "damaged." Examination further discloses that the complaint at no place and in no wise responds to that portion of the paragraph beginning with the numeral "(2)" in the paragraph headed "*With certain results.*" The nearest approach to this essential element of a charge under this statute is the following language found in the complaint: "With the intent of inducing and influencing others not to trade with, or have business dealings with said company thereby maliciously obstructing, interfering with and damaging the lawful business of said company, and said company itself with the intent of intimidating and threatening said company for the unlawful purpose of inducing and coercing said company to operate its business in a manner it may legally refrain from doing or to refrain from operating its business in the proper peaceful and lawful manner which it may otherwise lawfully do." This language indi-

cates only the intent and purpose which the defendant, "picketer," had in mind, or the result which he hoped would flow from his acts. This is not enough under the act. The act requires that the complaint shall charge, in addition, that such person, firm or corporation, as a result of the picketing, shall "*thereby* be induced or coerced against his, their or its will, intimidated, or threatened, to do something, he, they or it may legally refrain from doing, or to refrain from doing something, he, they or it may lawfully do." (Italics ours.) The complaint fails to charge either in the language of the statute or its equivalent that Central Storage & Van Company was either induced, coerced, intimidated or threatened.

In the light of the fact that the defect in the complaint was not one of technical procedure, the demurrer should have been sustained. *Dutiel v. State, supra.*

The demurrer was overruled and a trial was had, as hereinbefore indicated, on a stipulation of facts. The trial resulted in a conviction and sentence of the defendant. An examination of the stipulation clearly indicates that, even if the complaint had been sufficient as to form and substance, a conviction was improper under the evidence.

The evidence fails to support a charge that the Central Storage & Van Company was induced, coerced, intimidated or threatened in any manner whatsoever. In fact, the stipulation of facts expressly negatives any such situation or condition.

The rule as announced in the decisions of this court which is controlling in this situation is as follows: "In this state all public offenses are statutory; no act is criminal unless the legislature has in express terms declared it to be so; and no person can be punished for any act or omission which is not made penal by the plain import of the written law." *Lane v. State,* 120 Neb. 302, 232 N. W. 96; *Dutiel v. State, supra.* The charge against the defendant, assuming the sufficiency of the complaint, was not sustained by the evidence.

In the municipal court, in the district court, and again

in this court the constitutionality of section 28-813, Comp. St. 1929, was presented. In the view we have taken of the complaint, and the evidence in support of the charge against the defendant, this question cannot now be properly passed upon or determined. This court recently announced the following rule which is in line with its previous holdings: "Before this court can rule on the question as to whether or not an act of the legislature creating a crime invades the constitutional rights of a person, it must be presented with a case where the issues and the evidence would support a conviction if the statute is valid." *Dutiel v. State, supra.*

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

REVERSED.

CARTER, J., dissenting.

In my opinion, the question of the constitutionality of the anti-picketing law is properly before this court for decision in this case. Any other view presupposes that no case can properly be brought within its provisions. If the statute is so drawn that it can be made to serve no good purpose, litigants are entitled to this court's judgment to that effect. Likewise, if the law is constitutional, the court should so say for the benefit of those who desire to comply with the act if it meets constitutional requirements.

ROSE and PAINE, JJ., concur with the foregoing dissent.

GEORGE BEIDECK ET AL., APPELLEES, V. NATIONAL FIRE INSURANCE COMPANY, APPELLANT.
296 N. W. 873

FILED MARCH 7, 1941. No. 30968.

1. Insurance: REFORMATION OF CONTRACT. In an action for reformation of a written instrument, the burden rests upon the moving party of overcoming the strong presumption arising from the terms of the written instrument. If the proofs are doubtful and unsatisfactory and if there is a failure to overcome this presumption by testimony entirely plain and convincing beyond

reasonable controversy, the writing will be held to express correctly the intention of the parties.

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

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

Wells, Martin & Lane, for appellant.

LeRoy G. Stohlman and *Paul W. White, contra.*

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

YEAGER, J.

This action as originally instituted was by plaintiffs, appellees here, against defendant, appellant here, seeking reformation of a fire insurance policy on household goods and to recover for loss occasioned by fire under the terms of the reformation sought.

On or about May 19, 1936, on application of plaintiffs, the defendant, a fire insurance company, through its agent, the W. A. Downey Agency of Lincoln, Nebraska, issued to plaintiffs a three-year policy of fire insurance on their household goods then situated in the residence of plaintiffs at 746 B street, Lincoln, Nebraska. The policy was for $2,000 and the premium thereon was $14. In October, 1938, plaintiffs loaded on a truck a considerable portion of the household goods insured under the policy and proceeded toward a farm in Minnesota which they had rented and where they intended to reside. On October 26, 1938, while en route, and when they were near Fairfax, Minnesota, the goods on the truck caught fire and were completely destroyed. That the fire occurred and the goods were destroyed defendant does not deny, but it does deny the amount of the loss.

For cause of action plaintiffs pleaded that the policy of insurance, in the form issued, could not be the basis of

recovery for the loss sustained, but that they were entitled to have it reformed to conform to the application claimed to have been made by them prior to the issuance of the policy, and to conform to what they claim the agent of defendant represented that it did contain at the time of delivery. It was their claim, substantially, that they represented to the agent of defendant that they were expecting within a few days to go to the beet fields of Wisconsin, there to remain for several months when they would return to their home in Lincoln, and that they wanted fire insurance coverage on their household goods at home and wherever the goods might be taken or removed by them. They further claimed that the agent of defendant agreed to issue such a policy, and that when he delivered the policy in suit, which was never examined by plaintiffs until after the fire, he stated that it contained the coverage applied for by plaintiffs.

The defendant denies that there was any error or fraud in the writing of the policy, and denies that any promise or representation of coverage in excess of what appears in the policy was ever made.

The district court decreed a reformation of the policy, as sought by plaintiffs, and allowed a recovery on the policy as reformed in the sum of $1,250, for which sum judgment was rendered.

There are but two issues involved in a determination of the case. The first is the question of the right to reformation of the policy, and the second the amount of recovery, if the first is determined favorably to the plaintiffs.

In the decree the trial court found that either by inadvertence, accident, mutual mistake, or fraud, the terms of the contract as agreed upon between plaintiffs and defendant were not fully set forth in the policy of insurance issued. At the outset we may say that it is unnecessary to discuss inadvertence, accident or mutual mistake. An examination of the entire record discloses no evidence in support of any one of these three elements. If plaintiffs are entitled to reformation it is on the ground of misrepresentation or fraud alone.

The evidence, briefly but sufficiently summarized, on which fraud is predicated is about as follows: Plaintiff, Susie Beideck, communicated the information to the W. A. Downey Agency that she wanted insurance on the household goods of the plaintiffs. Soon thereafter Edward A. Downey, a son of W. A. Downey, and an agent of the agency, called at the Beideck home, where he was told by Susie Beideck that she wanted insurance in the amount of $2,000, and since plaintiffs were about to depart for the beet fields of Wisconsin, to be gone for some months, she wanted insurance to cover the goods at the residence in Lincoln or wherever such goods might be. George Beideck stated that he heard her statement and also the reply of Edward A. Downey. They both said that Downey, at that time, told Susie Beideck that he would furnish a policy of insurance giving the protection requested. Later a policy was delivered which plaintiffs said they never examined until after their fire loss was sustained. On delivery of the policy Susie Beideck paid the premium in the amount of $14. The policy was written for three years. Susie Beideck said that when the policy was delivered she asked if it furnished the protection which she had previously requested, whereupon she was informed by Edward A. Downey that it did. Plaintiffs were permitted to state, in response to questions by their attorney, that they believed and relied on the statements made by Edward A. Downey.

Against this, Edward A. Downey testified that he did not make the statements attributed to him. W. A. Downey and Edward A. Downey testified that such coverage as plaintiffs claimed they had contracted for was not available to plaintiffs or any one else; that no such insurance was written.

None of the other terms of the policy was discussed either before or after issuance, not even the length of the term, according to the testimony of plaintiffs, and they had no knowledge of the duration of the term.

The rule relating to the sufficiency of evidence to justify the reformation of written instruments has been stated by

this court on many occasions. There has been no material variation in the statement of the rule in any of the cases.

In *Home Fire Ins. Co. v. Wood,* 50 Neb. 381, 69 N. W. 941, is found a complete statement of the rule: "In each case the burden rests upon the moving party of overcoming the strong presumption arising from the terms of a written instrument. If the proofs are doubtful and unsatisfactory, if there is a failure to overcome this presumption by testimony entirely plain and convincing beyond reasonable controversy, the writing will be held to express correctly the intention of the parties." Other cases announcing or approving this rule are *Topping v. Jeanette,* 64 Neb. 834, 90 N. W. 911; *Sutherland State Bank v. Dial,* 103 Neb. 136, 170 N. W. 666; *Paine-Fishburn Granite Co. v. Reynoldson,* 115 Neb. 520, 213 N. W. 750; *Oft v. Dornacker,* 131 Neb. 644, 269 N. W. 418; *Sweley v. Fox,* 135 Neb. 780, 284 N. W. 318; *Jacobson v. Forster,* 138 Neb. 452, 293 N. W. 336.

Was this evidence in the light of the established rule of law sufficient to warrant a reformation of the policy in question? We think not. To be sufficient the proofs must not have been doubtful; they must have been satisfactory; they must have been of sufficient weight to overcome the presumption that the policy correctly expressed the intention of the parties; they must have been so plain and convincing as to remove any reasonable controversy. From a reading of all the evidence and giving to it either its face value, or an analysis which takes into consideration implications and probabilities, we cannot say that the plaintiffs' proofs are plain and convincing beyond reasonable controversy.

In the evidence there was a sharp and irreconcilable conflict. This court, in the recent case of *Oft v. Dornacker, supra,* an action for reformation of a deed, used the following language which we think is applicable here:

"There was a sharp and irreconcilable conflict in the evidence, appellant's witnesses testifying that there was an understanding between the parties that was never incorpo-

rated in the deed, while appellee and her witnesses asserted just as positively upon the witness-stand that no such understanding or agreement was ever made. Applying the well-known rule of equity to the evidence that the evidence must be clear, convincing and satisfactory to obtain the reformation of an instrument, we are constrained to hold that it was not sufficient to justify a reformation of the contract and that the trial court was right in so holding."

In the light of the view taken with reference to this proposition, it is unnecessary to discuss the question of value or evidence of value of property lost by fire.

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

REVERSED.

ASH GROVE LIME & PORTLAND CEMENT COMPANY, APPELLEE, V. MORAN CONSTRUCTION COMPANY, APPELLEE: CONTINENTAL CASUALTY COMPANY, APPELLANT.
296 N. W. 761

FILED MARCH 7, 1941. No. 30928.

1. **Payment.** Ordinarily, a creditor must comply with the debtor's direction regarding the applicatiion of payments.
2. **Highways.** Where a contractor owes a materialman under several contracts, including a highway contract secured by a bond, the surety thereon has a legal right to have payments by the contractor from funds derived from the highway contract applied to the indebtedness thereunder, and is not liable to the materialman who, knowing the source of the funds, applies them in payment of other indebtedness, though directed by the contractor to do so.

APPEAL from the district court for Douglas county: JOHN W. YEAGER, JUDGE. *Reversed and dismissed.*

Smith & Schall, O'Sullivan & Southard and *Gerald M. Vasak*, for appellant.

William R. Patrick and *Ellick, Fitzgerald & Smith, contra.*

Heard before SIMMONS, C. J., EBERLY, PAINE and MESSMORE, JJ., and LANDIS and MUNDAY, District Judges.

LANDIS, District Judge.

The Ash Grove Lime & Portland Cement Company, a corporation, appellee, obtained below a judgment for $26,181 on a contract bond against the Moran Construction Company, a corporation, as principal, and the Continental Casualty Company, a corporation, as surety. The Continental Casualty Company, appellant, alone appeals therefrom.

The facts are: The Moran Construction Company entered into a written contract with the department of public works of the state of Nebraska for the construction of a highway, and agreed therein, among other things, "to pay all just claims for material, supplies, tools, machinery and labor, and all other just claims filed against it or any of its subcontractors in carrying out the provisions." To secure the faithful performance of this contract, the Moran Construction Company, as principal, and the Continental Casualty Company, as surety, executed and delivered to the state their contract bond providing therein, among other things: "It is expressly understood and agreed that this bond is given to secure and does secure not only the faithful performance by the principal herein named of said contract for the construction work as specified in said contract and in strict accordance with the terms of said contract and the plans and specifications thereto attached and made a part thereof, but that it is given to secure and does secure also the payment by the said bounden Moran Construction Company of all just claims for materials, lubricants, oil and gasoline used or consumed in the construction of the work."

The Moran Construction Company entered into a written contract with the Ash Grove Lime & Portland Cement Company to purchase the cement necessary to carry out the highway construction project. In accordance therewith, cement was delivered and used in the project. Out of the

proceeds of the project, various sums were paid to the appellee cement company by the Moran Construction Company, some of which were credited on the cement purchased. Two such payments in amounts of $5,029.15 and $15,970.85, totaling $21,000, were not credited on the cement purchased, but by specific direction written in the checks the Moran Construction Company ordered the cement company, appellee, to apply them in payments of notes due appellee on other construction contracts than that covered by the contract bond as is shown by the checks themselves reproduced in appellee's brief. Appellee knew the source of the funds received by it in payment of the indebtedness for the cement purchased on the paving project, and of the $21,000 on notes not connected with said project, to be from payments by the state of Nebraska on the paving project covered by the bond upon which appellant is surety.

When the paving project was completed, appellee claimed that there was $18,746.10 due it for cement used in the paving project and the further sum of interest computed on items not paid within 30 days of invoice, amounting to $3,226.27, and also interest on the $18,746.10 from March 1, 1936, at 6 per cent., totaling the judgment obtained herein of $26,181 by the appellee against the Moran Construction Company as principal and Continental Casualty Company as surety. Neither appellant nor appellee have any procedural problems.

Appellee, though there is no bill of exceptions in this case, reproduces the two checks in its brief sustaining the first affirmative defense of the surety which was erroneously stricken below. It is apparent from the record that there is upon the part of all counsel a commendable attempt to submit all the facts, leaving for the court only a question of law to determine.

The controlling proposition for decision is: Where a contractor owes to the same creditor several debts growing out of various construction contracts, one of which is secured by a bond, has the surety on such bond a legal right to have any payment made by the contractor, principal on

such bond, from funds derived from such contract applied in satisfaction of the debt created under such contract, in preference to any other indebtedness of the contractor to such creditor, where the creditor knows the source of such funds?

Ordinarily, where the debtor directs the application of payments, the creditor must comply with the direction. Should the additional situation that the surety has some interest or equity in the funds with which the debtor makes payment to the creditor who has knowledge of the source thereof furnish an exception to this rule and allow the surety to insist that at least such payments shall be made to discharge the assured debt?

With us it is a matter of first impression and in considering the cases of other jurisdictions we find them in hopeless conflict. On analysis they may be said to fall into two main classes, one where they allow the surety to apply and control such payments, and the other where such right is refused the surety. The cases which allow control are divided into two classes, one allows control by the surety in every case, and the other allows application only where the creditor knows the source of the funds.

The courts which allow control despite knowledge by the creditor of the source of the funds place their decision on the ground of the equitable interest of the surety. Emphasis is made of the fact that money received from the contract upon which the surety is liable should be applied on the contract obligations upon which such surety can be held. *Columbia Digger Co. v. Rector,* 215 Fed. 618; *Columbia Digger Co. v. Sparks,* 227 Fed. 780; *Sioux City Foundry & Mfg. Co. v. Merten,* 174 Ia. 332, 156 N. W. 367.

The courts which refuse to allow the surety to direct application of the payments unless the creditor knew the source of the funds seem to reason by analogy that the surety's interest resembles somewhat of the *cestui* in a constructive trust, where the contractor assumes the position of trustee and the contract funds the trust *res. Thacker v. Bullock Lumber Co.,* 140 Ky. 463, 131 S. W. 271;

Sturtevant Co. v. Fidelity & Deposit Co., 92 Wash. 52, 158 Pac. 740.

There are the opposing views, where it is held that the surety has no right to apply and control the payments of the contractor to the creditor, even where such creditor has full knowledge of the source of the payment and of the surety relation. *Grover v. Board of Education*, 102 N. J. Eq. 415, 141 Atl. 81; *Standard Oil Co. v. Day*, 161 Minn. 281, 201 N. W. 410, 41 A. L. R. 1291. In commenting on this last case in the note in 41 A. L. R. 1298, it is suggested in relation thereto: "When, as in the reported case, the secondary creditor knew the source of the funds with which the secondary payment was made, the weight of authority seems to support the right of the person making the original payment (or one in the same position) to insist upon an application of the secondary payment which will protect him, or his property; or, at least, upon that hypothesis it cannot be said affirmatively to support the contrary view which is taken in the reported case." There are certain situations where equitable principles may be applied that relax the strict rules. This is true in our state in the materialman's lien cases for materials furnished a contractor for erection of buildings and the liability of the owner is considered. *Crane Bros. Mfg. Co. v. Keck*, 35 Neb. 683, 53 N. W. 606; *Boyer-Van Kuran Lumber & Coal Co. v. Colonial Apartment House Co.*, 94 Neb. 180, 142 N. W. 519; *Lee v. Storz Brewing Co.*, 75 Neb. 212, 106 N. W. 220; *Ballou v. Black*, 17 Neb. 389, 23 N. W. 3. In these cases the liability of the real estate to the statutory lien constitutes the suretyship obligation with the contractor as principal, and our court holds that the materialman should be required to apply payments which he knew came from the surety to discharge the debt upon which the latter was liable. Thus, where property was bound by a materialman's lien for materials furnished a contractor for the building and the owner, at the contractor's order, made a payment to the materialman, the latter could not apply that payment to other than debts due from the contractor, but must apply

it all to the discharge of the debt secured by the lien. *Lee v. Storz Brewing Co., supra.*

The conditions of this public contractor's agreement with the state for the paving contract, and the bond given to protect that agreement in the instant case, create an implied understanding that, where the creditor knew the source of the funds, money received from the paving contract cannot be applied to other indebtedness so as to make the contractor's surety liable for materials furnished under the contract as for materials not paid for. It would seem to have the materials paid for by the state and by the contractor used on other indebtedness to the materialman, with full knowledge of the source, amounts to constructive fraud. In the ultimate analysis, it amounts to the creditor receiving the money from the state, through the contractor principal, with knowledge of its source, for cement used in the paving contract, and then again being paid for by the surety. The sounder rule is that a creditor, with knowledge of the source of the money, cannot apply it to a debt other than that secured by the bond, so long as the bond remains unsatisfied. The payment by the contractor principal must be applied by the creditor, who has knowledge of the source of the funds, to the extinguishment of the liability of the surety on the contract on which it is received.

The rule is where a contractor owes to the same creditor several debts growing out of various construction contracts, one of which is secured by a bond, the surety on such bond has a legal right to have any payment made by the contractor, principal on such bond, from funds derived from such contract applied in satisfaction of the debt created under such contract, in preference to any other indebtedness of the contractor to such creditor, where the creditor knows the source of the funds. The general principle that a surety in a case such as the one at bar has a special interest in the funds arising from payments made under the contract is based upon sound equity, fair dealing, and fundamental honesty and is supported by numerous authorities, as listed in *Nelson Mfg. Co. v. Wallace,* 66 S. W. (2d) (Tex. Civ. App.) 505.

If the two payments made by the Moran Construction Company to the appellee, totaling $21,000, had been properly applied in satisfaction of the debt created under the paving contract for cement used therein instead of to other indebtedness of the contractor principal to the said creditor, then there would be no liability upon the part of the appellant on its contract bond.

The judgment against the contractor principal unappealed from stands, but as to the judgment against the surety entered below and appealed from, there is a reversal, with directions to enter a dismissal as to such surety.

REVERSED AND DISMISSED.

FRED H. SCHIRMER, APPELLEE, V. CEDAR COUNTY FARMERS TELEPHONE COMPANY ET AL., APPELLANTS.
296 N. W. 875

FILED MARCH 14, 1941. No. 31083.

1. **Workmen's Compensation.** Where an employee suffers an accident in the course of his employment, producing a coronary thrombosis as a direct result, the disability resulting therefrom is compensable under the workmen's compensation act.
2. ———. An attorney's fee is not allowable in the district court where an employee, seeking compensation, is denied recovery in the compensation court, and on appeal to the district court an award of compensation is made.

APPEAL from the district court for Cedar county: MARK J. RYAN, JUDGE. *Affirmed in part and reversed in part.*

Votava & McGroarty and *Eugene F. Fitzgerald,* for appellants.

Clarence E. Haley, contra.

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

SIMMONS, C. J.

This appeal in a workman's compensation case presents

two questions: (1) Was the plaintiff's disability caused by the accident which he suffered? (2) Assuming an affirmative answer to that question, did the trial court err in allowing an attorney fee to the plaintiff?

Plaintiff was an employee of the defendant company as a lineman. While so engaged, he, using lineman's spurs, had climbed a pole to fasten some "floater" insulators in position on the outer end of a cross-arm. He had climbed the pole, had fastened the spur on his right leg in the pole, had his left arm across the cross-arm and between two pins, and was engaged in fastening the insulators, when his spur slipped a few inches, and again fastened in the pole. When the spur slipped, he tightened his hold with his left arm, catching the weight of his body and preventing a fall. He immediately felt a sharp pain in the chest. He finished his work in a few minutes, came down from the pole, and told his son that the air felt "very pure." He drove home a distance of a mile and on arrival there was suffering great pain in the entire chest area. He was taken to a hospital, where a definite diagnosis of coronary thrombosis was made. His left arm was slightly bruised in the accident. That this accident arose out of and in the course of his employment cannot be seriously questioned. That the plaintiff prior thereto was in apparent good health, and subsequently thereto has not been able to perform his usual tasks, is not disputed.

Defendant contends that plaintiff's physical condition was the result of disease, and was in no way caused or aggravated by the accident.

The case was tried before one judge of the compensation court, who entered an order dismissing the claim. On appeal, the matter was tried to the district court, who found that the plaintiff was entitled to compensation under the act. The matter comes to this court on appeal, subject to the statutory provision that the judgment of the district court may only be modified or set aside on the ground, "(3) That the findings of fact are not conclusively supported by the evidence as disclosed by the record, and if so found, the

cause shall be considered *de novo* upon the record." Comp. St. Supp. 1939, sec. 48-174.

"It is sufficient to show that the injury and preexisting disease combined to produce disability." *Chatt v. Massman Construction Co.*, 138 Neb. 288, 293 N. W. 105. An issue of fact is presented. In sustaining the burden of proof, "more than a preponderance of evidence is not required." *Chatt v. Massman Construction Co., supra.*

On this issue, plaintiff and defendant each offered the testimony of one expert witness. Plaintiff's witness was the physician who was called immediately following the accident, and who, with consultants, cared for plaintiff from that time forward. In response to the following questions, he gave the following answers:

"Q. Doctor, let me ask you this, Mr. Schirmer was working on a pole and slipped and caught himself with his left arm. Would that jar of itself be able to set up any complication or cause this coronary thrombosis? * * * A. I believe in this man's particular case, knowing his physical background, it would."

In answer to questions as to when "coronary thrombosis will attack a person," he answered that, "during unusual, severe exertion 5.6% or 6%" of the cases occur, and that "trauma shows only 8/10 of 1%."

"Q. You couldn't tell the court this theory of yours was correct or whether it was merely theory or conjecture? A. I would say in this man's case, irrespective of the condition of the arteries, it was the immediate strain of catching himself on the pole that produced this cataclysm so far as he was concerned. Q. You have nothing to go on so far as that is concerned except what had happened to him on the pole? A. And the fact that he gave a history of catching himself with his left arm. Q. And if it hadn't been for the history you would have to assume it was an ordinary case of thrombosis? A. One would have to suppose that. Q. As a matter of fact, you agree with the statistics quoted here, it could have happened to him when asleep or walking or resting or any other mild activity? A. Absolutely. On the

other hand this case falls under the 8/10 per cent. Q. The 8/10 of 1%? A. 8 mills. * * * Q. You don't contend any slipping here caused the diseased condition of the arteries do you? A. No. Q. Nor do you contend the slipping formed a blood clot? A. My contention was this—due to pneumothorax rupture—catching himself with his left arm and throwing his entire weight on the chest there was damage. We didn't know anything about it. We couldn't possibly familiarize ourselves with what precipitated this attack. Q. In other words you took a good guess? A. After all the only thing a physician has to go by—if you come into my office and say, 'Doctor Ogden hit me,' I believe he hit you; because if I didn't see it I have no way of proving it. Q. As a matter of fact you don't know how severe it was? A. I had the patient's statement and I know how I would like to catch myself that way."

The accident and severe illness occurred in January, 1939. Defendant's expert witness first examined plaintiff in October, 1939, covering a hospital period of five days. He found no coronary thrombosis at that time but did find an "extrasystoles heart," a not uncommon condition. He was asked a hypothetical question, concluding with a request for his opinion "as to whether or not his slipping on the pole in any way caused or aggravated this condition of coronary thrombosis?" He could not "see any connection between the slipping and the coronary occlusion which took place" and gave his reasons for that opinion. He further testified that he did not see how plaintiff's slipping on the pole and catching himself with his left arm could cause any particular closing of the arteries or strain in the coronary arteries and that coronary thrombosis was always caused by a diseased artery.

Upon such testimony the trial court found that "there was a direct connection between the accident and his disability which was unquestionably sustained by him while in the usual course of his employment."

"In the determination of the question of causation, the disability or death for which compensation is claimed may

just as legitimately be attributed to the accidental injury where undeveloped and latent physical conditions are set in motion and accelerated so as to produce such final result as where the same result follows directly from visible violence done to the physical structure of the body." 71 C. J. 605. "The acceleration, aggravation, or lighting up of a pre-existing disease by an injury may constitute disability of a character such as to come within the meaning of workmen's compensation acts." 71 C. J. 608. "Where an employee, while engaged in the work of his employment, aggravates or accelerates the condition of diseased blood vessels, thereby causing death or disability, it may constitute an injury of a character such as to come within the meaning of workmen's compensation acts." 71 C. J. 610. "The acceleration or aggravation of an employee's heart condition thereby causing death or other disability may constitute physical harm of such a character as to come within the meaning of workmen's compensation acts." 71 C. J. 611. For cases dealing generally with situations of this character, see annotations, 19 A. L. R. 110; 28 A. L. R. 209; 60 A. L. R. 1314.

We see no controlling reason for disturbing the finding of the trial court.

The trial court allowed an attorney fee to the plaintiff in addition to the compensation award. The defendant employer prevailed in the compensation court and plaintiff appealed to the district court. The statute provides that, "In the event the employer appeals to the district court * * * and fails to obtain any reduction in the amount of such award, the district court may allow the employee a reasonable attorney's fee to be taxed as costs." Comp. St. Supp. 1939, sec. 48-125. This provision does not authorize an award of an attorney's fee in this case. Plaintiff relies, however, upon the provision that, "Whenever the employer refuses payment or * * * neglects to pay compensation for thirty days after injury, and proceedings are held before the compensation court, a reasonable attorney's fee shall be allowed." Comp. St. Supp. 1939, sec. 48-125. This provi-

sion does not justify the award of an attorney's fee in the situation here presented.

The judgment of the district court is affirmed as to all matters except the allowance of an attorney's fee, and as to that it is reversed.

AFFIRMED IN PART AND REVERSED IN PART.

CARTER, J., dissenting.

Plaintiff claims that while working on a telephone pole with the climbing spur on his right foot imbedded in the pole and with his left arm over the cross-arm, he slipped, resulting in the injury of which he complains. On cross-examination he admitted that he did not know whether he slipped or not. He told his physician that he did not know what happened. There is no other evidence of accident. It is more likely that plaintiff's heart condition caused what he chooses to call an accident than that the alleged trauma caused his heart ailment. Such evidence cannot sustain a finding that plaintiff suffered an accident.

The evidence shows that plaintiff was suffering from a coronary thrombosis. It is a common disease. It is estimated that only eight-tenths of one *per centum* of all such cases result from trauma. The testimony of plaintiff's medical expert is interesting, a part of which is: "Q. Nor do you contend the slipping formed a blood clot? A. My contention was this—due to pneumothorax rupture—catching himself with his left arm and throwing his entire weight on the chest there was damage. We didn't know anything about it. We couldn't possibly familiarize ourselves with what precipitated this attack. Q. In other words you took a good guess? A. After all the only thing a physician has to go by—if you come into my office and say, 'Doctor Ogden hit me,' I believe he hit you; because if I didn't see it I have no way of proving it." As opposed to this evidence, defendant's expert medical witness says: "I cannot see any connection between the slipping and the coronary occlusion which took place for the reason that in order for a coronary thrombosis to occur there has to be a lot of preliminary groundwork laid. That is, there has to be coronary sclerosis

develop. One may involve any small portion of the artery and then after that has developed to a certain point there has to be a blood clot form on this, and this takes a considerable space of time for this blood clot to form. And when the time comes for that to shut off, it is going to shut off whatever the person is doing at that time." Plaintiff's evidence as to the cause of the coronary thrombosis is merely a guess. This, coupled with the rareness in which trauma plays a part, is very conclusive of the fact that the award is based upon speculative and conjectural evidence. This is insufficient to sustain an award. The burden of proof is upon plaintiff to show by a preponderance of the evidence that his disability was the result of accident arising out of and in the course of his employment. In my judgment, he has utterly failed to prove his case.

MARY B. MCDONALD, APPELLEE, V. LINCOLN COUNTY, APPELLANT.
296 N. W. 892

FILED MARCH 14, 1941. No. 30917.

1. **Taxation.** The liability of a county to refund taxes paid by purchaser of real estate at a county treasurer's sale for delinquent taxes, where the title fails, or the property is exempt from taxation, is statutory and does not exist at common law.
2. ———. Section 77-2054, Comp. St. 1929, construed, and *held* to be "cumulative" only, and not in its inherent nature amendatory.
3. ———. The legislature may define certain words used in the statute, or may declare in the body of the act what construction is to be placed thereon, and the court is bound by such definition and such construction.
4. ———. The term "cumulative" as applied to section 77-2054, Comp. St. 1929, indicates an harmonious coexistence and cooperation, and must be construed as in addition to, but in no manner amending, changing, or modifying the terms of section 77-2030, Comp. St. 1929.
5. **Statutes.** "The mere reenactment of a statute in a code or revision has been held not to change its meaning, construction or effect. And this is held to be true though the sections of an act are separated and arranged in different connections." 2 Lewis' Sutherland, Statutory Construction (2d ed.) 857, sec. 451.

6. **Taxation.** "Where a county treasurer sells lands for taxes which were not liable to taxation, and upon which no taxes were due, the tax purchaser may recover from the county the amount paid by him, with interest thereon." *Wilson v. Butler County*, 26 Neb. 676, 42 N. W. 891.
7. ———. "Where a county has caused land which is not taxable to be assessed and taxes levied thereon under which the land is afterwards sold and attempted to be conveyed, and the county from year to year afterwards causes said land to be assessed and taxes levied thereon, the tax purchaser may pay such taxes to protect his supposed lien, and, upon the failure of his interest in the land, may recover the amount he has so paid, with interest thereon, from the county." *Wilson v. Butler County, supra.*
8. ———. "Where a county has caused certain real estate to be assessed, and taxes to be levied thereon, a tax purchaser may presume that the property was taxable, and is not required to make a further examination of that fact as a condition of maintaining an action against the county for the purchase money, and interest, and taxes thereafter paid to protect the tax lien which was believed to exist." *Wilson v. Butler County, supra.*
9. ———. The limitation of the revenue law with respect to the period within which an action must be brought to enforce a tax lien, or a claim for refund of void taxes, does not relate to the remedy merely, but to the cause of action.
10. ———. "Purchasers of property at tax sales, whether for investment or for the purpose of securing title thereto, must look to the remedy prescribed by statute." *Foree v. Stubbs*, 41 Neb. 271, 59 N. W. 798.
11. ———. The liability of a county to the holder of a tax sale certificate for the refund of taxes illegally assessed by the county is measured solely by the statute relating thereto, which bars such claims made after the lapse of five years from the date of the certificate sought to be refunded, notwithstanding the prosecution of a timely action in a court of competent jurisdiction to secure a foreclosure of the tax lien.
12. *Gibson v. Dawes County*, 129 Neb. 706, 262 N. W. 671, *Wetzel v. Dawes County*, 129 Neb. 711, 262 N. W. 674, and *Kennedy v. Dawes County*, 130 Neb. 227, 264 N. W. 452, adhered to.

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

S. S. Diedrichs, R. H. Beatty and *Milton C. Murphy*, for appellant.

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

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE and MESSMORE, JJ., and HASTINGS and KROGER, District Judges.

EBERLY, J.

This action is an appeal from a judgment of the district court for Lincoln county, Nebraska, in favor of Mary B. McDonald and against the county of Lincoln for $12,271.64, with interest and costs made and entered by it on an appeal from the disallowance by the county board of that county of a claim for a refund of money paid to the county treasurer for a tax sale certificate and subsequent taxes paid by Mary B. McDonald, as owner thereof, on the Masonic Temple Craft building in North Platte.

The material facts are not in dispute. It appears that the tax sale certificate was issued to the appellee, Mary B. McDonald, on November 3, 1930, and the payments of the taxes subsequently assessed against the premises were made when and in the amounts as alleged in her petition. The original petition was filed on June 19, 1935, by Mary B. McDonald in the district court for Lincoln county in a case wherein she was plaintiff and the Masonic Temple Craft of North Platte, Nebraska, *et al.*, were defendants, the object and prayer of which were the foreclosure of the lien of the tax sale certificate and of subsequent taxes paid by the plaintiff. Service of summons issued thereon was made on all parties on June 20, 1935. After trial on the merits on September 23, 1936, a decree of foreclosure and sale was awarded the plaintiff in the sum of $7,433.65 and interest, as provided by law. An appeal was thereupon presented from this judgment of the district court to the supreme court, wherein, after due hearing, judgment was entered directing that the judgment of the district court, made and entered on September 23, 1936, be reversed and the plaintiff's action be dismissed, and mandate so directing was duly issued from the supreme court on November 7, 1938; and such mandate was received and filed in the district

court for Lincoln county on November 8, 1938. See *McDonald v. Masonic Temple Craft*, 133 Neb. 589, 276 N. W. 176; *Id.*, 135 Neb. 48, 280 N. W. 275.

Thereafter on December 10, 1938, Mary B. McDonald filed with the county board of Lincoln county, Nebraska, a claim in writing for a refund of the moneys thus paid by her to the county treasurer of Lincoln county. This claim was disallowed in full on December 19, 1938. An appeal was prosecuted by Mary B. McDonald from this disallowance to the district court for Lincoln county. Her petition on appeal, in proper form, set forth the facts of the transaction and the adjudication by the supreme court of the state of Nebraska of the invalidity of the taxes in suit, with appropriate prayer.

The answer may be summarized as an admission of the levy of the taxes in suit, the purchase by plaintiff at tax sale, and subsequent payment of taxes as alleged in the petition, but it alleges that the major part of these taxes were levied by other municipal subdivisions of the state of Nebraska (the city and school district of North Platte), and that the proceeds so collected by the county treasurer were by him distributed to such municipal subdivisions according to their respective interests and rights thereto, and are not now in the hands of the county treasurer. Further, this answer admits the entry of judgment determining the illegality of the taxes in suit, and alleges that Lincoln county was not a party in that proceeding, and, in addition, pleads that plaintiff's action was not instituted within five years from the date of issuance of tax sale certificate, and therefore is barred.

To this answer, a reply in the nature of a general denial was filed.

The result of the trial on the merits in the district court was the judgment referred to at the commencement of this opinion. From the order of the trial court overruling its motion for a new trial, the defendant county appeals.

Appellant county, hereinafter referred to as the "defendant," now contends, viz.: (1) That plaintiff's claim

for refund is barred by the applicable statute of limitations, more than five years having elapsed between the date of the issuance of the tax sale certificate and the filing of plaintiff's claim for refund on December 10, 1938; (2) if, however, recovery is permitted on this claim it should be limited to the proportionate sum of the taxes which had been levied for the county's sole benefit, excluding from the recovery against it the taxes levied for the city of North Platte and the school district thereof, which formed a part of the original tax sale; (3) that section 77-2054, Comp. St. 1929, authorizes recovery for special assessments only, and is inapplicable to general taxes.

These questions thus presented, arising from the consideration of our revenue statutes, come within the scope or purview of the general rule, viz.:

"A statute which creates a new right, privilege or immunity, and regulates the manner of its exercise, will be construed as mandatory. In other words, the right can be exercised only in the manner and within the time prescribed. Similarly, when a statute gives a new right and prescribes a particular remedy for its recovery, such remedy must be strictly pursued; * * *." Crawford, Statutory Construction, 526, sec. 264.

In line with these principles we have clearly determined that the liability of a county to refund taxes paid by purchaser of real estate at a county treasurer's sale for delinquent taxes, where the title fails, or the property is exempt from taxation, is statutory and does not exist at common law. *Speidel v. Scotts Bluff County*, 125 Neb. 431, 250 N. W. 555; *Gibson v. Dawes County*, 129 Neb. 706, 262 N. W. 671.

Certain sections of our statute impose upon a county the duty to hold the purchaser of real estate at a tax sale harmless by refunding the amounts of payments made by him to the county treasurer when title fails or such sale is adjudicated void. These statutory provisions are as follows, viz.:

"When by mistake or wrongful act of the treasurer or

other officer land has been sold on which no tax was due at the time or whenever land is sold in consequence of error in describing such land in the tax receipt, the county is to hold the purchaser harmless by paying him the amount of principal, interest and costs to which he would have been entitled had the land been rightfully sold, and the treasurer or other officer shall be liable to the county therefor upon his official bond; or the purchaser or his assignee may recover directly of the treasurer or other officer in an action on his official bond." Comp. St. 1929, sec. 77-2030.

"Whenever, for any reason, real estate has been sold or shall hereafter be sold for the payment of any tax or special assessment levied by any county, municipality, drainage district or other political subdivision of the state, and it shall thereafter be determined by a court of competent jurisdiction that said sale was void, it shall be the duty of such county, municipality, drainage district, or other political subdivision of the state which levied the tax or special assessment to hold said purchaser harmless by paying him the amount of principal paid by him at the sale with interest thereon at the rate of 6% *per annum* from the date of sale." Comp. St. 1929, sec. 77-2054.

And these sections are in a measure modified or qualified and limited by the provisions of section 77-2049, Comp. St. 1929, the terms of which are as follows:

"If the owner of any tax sale certificate shall fail or neglect to demand a deed thereon, or to commence an action for the foreclosure of the same within five years from the date of the sale, such tax sale certificate shall cease to be valid or of any force or effect whatever, and the real estate covered thereby shall be forever released and discharged from the lien of all taxes for which the same was sold. *And it is hereby made the duty of each and every county treasurer of the state of Nebraska to enter on the tax sale records of his or her office a cancelation of all tax sales on which five years have elapsed since date of sale, with date of entry affixed, in language substantially as follows: 'Canceled by section 6569 Revised Statutes of Nebraska for*

1913 (77-2049).' No county treasurer or bonded abstractor shall be held responsible on his bond or otherwise on account of such entry being made in accordance with this section. All land covered by tax sales that comes within the provisions of this act shall from the time of this entry be considered to stand of record as though no tax sale had ever been made." (Italics ours.)

The record discloses that, due to the tax exempt character of the real estate involved, the taxes here in suit were void when and as assessed and levied. When the premises herein involved were sold to the plaintiff on November 3, 1930, at public sale by the county treasurer of Lincoln county, no taxes whatever "were due thereon at that time." *McDonald v. Masonic Temple Craft,* 135 Neb. 48, 280 N. W. 275.

And, for like reason, the payment of taxes purporting to have been levied and assessed on the premises here involved by plaintiff as owner of such treasurer's certificate of tax sale, made subsequently and in good faith, were of taxes improperly assessed on tax exempt property and wholly void. The facts of the record amply sustain the conclusion that the erroneous determination of the assessable character of the premises here involved, the attempted assessment thereof, the levy of the taxes here in suit thereon, and the sale of the same at public tax sale, as well as all necessary acts connected therewith, were done and performed and carried out exclusively by the taxing officers of Lincoln county, over whose official acts the city of North Platte and its school district were vested with no control whatever; that at the time of the performance of such official acts the property in suit was exempt from such taxation because of the existence therein of an exclusive use for charitable purposes (Const. art. VIII, sec. 2), which was not disclosed by the tax records to which the tax purchaser then had access.

Under these facts, the question presented for consideration is: What relief is the plaintiff entitled to under the above statutory enactments?

Section 77-2054, Comp. St. 1929, was originally enacted as section 2, ch. 228, Laws 1915, the act being entitled "An act providing for and regulating the collection, by sale of real estate, of all delinquent taxes and special assessments levied by any county, municipality, drainage district or other political subdivision of the state and providing for the reimbursement by said political subdivision of the state, of the principal paid by tax purchasers at void sales with interest thereon from the date of sale, and making this act cumulative only." Laws 1915, ch. 228.

The first section of this act included a provision that "All provisions of said revenue law now in force with reference to the collection of taxes shall apply with equal force to all taxes and special assessments levied by said county, municipality, drainage district or other political subdivision of the state." Laws 1915, ch. 228, sec. 1.

This by necessary implication included as part thereof the provisions of chapter 112, Laws 1915, approved April 15, 1915, entitled, viz.: "An act to amend section 6569, Revised Statutes of Nebraska for 1913 (now Comp. St. 1929, sec. 77-2049), relating to tax sale certificates, and to repeal said original section."

The third section of the act (now Comp. St. 1929, sec. 77-2055), provides: "This act shall be construed as cumulative only, and not to deprive any county, municipality, drainage district or other political subdivision of the state of any right or remedy they may now have for the collection of taxes, or special assessments under the existing laws of this state, nor shall it be construed to deprive any tax purchaser of any right or remedy he may now have under the laws of this state. Nor shall it be construed to mean that the legislature intended by the passage of this act that the right to sell real estate for special assessment does not exist under the present law." Laws 1915, ch. 228, sec. 3.

This statute as an entirety is to be construed in harmony with the principles that "The legislature may define certain words used in the statute, or declare in the body of the act the construction to be placed thereon, and the court is bound

by such definition or construction, and will apply it." 59 C. J. 948.

The word "cumulative" has been defined, viz.: "A word which is said to be derived from the Latin cumulo, to heap, or cumulus, a heap, meaning that which augments by addition; that which is added to something; additional; that which is superadded to another thing of the same character and not substituted for it." 17 C. J. 401.

In *State v. Laredo Ice Co.*, 96 Tex. 461, 73 S. W. 951, it is stated: "The term 'cumulative' indicates an harmonious coexistence and cooperation, rather than a consolidation of two things into one. An amendment to a statute is not 'cumulative,' because it repeals and takes the place of the part of the law that it amends, thereby becoming a part of the law amended."

The use of the word "cumulative" in the act of 1915 negatives the concept of "amendatory." Indeed, to be considered as amendatory to section 77-2030, Comp. St. 1929, would involve transgression of the constitutional rule that "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." Const. art. III, sec. 14.

It follows that the provisions of section 77-2054, Comp. St. 1929, must be construed as in addition to, but in no manner amending, changing, or modifying the terms of section 77-2030, Comp. St. 1929. So construed, section 77-2054 embraces within its purview all "taxes" as well as "special assessments," "levied by any county," etc. And it also follows that all rights and remedies afforded the tax sale purchaser by existing legislation at the time of the enactment of this law of 1915, and the prescribed conditions and limitations therein expressed (including Comp. St. 1929, sec. 77-2030), were continued wholly unmodified, in full force and effect.

"The mere reenactment of a statute in a code or revision has been held not to change its meaning, construction or effect. And this is held to be true though the sections of an act are separated and arranged in different connections." 2

Lewis' Sutherland, Statutory Construction (2d ed.) 857, sec. 451.

The legislative development of what is now section 77-2030, Comp. St. 1929, is set forth in *Norris v. Burt County*, 56 Neb. 295, 76 N. W. 551. It was finally perfected as section 222, ch. 73, Laws 1903. In construing the act of 1879, which is substantially identical with our present act, this court announced these doctrines:

"Where a county treasurer sells lands for taxes which were not liable to taxation, and upon which no taxes were due, the tax purchaser may recover from the county the amount paid by him, with interest thereon.

"Where a county has caused land which is not taxable to be assessed and taxes levied thereon under which the land is afterwards sold and attempted to be conveyed, and the county from year to year afterwards causes said land to be assessed and taxes levied thereon, the tax purchaser may pay such taxes to protect his supposed lien, and, upon the failure of his interest in the land, may recover the amount he has so paid, with interest thereon, from the county.

"Where a county has caused certain real estate to be assessed, and taxes to be levied thereon, a tax purchaser may presume that the property was taxable, and is not required to make a further examination of that fact as a condition of maintaining an action against the county for the purchase money, and interest, and taxes thereafter paid to protect the tax lien which was believed to exist." *Wilson v. Butler County*, 26 Neb. 676, 42 N. W. 891.

See, also, *Roberts v. Adams County*, 18 Neb. 471, 25 N. W. 726; *Roberts v. Adams County*, 20 Neb. 409, 30 N. W. 405.

It is obvious, therefore, that, waiving the question of the statute of limitations, the county, under the rule of interpretation long established, is liable under section 77-2030, Comp. St. 1929, for all taxes which entered into the sum paid by the taxpayer, without regard for whose benefit they were levied. Indeed, our revenue act expressly defines "county tax" as follows: "The term 'county tax' includes

all taxes due to the county, school districts and other subdivisions of the county, which are levied and collected by the county." Comp. St. 1929, sec. 77-108. And in line with this conclusion it was early held by this court that a claim for refund of taxes illegally assessed under section 71 of the revenue act then in force was a claim against a county. *Richardson County v. Hull*, 24 Neb. 536, 39 N. W. 608.

As we have seen, the fact that a court of competent jurisdiction may have determined the original tax sale for the taxes here in suit to be void, as contemplated by section 77-2054, Comp. St. 1929, would in no manner affect the rights conferred by section 77-2030, Comp. St. 1929. The rights created by both section 77-2054 and section 77-2030 continue at all times in "harmonious coexistence and cooperation." Indeed, they cannot be mutually repugnant. It follows that, unless barred by section 77-2049, claims for refund of taxes paid in this case, presented to the county commissioners of Lincoln county, would be properly sustainable as valid claims for indemnity.

Section 77-2049, Comp. St. 1929, already quoted, was evidently derived from section 180 of the revenue act of 1879. Laws 1879, p. 347. It originally read: "If the owner of any such certificate shall fail or neglect either to demand a deed thereon, or to commence an action for the foreclosure of the same, as provided in the preceding sections, within five years from the date thereof, the same shall cease to be valid or of any force whatever, *either as against the person holding or owning the title adverse thereto, and all other persons, and as against the state, county, and all other municipal subdivisions thereof.*" (Italics ours.) It is clear that the legislature of 1903, for the words just italicized, relied on the all inclusive word "whatever" which evidences a like intent. The legislature of 1915 by an amendment thereto reenacted the provisions of the 1903 act and added the words which appear italicized in the copy of section 77-2049 hereinbefore set forth. The terms of the statute are such that it constitutes a special five-year statute of limitations, not a pure statute of limitations applicable to pleadings.

"A wide distinction exists between pure statutes of limitation and special statutory limitations qualifying a given right. In the latter instance time is made an essence of the right created and the limitation is an inherent part of the statute or agreement out of which the right in question arises, so that there is no right of action whatever independent of the limitation. A lapse of the statutory period operates, therefore, to extinguish the right altogether. To such limitations the rules of law governing pure statutes of limitation, applicable to all classes of actions, have no application; they are to be determined by the law of the place under which the right of action arose or the contract was made, and are not to be treated as waived merely because they are not specially pleaded. * * * Where time is of the essence of the right created, and the limitation is an inherent part of the statute or agreement under which the right in question arises, so that there is no right of action independent of the limitation, such special limitation extinguishes the right rather than affects the remedy." 37 C. J. 686.

This special nature of the language now appearing in section 77-2049, Comp. St. 1929, was early recognized by this court. In *Alexander v. Shaffer,* 38 Neb. 812, 57 N. W. 541, it was stated: "When land has been sold for taxes and a suit to foreclose the lien therefor is not instituted within five years from the expiration of the time to redeem, the lien is extinguished and ceases to be a charge upon the land. The statute in that respect does not merely operate to defeat the remedy, but limits the duration of the lien itself."

And in *Foree v. Stubbs,* 41 Neb. 271, 59 N. W. 798, we held: "The limitation of the revenue law with respect to the period within which an action must be brought to enforce a tax lien does not relate to the remedy merely, but to the cause of action."

See, also, *Carson v. Broady,* 56 Neb. 648, 77 N. W. 80.

So also, we are committed to the view that "Purchasers of property at tax sales, whether for investment or for the

purpose of securing title thereto, must look to the remedy prescribed by statute." *Foree v. Stubbs, supra.*

By the uniform course of our decisions, we are committed to the view that, under the language of section 77-2049, Comp. St. 1929, all rights against all persons "whatever" cease, terminate, at the expiration of five years from the date of the certificate of tax sale, unless the tax purchaser shall "demand a deed thereon," or unless he shall commence an action to foreclose the same. In other words, two remedies are removed from the bar of the statute, (1) the demand for tax deed, and (2) the action to foreclose the certificate of tax sale. But these do not include any rights to a refund by county boards of taxes paid. If the tax purchaser secures a tax deed, his rights are limited to those conferred upon him by the instrument. *Carson v. Broady, supra.* If he proceeds to foreclose his tax sale certificate, his rights are measured by the results of that procedure. All other rights created by the tax sale are by section 77-2049 terminated at the end of five years from the date of such tax sale which this statute marks as termination of the county's liability to refund.

The provisions of section 77-2054 are not overlooked in this connection, nor is the language therein contained thought to be violated by the conclusion thus stated. Section 77-2054 was originally enacted under a comprehensive title as section 2 of chapter 228, Laws 1915. The original enactment contained three sections, and its proper construction necessarily invokes the rule that, "In construing a statute, effect must be given to all its provisions." *Chicago, B. & Q. R. Co. v. School District,* 110 Neb. 459, 194 N. W. 479. See, also, *State v. City of Lincoln,* 101 Neb. 57, 162 N. W. 138. While one of the pertinent provisions of section 2 of this 1915 act (now section 77-2054) is that, "Whenever, for any reason, real estate has been sold or shall hereafter be sold for the payment of any tax or special assessment * * * and it shall thereafter be determined by a court of competent jurisdiction that said sale was void," the duty "to hold said purchaser harmless by paying him

the amount of principal paid by him," etc., exists. It will be noted that no period of limitation is expressed by these words quoted, nor indeed in the section in which they are found. However, section 1 of this act of 1915 expressly directs that "All provisions of said revenue law now in force with reference to the collection of taxes shall apply with equal force to all taxes and special assessments levied by said county, municipality, drainage district or other subdivision of the state." Thus, by direct reference the provisions of section 77-2049 were incorporated into and became a controlling part of section 77-2054 and rendered the five-year statute of limitations controlling herein. It is obvious from a mere reading of this law of 1915, as an entirety, that its expressed object and purpose were to add and insure an additional right of recovery without in any manner interfering with the controlling force of the statute of limitations then existing. So too, the obvious rules of construction are that section 77-2054, in itself silent as to matters of limitation, must be construed with all tax legislation to which it is expressly made cumulative; that amendments and repeals by implication are not favored; and that section 77-2054, as a cumulative act, and the original legislation to which it applies must be so construed that both continue harmoniously cooperative and coexistent. The result of this construction is that section 77-2054, being expressly cumulative and not amendatory in character, cannot be deemed to extend the right of the taxpayer to reimbursement from the county, in the event of a denial by a court of competent jurisdiction of a tax foreclosure, beyond the term of five years from the date of the tax sale certificate under which he claims.

The course of decisions in this jurisdiction is in accord with this conclusion.

Thus in *Gibson v. Dawes County,* decided October 11, 1935, 129 Neb. 706, 262 N. W. 671, the facts disclose that a tax sale was had on November 6, 1922, for delinquent taxes levied for 1920 and 1921, and subsequent taxes were paid thereon. Action to foreclose the same was commenced prior

to November 1, 1927. On October 27, 1930, decree was rendered therein finding that certain of the subsequent taxes paid thereon were invalid. For these a claim for refund was presented to the county board, which was by it denied. The action of the county board was by this court approved.

In *Wetzel v. Dawes County*, 129 Neb. 711, 262 N. W. 674, decided October 11, 1935, land was sold for taxes assessed prior to November 1, 1926. Action to foreclose the tax lien was commenced within five years from the date of tax sale. A decree of court determining that the land was not subject to taxation was rendered on October 20, 1932. A claim for refund was filed with the county clerk October 26, 1932, and such claim was held by this court as barred by the statute of limitations.

In *Kennedy v. Dawes County*, 130 Neb. 227, 264 N. W. 452, the public tax sale certificate was issued November 3, 1923, and subsequent taxes were paid by the holder thereof. Action to foreclose was properly commenced "a few days before the five years expires." A judgment was entered determining the land not subject to assessment in 1930. Claim for refund was filed January 21, 1931, and disallowed February 7, 1934. On appeal, the action of the county board was approved.

The determining principle appears to be: The liability of a county to the holder of a tax sale certificate for the refund of taxes illegally assessed by the county is measured solely by the statute relating thereto, which bars such claims made after the lapse of five years from the date of the certificate sought to be refunded, notwithstanding the prosecution of a timely action in a court of competent jurisdiction to secure a foreclosure of the tax lien.

It follows that in the entry of the judgment appealed from the district court erred. Such judgment is accordingly reversed and the action of plaintiff dismissed.

REVERSED AND DISMISSED.

KROGER, District Judge, dissenting.

I find myself unable to agree with the majority opinion.

This case presents a simple question, viz.: When does the statute of limitations commence to run against a claim for refund for taxes paid under a void tax sale as provided by section 77-2054, Comp. St. 1929?

By an involved process of reasoning, a majority of this court has found that the five-year limitation contained in section 77-2049, Comp. St. 1929, applies also to the remedy provided by section 77-2054, Comp. St. 1929, and that in the instant case the statute of limitations commenced to run from the date the void tax sale certificate was issued. For a better understanding of the question thus presented, I will restate a few of the facts.

The tax sale certificate was issued November 3, 1930. In June, 1935, petition was filed to foreclose the same. From the decree of foreclosure an appeal was taken, and finally in 1938, on rehearing, this court reversed the judgment of the district court and dismissed the action. This was the first time that any court had declared the tax sale entirely void and was more than three years after the action to foreclose was commenced, so that, even if the plaintiff had filed her action at the earliest possible date, the decision holding her tax certificate void would not have been rendered until more than five years after the date of such certificate and, according to the majority opinion, too late for her to file her claim against the county.

The majority opinion does not point out what remedy a purchaser of a void tax sale certificate has when, through no fault of his own, a court of competent jurisdiction, within the five-year period, finds the certificate to be valid and then on appeal, after the five years have elapsed, the appellate court holds the certificate void. Certainly, the state, through its constituted taxing bodies, should not be permitted to take the money of a citizen for taxes alleged to be due and then, when the tax has been declared invalid, plead the statutes of limitations. The answer that the tax purchaser acts at his peril does not meet the situation. The state is interested in the prompt payment of taxes and the provisions of our statutes for the sale of property for de-

linquent taxes are intended to bring about that result. The legislature did not intend that the taxing authority be operated as a shell game, either with or without judicial sanction.

In my opinion, section 77-2049 deals entirely with valid tax sale certificates, and simply provides that an owner of a tax sale certificate must do one of two things within five years. He must demand a deed or commence an action to foreclose. Nothing more is required or contemplated. Plaintiff complied with this section by commencing her action to foreclose within the five-year period. Thereafter a thing happened that was not covered or contemplated by section 77-2049, to wit, a holding by a court of competent jurisdiction that the tax sale certificate was void. This holding gave the right to a new cause of action under section 77-2054, and since the latter does not contain a limitation clause, it would be governed by our general statute of limitations, and not by section 77-2049. To hold that it is governed by the latter section is equivalent to saying that the statute of limitations will run against a cause of action before the same accrues. A holding by a court of competent jurisdiction that the tax sale was void is a condition precedent to a claim under section 77-2054. How, then, can his cause of action be said to accrue before such finding is made? As is demonstrated by the facts of this case, the owner of the certificate is helpless to obtain such a finding within five years from the date of the certificate. He has no power to compel the court to make any finding within any specified time, yet the majority opinion not only holds that the action accrued, but that it was barred before any court of competent jurisdiction found the tax sale certificate to be void. This strikes me as being directly the opposite of what the legislature intended and stated in words that require no interpretation when they enacted section 77-2054.

I am not unmindful of the holdings in the cases of *Gibson v. Dawes County*, 129 Neb. 706, 262 N. W. 671, *Wetzel v. Dawes County*, 129 Neb. 711, 262 N. W. 674, and *Kennedy*

v. Dawes County, 130 Neb. 227, 264 N. W. 452. These cases show the danger of blindly following precedent. The first case decided was *Gibson v. Dawes County, supra,* and was disposed of on demurrer. This court, in that case, said: "From the standpoint of the demurrer and of invulnerable pleading, therefore, the petition does not show that the taxes which plaintiff seeks to recover back were all void or that his tax sale certificate was invalid." And while there is some dictum to the effect that the statute of limitations had run, the decision was based on the sufficiency of the pleadings. The other cases cited are based upon the supposed holding in *Gibson v. Dawes County, supra.* If these cases state the correct rule of law, they are controlling. I submit, however, that the *Gibson* case can be distinguished, and that the other cases do not correctly state the law, are wrong in principle, and should be overruled.

I am authorized to state that Hastings, District Judge, joins with me in this dissent.

SIMMONS, C. J., dissenting.

I join in the dissent. I am not able to reconcile the conclusion reached by the majority with right or justice. Nor do I believe that the legislature ever intended that such a construction would be placed upon its acts.

I am authorized to say that Carter J., though not participating in the decision of this case, concurs with the propositions of law announced in the dissenting opinion.

DRAINAGE DISTRICT NO. 1, LINCOLN COUNTY, APPELLANT, V. VILLAGE OF HERSHEY, APPELLEE.

296 N. W. 879

FILED MARCH 14, 1941. No. 31003.

1. **Drains.** All assessments for a drainage district shall be made upon the basis of benefits derived and secured by reason of the construction of such improvement, and where the evidence discloses that such assessments have been made upon property not included in the drainage district, they are void.

2. ———. An assessment levied against property outside of a drainage district by the board of supervisors of such district constitutes a void judgment by such board.
3. **Judgment.** A void judgment is one that has merely the semblance of a judgment, without some essential element or elements upon which its validity as such depends.
4. **Drains.** An assessment made by a drainage district must conform to and be in accordance with sections 31-414 and 31-415, Comp. St. 1929, and where the evidence discloses a gross departure from the method, as set forth in such provisions of the statute, a demonstrable mistake of fact exists, and such assessment is void and open to collateral attack.

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

Beeler, Crosby & Baskins, Robert B. Crosby and *Horace E. Crosby,* for appellant.

Mothersead & York, contra.

Heard before SIMMONS, C. J., ROSE, EBERLY, MESSMORE and YEAGER, JJ., and MEYER, District Judge.

MESSMORE, J.

This is a suit for judgment upon taxes assessed by Drainage District No. 1, in Lincoln county, Nebraska, against the village of Hershey. The drainage district (plaintiff) was organized in 1921, pursuant to and in accordance with chapter 19, art. 4, Rev. St. 1913, now chapter 31, art. 4, Comp. St. 1929. Plaintiff's petition alleged facts sufficient to show compliance with the foregoing statutes and to perfect the drainage district. The factual details therein need not be set out, but will be more fully covered in the opinion as occasion requires.

The petition alleges: The board of supervisors of the drainage district, in considering the engineer's reports, the estimated cost of improvements, and the classification of lands for assessment, decreed that there be assessed against the defendant the sum of $21,364.01 in benefits to the

streets and alleys. No objections were filed by defendant or appeal taken from this action of the board of supervisors, and said assessment benefits became final. The assessment benefits were filed with the county clerk as required by law, and bonds in the sum of $249,000 were duly issued and sold on the assessments so made. The petition alleged annual assessments from the years 1924 to 1934, inclusive, and in the years 1935 and 1936 no assessments were levied. In August, 1937, plaintiff purchased delinquent assessments, due from defendant, from the county treasurer on tax sale certificates. In November, 1937, plaintiff issued refunding bonds. In order to accomplish such refunding, the plaintiff was obligated to collect 20 per cent. of the original interest fund and all of the maintenance fund. The amount due from the defendant is $4,485.63, for which plaintiff prayed judgment.

The defendant's answer, so far as pertinent, alleged that the purported assessments made against the streets and alleys of defendant village were fraudulent and void, because all benefits to such privately owned tracts of land in the defendant village were assessed to such village, as well as the benefits to the streets and alleys. The reply alleged that all the reports and assessments made to the plaintiff were in writing; that no assessments were made of the privately owned lands in defendant village and that all assessments were properly made.

The trial court made the following finding, in substance: That the engineer, in making the survey and report, and the board of supervisors (or plaintiff), in making the assessments to lands lying within the village of Hershey (defendant), either estimated or measured the number of acres of land within the village and ascertained the length and breadth of the streets and alleys in the village, and then omitted to levy any benefit assessments upon such streets and alleys as would equal the number of units that they found should otherwise have been assessed to all the lands lying within the defendant village, including said streets and alleys. The court then found that this manner of assess-

ment was contrary to the method prescribed by statute and prejudicial to the rights of the defendant village, and declared the law to be that the action of the board of supervisors of plaintiff district, in levying assessments and benefits, when no appeal was taken, was binding and not subject to collateral attack, if the assessments were valid and not fraudulent; that such law did not apply if the assessments were for any reason void. The court further found that the method used by the plaintiff in making the assessments was such a departure from the method prescribed by law (Comp. St. 1929, ch. 31, art. 4) as to make the assessment against the defendant village void and render the assessment open to collateral attack. The court further found that it had no power to allow a partial recovery, and that there was no estoppel against the defendant from raising the question at this time; dismissed the plaintiff's petition at plaintiff's cost, without prejudice to the right of the plaintiff to reassess defendant's streets and alleys and the lands located in the village. The trial court reasoned that the judgment of the drainage district board was void, in that the engineer assessed benefits upon the whole acreage within the village and not alone for the benefit of the streets and alleys, and found that this matter affirmatively appeared in the record.

From the court's order and judgment plaintiff appeals and states the assignment of error as follows: That the trial court erred in finding that the assessments of the drainage district against the streets and alleys of the defendant village were void because not made as provided for by statute. Plaintiff's contention is that such assessments must be considered as a judgment. The evidence on the point herein involved is reflected by the record as follows:

Paragraph 68, on page 13 of the engineer's report (exhibit 6), is as follows: "The assessment of benefits to the village of Hershey has been based on the length of the streets and alleys. It has been found that there are 7.4 miles of streets in the village, which have been assessed at the rate of 9,000 units per mile; and 2.17 miles of alleys

which have been assessed at the rate of 2,000 units per mile. This gives a total assessment of 70,940 benefit assessment units against the village. This makes the assessment per acre within the corporate limits somewhat higher than for the farm lands, as it properly should be, as the land is used for a more valuable purpose than farm land"

The chief engineer for the plaintiff testified that, in making the assessment of benefits to the various tracts of land, he did not report any benefits against the individual lots and tracts of land within the corporate limits of defendant village; that he did recommend an assessment against the defendant village as such and took into consideration the fact that the individual lots were benefited, but did not make that fact the measure of the assessment. He further testified that the assessment against the streets and alleys in defendant village is more in the nature of a benefit to the town as a whole, while the assessment against the highway is made for a direct benefit to the road, and that the different classes of uses of streets and types thereof would require different assessment benefits; that the assessment against the defendant village was against the village as a whole, which includes everything in the village, and it was to divide the assessment as it saw fit. Exhibit 6, par. 68, *supra*. As to the assessment unit per acre within the corporate limits being somewhat higher than for farm lands, he testified that this referred to a total acreage within the corporate limits, including lots, streets and alleys; that he levied the assessment against the defendant village as a unit, the same as any other corporation, and against all of the taxable property therein, and intended the one assessment to cover the benefits to all classes of property within the village, excepting railroad, wire and canal lines. The foregoing evidence is not in dispute.

The result of this assessment required the owners of real estate in defendant village to pay in accordance with the assessed valuation and not the benefits received. While real estate was the only possible property that could be benefited by drainage, the general taxes to pay the assessment

would also be paid by owners of personal property. Obviously, the officials of the plaintiff, contrary to the express provisions of the statute, assessed against the defendant all benefits that they conceived should accrue to the town lots and real estate within the corporate limits of defendant village, even though such lots were not included within the boundaries of the drainage district.

Section 31-414, Comp. St. 1929, provides: "No assessment shall be made for benefits to any lands upon any other principle than that of benefits derived, but all assessments shall be made upon the basis of benefits derived and secured by reason of the construction of such improvements and works in affording drainage, or giving an outlet for drainage, protection from overflow, and damage from water."

Section 31-415, Comp. St. 1929, provides: "The benefits to public streets and highways, railroad property, right of way, and roadbed, shall be assessed according to the increased efficiency and value added thereto by reason of, and the protection derived from the aforesaid drainage works and improvements."

This court has held on a number of occasions: "All taxes for such improvements (public improvements, such as sewerage, and the rule likewise applies to a drainage district) must be levied on property specially benefited by the improvement, but no taxes for the improvement can be levied on property outside of the improvement district." *McCaffrey v. City of Omaha*, 91 Neb. 184, 135 N. W. 552. See, also, *Morse v. City of Omaha*, 67 Neb. 426, 93 N. W. 734; *Hanscom v. City of Omaha*, 11 Neb. 37, 7 N. W. 739. An assessment against land not benefited is absolutely void. See *City of Scottsbluff v. Acton*, 135 Neb. 636, 283 N. W. 374.

The instant case is not one where the board of supervisors of the drainage district erred in judgment, or the board decided according to its best judgment on conflicting evidence. It is an attempt to collect from defendant village for benefits to property not owned by defendant, not within the boundaries of the plaintiff district, and not subject to

assessment for the construction of the drainage contemplated,—obviously, a violation of the statutes heretofore cited, and under which the plaintiff district was organized, an act entirely beyond the statutory authority of the plaintiff. The action of the plaintiff's board of supervisors in making the assessments in the instant case resulted in a judgment void on its face, and it requires only an inspection of the record to demonstrate such fact. Its status is that of a mere nullity and, in legal effect, no judgment at all, conferring no right and affording no justification. 1 Freeman, Judgments (5th ed.) 642, sec. 322.

"It is a general rule of law that a judgment which is null and void is subject to collateral attack." 31 Am. Jur. 181, sec. 583. "A void judgment may be impeached in a collateral proceeding." 34 C. J. 510. "A void judgment is one that has merely the semblance of a judgment without some essential element or elements upon which its validity as such depends." 34 C. J. 509. The determination of a board of supervisors of a drainage district, levying or confirming a drainage assessment, is subject to collateral attack, where such assessment is absolutely void, as for fraud or demonstrable mistake of fact. See 19 C. J. 745. The assessment in the instant case is absolutely void and constitutes a demonstrable mistake of fact.

A demonstrable mistake of fact means a mistake of fact as to the existence of which there is no room for doubt. *State v. Board of Public Works of St. Paul,* 27 Minn. 442, 8 N. W. 161.

In *State v. District Court of Ramsey County,* 29 Minn. 62, 11 N. W. 133, which involved the same question as in the case last cited, the court held: "The determination of the board of public works as to what property is benefited, and the extent of such benefit, when made in accordance with * * * statutory requirements, is conclusive in the absence of fraud or mistake. But a determination, although honestly made, upon a rule of assessment other than that prescribed by statute * * * is not valid." The case was remanded and the assessment held void as not being in com-

pliance with the statute, and a proper subject of objection upon the application for judgment in the district court; that is, a demonstrable mistake of fact.

In the case of *County of Otter Tail v. Batchelder*, 47 Minn. 512, 50 N. W. 536, the rule is applied, although the case involved a general tax instead of special assessments. The court recognized the binding effect of an assessment made and unappealed from, and that, even though there be no actual fraud, a mistake can be of such a nature as to amount to fraud. The court said: "We go further, and hold, as was considered in respect to special assessments under a city charter in *State v. Board of Public Works of St. Paul*, 27 Minn. 442 (8 N. W. Rep. 161) and *State v. District Court of Ramsey County*, 29 Minn. 62 (11 N. W. Rep. 133), that, even though no intentional fraud be proved, it may be shown in defense that the error in the assessment was so gross that it cannot be accounted for upon any ground of mere misjudgment of value, but must have resulted, if not from fraud, from what in the case first cited above was called a 'demonstrable mistake of fact.' By proof of this nature it would be possible to show very clearly that there had really been no assessment of the property in question." The foregoing Minnesota cases remain the law in that state. See, also, *Hudlemyer v. Dickinson*, 143 Mich. 250, 258, 106 N. W. 885, 108 N. W. 1116.

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

AFFIRMED.

TAXPAYERS' LEAGUE OF WAYNE COUNTY: C. H. HENDRICKSON, APPELLANT, V. DONALD S. WIGHTMAN ET AL., APPELLEES.

296 N. W. 886

FILED MARCH 14, 1941. No. 30914.

1. **Municipal Corporations.** A city purchasing and foreclosing a tax sale certificate on real estate does so as trustee of an express

trust for the use and benefit of all entitled to participate in the distribution of the proceeds, and such trustee may not bid in the property without paying the amount of bid.

2. ———: TAXATION. On a judicial sale to satisfy a decree in which there was granted a first lien to a holder of a tax sale certificate bought at public tax sale, and a second lien on the same property in favor of a city under a private tax sale for subsequent paving taxes, the sheriff accepted a bid made in the name of the city clerk who was not a lienholder, for an amount sufficient to satisfy both decrees, but no part thereof was paid, or in any way satisfied, and report of sale was presented to court for confirmation and a decree of confirmation secured *pro forma*, without the attention of the court being called to the fact that bid was not paid, and sheriff's deed issued to bidder without any part of the consideration being in any way satisfied; *held* that such proceedings amounted to more than a mere irregularity; that they constituted a constructive fraud and were void, and were not cured by the decree of confirmation; and, further, that the liens of the decrees under which the property was offered for sale were not satisfied or barred thereby.

3. ———. In such case, an action may be maintained by a resident taxpayer to protect interests of city and public, without showing any interest or injury peculiar to himself.

4. ———. While it was essential that the plaintiff allege in his petition refusal of city to institute action or join in the action instituted, and ordinarily such allegation should be established by evidence, yet, where the city is made a party defendant and joins issue by answer contesting the plaintiff's cause of action, a demand will be deemed waived, as a demand under such circumstances would be an idle ceremony.

APPEAL from the district court for Wayne county: CHARLES H. STEWART and ADOLPH E. WENKE, JUDGES. *Reversed, with directions.*

C. H. Hendrickson, pro se.

H. E. Siman and *H. D. Addison, contra.*

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, MESSMORE and YEAGER, JJ., and ELDRED, District Judge.

ELDRED, District Judge.

Originally the Taxpayers' League of Wayne county, Nebraska, and the appellant, C. H. Hendrickson, filed a joint petition in the district court for Wayne county, alleging

that action was brought on behalf of all other persons similarly situated who care to join in the petition. Donald S. Wightman and Edith Wightman were at first the only defendants. Some preliminary motions and demurrers were acted upon by the trial court and by ruling on the last demurrer it was held that the petition, in its then form, did not state facts sufficient to constitute a cause of action in favor of either plaintiff. The Taxpayers' League does not file, or join in, any further pleadings filed in this case, although its name is still carried as a party plaintiff. No final judgment appears to have been entered as to said Taxpayers' League.

On March 23, 1939, an amended petition was filed by C. H. Hendrickson, plaintiff, v. Donald S. Wightman, Edith Wightman, Walter S. Bressler, Hazel Bressler, and the city of Wayne, defendants. Plaintiff, C. H. Hendrickson, as a resident and taxpayer of the city of Wayne, is seeking to have a sheriff's deed issued to defendant Walter S. Bressler for three lots in said city, as the result of a tax foreclosure proceeding, and also a quitclaim deed executed by Walter S. Bressler and Hazel Bressler, his wife, to Donald S. Wightman, canceled; and that the city of Wayne be decreed the owner of said property, and for equitable relief. All defendants answered and, after a few admissions of formal allegations, deny generally all allegations of said amended petition, and plead that the property was sold for fair and reasonable value. No specific affirmative relief is asked by any of the defendants, but defendant Wightman asked for dismissal of plaintiff's amended petition and for general equitable relief. October 17, 1939, decree was entered denying prayer of petition and quieting title to property involved in the defendant Donald S. Wightman, as against the city of Wayne. Plaintiff, C. H. Hendrickson, has appealed.

On October 31, 1931, the city of Wayne brought an action in the district court for Wayne county to foreclose a tax lien on lots 1, 2, and 3, in block 6, in Crawford & Brown's Addition to Wayne, Nebraska, making Alfred H. Lewis,

the fee owner, Margaret Lewis, his wife, and one Alice V. Lewis, also the holder of a tax lien, parties defendant. The claim of the city of Wayne was based on an alleged purchase by it of said real estate on June 25, 1931, at private tax sale for delinquent paving tax instalments one to ten, inclusive, in paving districts No. 3 and No. 4 of said city, aggregating $2,495.21. A cross-petition was filed by Alice V. Lewis for foreclosure of a tax sale certificate issued to her on October 13, 1930, on a public tax sale of said premises for delinquent taxes for the year 1928, amounting to $75.68, and for subsequent taxes for the years 1929, $65.25, and 1930, $64.64, being general taxes assessed and levied on said property for state, county, school district and municipal purposes. March 18, 1932, decree was entered in favor of Alice V. Lewis for $235.72, with 12 per cent. interest from said date, which was adjudged to be a first lien on said premises, and in favor of the plaintiff, the city of Wayne, for the sum of $2,713.76, with 12 per cent. interest from said date, which was adjudged to be a second lien thereon. September 9, 1936, an order of sale was issued commanding the sheriff to sell said real estate to satisfy the amount on both of said liens. Sheriff's return shows he sold property on October 19, 1936, to defendant Walter S. Bressler for the sum of $4,600. No money was paid by bidder or any one else on said bid. September 27, 1938, sale was confirmed and deed ordered issued. Decree of confirmation does not show any money received and no order was made for disbursement of proceeds of sale. September 30, 1938, the sheriff of said county issued to said Walter S. Bressler a sheriff's deed for said premises, reciting sale to Walter S. Bressler for $4,600. There is no contention made by any party to this proceeding that the $4,600, or any part of it, was ever paid. Defendant Walter S. Bressler, at the time of the transactions involved herein, was the city clerk of the defendant city of Wayne, and he made the bid and took the sheriff's deed to the real estate as trustee for and on behalf of the city of Wayne, though proceedings do not recite that he was trustee for city. Dur-

ing the times mentioned, defendant Donald S. Wightman and wife were residing in Wayne, knew the said Walter S. Bressler was city clerk; that he made the bid for the property as trustee for the city of Wayne; and defendant Wightman had knowledge of that fact when he entered into an agreement for the purchase of the property.

It appears that the agreement through which Donald S. Wightman was to secure said premises from said Walter S. Bressler or said city was that he should pay $1,500 and receive title free and clear of all encumbrance, except subsequent paving tax instalments. Wightman commenced negotiations with the mayor for said property on July 10, 1938, and after he had agreed on the price he undertook getting of quitclaim deeds from Alice Lewis Durnin and husband and Alfred H. Lewis and wife.

In payment of the consideration of $1,500 defendant Wightman gave one check for $100 and one for $1,034.75. He paid Alice Lewis Durnin, formerly Alice V. Lewis, who held the first lien in the tax foreclosure, for a quitclaim deed from herself and husband, executed on September 19, 1938, the sum of $319.21, and paid Alfred H. Lewis for a quitclaim deed from himself and wife, executed on the 19th day of September, 1938, the sum of $40. Defendant Wightman claims he was out about $200 additional on account of expense in securing these quitclaim deeds. All these transactions appear to have been had prior to the time the sheriff's sale was confirmed and sheriff's deed issued.

The checks given by the defendant Wightman, aggregating $1,134.75, as part payment of the purchase price, were delivered to city by the defendant Bressler, and the defendant Bressler and wife on the 5th day of October, 1938, executed and delivered to the defendant Wightman a quitclaim deed for said property. The city of Wayne on October 6, 1938, paid taxes on said property with the Donald S. Wightman checks as follows: Instalments of paving taxes Nos. 11, 12, 13, and 14, $861.96, and general taxes for the years 1933, 1934, 1935, 1936 and 1937, $271.20. Later, on October

31, 1939, three additional instalments of taxes on said property in paving districts Nos. 3 and 4 were paid by city warrant in sum of $492.66, making a total of taxes paid by the city on property $1,625.82. The aggregate of the Wightman checks and the city warrant amounted to $1.59 in excess of the taxes paid, which sum appears to have been refunded for some reason.

It thus appears that out of the $1,500 Wightman agreed to pay for the property, he secured a deed from the lienholder holding first lien of $235.72 and interest, and also a quitclaim deed from the owner of the equity for the sum of $40, and the balance has been applied to the payment of general and paving taxes subsequent to the lien of the city for paving instalments numbered one to ten, inclusive, for which the city was given a second lien by the decree of foreclosure. No money has been received or paid by or to any one on said second lien for paving taxes in tax foreclosure case.

Appellant has made ten assignments of error. Assignments Nos. 1 and 2 allege error in the holding that the Taxpayers' League had no capacity to sue, and in the alleged dismissal of the case as to the said Taxpayers' League; but the record does not disclose that case was dismissed as to said League, and it does not appeal. Appellant Hendrickson may not successfully assign error in ruling only affecting a party who has not appealed.

Assignment No. 3 alleges error in the court requiring Walter S. Bressler and wife and the city of Wayne to be made parties defendant. Under the facts in this case as reflected by the record, they were at least proper parties and the ruling of the court was not prejudicial.

By another assignment, error is urged on account of the trial court considering evidence of its opinion as to the value of the premises based on view thereof. Section 20-1108, Comp. St. 1929, authorizes view of premises by a jury where, in the opinion of the court, it is proper for the jury to have a view of the property involved; and the rule is that a jury may take into consideration the result of their

observation of the premises involved in the case and consider the same in connection with all the other evidence submitted to them on the trial in arriving at their verdict. While the statute does not specifically provide that judges may have a like privilege of examining the property, there is no logical reason why the same privilege should not be granted to a trial judge or judges in any case where a view would have been warranted had the case been tried before a jury. Such action on the part of the trial court in this instance was not error.

All other assignments relate to alleged errors in the findings of the trial court under the evidence, and in the court's conclusions of law as applied to the facts, and will be considered together.

On the opening of the trial defendants objected to the taking of evidence for the reason that the amended petition did not state facts sufficient to constitute a cause of action. No demurrer was filed to the amended petition. The amended petition, therefore, should receive a liberal construction. It is urged by plaintiff that the sheriff's deed was absolutely void for want of any consideration; and that the deed from Bressler to Wightman conveyed no title because the city was the real owner of any title secured by Bressler and its interest could only be conveyed after published notice of intended sale. Comp. St. Supp. 1939, sec. 17-401. The making of bid for the property in the name of the city clerk was doubtless an effort to circumvent the provisions of said section 17-401 relating to sales of real estate owned by such a city. Whether such result could be so accomplished under circumstances here shown is not necessary to a decision of this case, as Wightman does not claim to have purchased the property from Bressler, but claims his dealing to have been had with the mayor and council of the city. While it is claimed by appellant that this is a case of fraud, actual or intentional fraud has not been specifically charged. However, if the facts pleaded and proved are sufficient to constitute constructive fraud, that is sufficient.

In fairness to parties handling the tax foreclosure involved herein, it may be proper to here suggest that this case appears to be one of many instituted in that and other counties in this state with the hope that parties interested might find some way of clearing the title to property burdened with excessive tax liens which the owner could not or would not pay, and placing the property again on a tax-paying basis. On the trial there appears to have been no effort to avoid a showing of the true facts. There is but little dispute in the evidence as to the facts involved; the dispute being mostly as to the conclusions to be drawn therefrom.

Appellees in their brief state there is "only one question before the court, and that is the question of the validity of the deed from Bressler to Wightman, and the secondary proposition, of the right of the plaintiff to maintain this action in any event." We cannot subscribe to this view. The validity of the sale and the sheriff's deed issued under the tax foreclosure proceeding is a vital issue. As to the plaintiff appellant's right to maintain action, the evidence shows that the plaintiff is a resident and taxpayer of the defendant city. He alleges that the city refuses to join as plaintiff and for that reason is made a party defendant. While our attention has not been directed to any evidence as to a specific refusal of the city to join as plaintiff, the fact that it has appeared and answered and is resisting plaintiff's case is sufficient to show such refusal. A demand would have been an idle ceremony. *Ryan v. Olson,* 183 Wis. 290, 197 N. W. 727. A resident taxpayer can maintain such an action without showing any interest peculiar to himself. *Woodruff v. Welton,* 70 Neb. 665, 97 N. W. 1037; *Fischer v. Marsh,* 113 Neb. 153, 202 N. W. 422. While the action of the city in the instant case may not technically be the expending of public funds, yet the acts complained of, if upheld, would have the effect of canceling the lien of the city for the instalments of paving taxes awarded by the decree in the tax foreclosure case in the sum of $2,713.76, and interest, without any consideration therefor whatever.

The proceedings cannot be justified on the theory that the city had the benefit of $1,134.75 which was paid by Wightman to Bressler and by Bressler to the city, and applied to the payment of general taxes on the property and paving taxes subsequent to those included in the tax decree. The same parties or municipalities would not be interested in the general and paving taxes. The city also paid additional taxes for which it issued a city warrant for $492.66. The using of said money so received to pay such subsequent taxes was evidently for the purpose of carrying out the agreement that Wightman should have the property for $1,500 free of encumbrance except subsequent paving tax instalments. The amount due the city under the decree could not be canceled in that way.

A statement of the presiding judge entering the decree of confirmation appears in the record. He was asked: "Q. Was it called to your attention at that time that Mr. Bressler had not paid in his bid? A. No. It was done *pro forma.*" We may assume that, following a somewhat usual and general practice in such cases, the decree was drafted by interested counsel, and upon these "*pro forma*" proceedings presented to the presiding judge for approval. This decree recites: "And the court having examined the proceedings in said action and with special reference to said sale is satisfied that the same are correct and regular in all respects and that said real estate was sold at a fair value and a subsequent sale would not realize a greater amount." It is now urged by appellees that appellant cannot go back of the decree of confirmation and attack the validity of the proceedings of sale in the absence of a charge of fraud. Though intentional or actual fraud is not charged in specific terms, constructive fraud sufficiently appears therefrom. If the title to the property could be successfully passed and tax liens, in this case amounting to $2,949.48 and interest when decree was rendered, barred by such proceedings, it would certainly be at least a constructive fraud both upon the owners of the equity as well as upon the holders and those interested in the tax liens being foreclosed.

"Constructive fraud is a breach of legal or equitable duty which, irrespective of the moral guilt of the fraudfeasor, the law declares fraudulent because of its tendency to deceive others, to violate public or private confidence, or to injure public interests. Neither actual dishonesty of purpose nor intent to deceive is an essential element of constructive fraud." 26 C. J. 1061.

The property was being offered for sale to satisfy the two liens embodied in the decree; the first lien in favor of Alice V. Lewis and the second in favor of the city of Wayne. There may have been some doubt at time bid was made, in the minds of some of the bar, as to the right of the city to make a bid on property without paying amount bid, where sale was under tax lien held by such city only; but, in a case of this kind where sale was to satisfy two decrees, due different parties, there never could have been any reasonable doubt as to the necessity of bidder paying or satisfying bid. Even had the plaintiff entertained a belief, though an erroneous one, at time bid was made, that it could bid the property in either in its own name or in the name of some officer for it as trustee, without paying the bid, yet any doubt as to that question must have been removed and set at rest prior to the confirmation of such sale by the decision of this court in the case of *City of McCook v. Johnson,* 135 Neb. 270, 281 N. W. 69, the opinion in which was filed July 15, 1938. On September 27, 1938, more than two months after the decision of this court in *City of McCook v. Johnson, supra,* the proceedings of the sheriff's sale in the tax foreclosure case, reported for the sum of $4,600, but without, in fact, any part of it being paid, were presented to the court for confirmation without the attention of the court being directed to the fact that no part of the bid was paid; and a formal order confirming same was secured, and sheriff's deed was issued pursuant thereto.

This is not a case where some innocent third party has bought property in good faith on the strength of a record showing good title. The record did not show good title in Bressler. At time Wightman negotiated for the property,

sheriff's sale to Bressler had not been confirmed nor sheriff's deed issued. That Wightman realized the only manner of getting title was through the former owners who were parties to the tax foreclosure is evidenced by his securing the quitclaim deeds from the defendants in tax foreclosure case; but, it further appears from his testimony, "I was cleaning up for the city." And, "Q. Did you have any attorney to look after any part of this for you? A. No. I was acting on the instructions from the city council."

If this were a question of mere irregularity in proceedings, the rule urged by the appellees, that confirmation cures defects and irregularities in the absence of fraud, might be applied, but an entire failure to pay consideration and the securing of a sheriff's deed without any consideration whatever therefor, under the circumstances shown by the record in this case, amounts to more than a mere irregularity. Such a sale and confirmation were and are void and cannot be sanctioned on the theory that confirmation cures irregularities and defects. Such sale did not result in the satisfaction of either the first or second lien in the tax foreclosure, neither did it bar or foreclose the owners of equity of their interest in the property.

The defendant Wightman has secured a deed, not only from Bressler and wife, but he has also secured a deed from the former owners of the equity, and also from the holders of the first lien in the tax foreclosure case. Thus, he has acquired, so far as this record reveals, all interests and liens other than that of the city of Wayne. There is no evidence that any part of the lien of the city for the first ten instalments of paving tax, which was merged in the decree in the tax sale foreclosure, has been paid. All the money received by the city from the defendant Wightman through Bressler, $1,134.75, has been applied to the payment of taxes subsequent to those included in the tax foreclosure. The decree of the city is still effective and unsatisfied and a valid and enforceable lien upon the property. The decree of the trial court in this case finds that there was no fraud practiced by the parties interested in the tax

foreclosure proceedings. While that finding might be justified if the question was only as to actual or intentional fraud, we feel constrained to hold that the evidence is sufficient to show constructive fraud. If these proceedings are sanctioned and the judgment in this case is upheld, it would mean that the lien for the paving assessments included in the foreclosure had been barred, and the property released from payment of the amount adjudged due by the decree. That part of the decree of the district court finding and decreeing that Donald S. Wightman is the owner of the property involved herein, we find to be correct; but that part of the findings and conclusions of the trial court that the city has no right, interest or claim upon said property, and that the title to said property should be quieted and confirmed in the defendant Wightman as against the city, is erroneous. We conclude that the decree of the court should confirm the title of the defendant Donald S. Wightman in and to said property, subject to the lien of the defendant city of Wayne under the decree of foreclosure entered on the 18th day of March, 1932, for the sum of $2,713.76 and interest. Reversed and remanded, with instructions to render decree in harmony with this opinion.

REVERSED.

MARY A. COX, APPELLANT, V. KATHERINE GETSEY JOHNSTON ET AL., APPELLEES.

296 N. W. 883

FILED MARCH 14, 1941. No. 30892.

1. **Courts.** Section 16, art. V of the Constitution, grants to county courts original jurisdiction of settlements of estates of deceased persons, but such section does not operate to oust district courts of jurisdiction of actions for relief in the nature of specific performance of a contract to leave property at the time of death to another, even though the property involved is wholly personal property or money.
2. **Specific Performance.** Jurisdiction of the district court in an action for relief in the nature of specific performance of a con-

tract to leave property to another at the time of death does not arise from any distinction between real estate and personal property, but arises rather from the inadequacy of an action at law.

3. ———. An action against an executor or administrator for relief in the nature of specific performance of a contract to leave personal property or money to another at the time of death is not such an action against such personal representative as is prohibited by section 30-801, Comp. St. 1929.

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

Crofoot, Fraser, Connolly & Stryker, for appellant.

Clinton Brome and *Max Fromkin, contra.*

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

TEWELL, District Judge.

This action was begun in the district court for Douglas county to secure relief in the nature of the specific performance of an alleged oral contract to bequeath property by will at the time of death. To the plaintiff's amended petition a demurrer was filed by each defendant separately. These demurrers were sustained by the trial court, and, upon the plaintiff refusing to further plead, the petition of the plaintiff was dismissed. The plaintiff appeals.

The sole plaintiff is Mary A. Cox. The two defendants are Katherine Getsey Johnston, as an individual and as executrix of the estate of James B. Kelkenney, deceased, and Arthur A. Kelkenney. In the plaintiff's amended petition the facts hereinafter stated are alleged. James B. Kelkenney died while a resident of Omaha, Nebraska, on May 3, 1938. A petition seeking the probate of a document dated March 28, 1938, as the last will of said James B. Kelkenney, who is hereinafter called the testator, was filed on May 13, 1938, in the county court of Douglas county. Such document, of date March 28, 1938, is hereinafter referred to as the second will. On June 15, 1938, St. James Orphanage and Father Flanagan's Boys' Home filed objec-

tions to the probate of said second will, and presented for probate a document dated April 20, 1933, as the last will of said testator. Such document of date of April 20, 1933, is hereinafter referred to as the first will. In the second will the two defendants in this action, as individuals, were named as the sole residuary devisees. In July, 1938, upon trial in the county court, an order was entered admitting said first will to probate, and denying the probate of said second will. An appeal from this order to the district court was perfected. An order was entered fixing October 29, 1938, as the last day for filing claims, notice thereof duly given, and, after time for filing claims had elapsed, an order was entered barring all claims not filed. Trial in the district court resulted in a judgment admitting said second will to probate, and denying the probate of said first will. No appeal was taken from such judgment of the district court and it became final. The estate consists of property that is far in excess of the amount necessary to pay all claims and expenses of administration. In May, 1936, the plaintiff is alleged to have entered into an oral contract with the testator to the effect that upon consideration of the plaintiff moving her home from Des Moines, Iowa, to the testator's home in Omaha, and the plaintiff making her home with the testator, and taking charge of the management and running of the testator's household, the testator would leave the real estate in which said home was made and the sum of $2,500 in money to the plaintiff upon his death. The plaintiff is alleged to have fully performed such contract on her part. The terms of the first will above mentioned devised said real estate to the plaintiff and bequeathed her $2,500 in money. By the terms of the second will said real estate was devised to the plaintiff, together with household furniture and furnishing, but the sum of $2,500, or any other sum of money, was not bequeathed to the plaintiff. To secure said sum of $2,500 in money is the primary object of this action.

It will be noted from the dates set forth above, and from the alleged provisions of the two wills, that, when the time

for filing claims elapsed, the first will, which gave the plaintiff the real estate and the sum of $2,500 in money, had been admitted to probate, but that, after the time for filing claims had elapsed, the second will, which gave the plaintiff only the real estate and household furniture, was declared to be the last will of the testator. No claim in the probate proceedings was ever filed by the plaintiff.

One contention of the defendants is to the effect that the county court is, by the Constitution of Nebraska, given exclusive jurisdiction in all matters relating to the probate and settlement of estates of deceased persons, and, in such matters, has general equity jurisdiction. We do not challenge such contention. However, with such contention as a premise, the defendants draw the conclusion that the district court has no jurisdiction of an action originally brought in such court to secure relief in the nature of the specific performance of a contract to bequeath only a specified sum of money by will. With this conclusion we cannot agree. This contention overlooks the fact that the plaintiff's request is not to recover a debt, or to recover damages for the breach of a contract, or to recover for the reasonable value of services rendered, or to recover through a claim the balance due upon a contract. Whatever may have been the rights of the plaintiff to have maintained a claim against the estate for any one of such forms of relief, or what would have been the measure of her recovery upon any such claim, are matters not here involved, except as such matters might enter into the question in this case of whether or not the plaintiff had such an adequate remedy at law as to bar her maintenance of this action. This question of an adequate remedy at law will be mentioned later in this opinion. 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. *Lacey v. Zeigler*, 98 Neb. 380, 152 N. W. 792. Section 16, art. V of the Constitution, above mentioned, was amended in 1920 since the opinion in *Lacey v. Zeigler, supra,* was filed, but not in such manner as to affect the rule above stated. Whether or not the county court has jurisdiction concurrent with that of the district court in an action such as is this is not now involved.

A second contention of the defendants, which is closely allied to the contention above discussed, is to the effect that an action for the specific performance of a contract for the payment of money only may not be maintained, and that actions for the specific performance of a contract to leave property by will are originally brought and maintained in the district court only in cases in which the title to real estate is involved, and then only because the county court is without jurisdiction to compel the transfer of real estate. It is, no doubt, true that an action in equity for the specific performance of a contract to convey personal property ordinarily will not lie. Perhaps such an action to enforce the payment of money only could never be maintained. With this contention as a whole, however, we do not agree. Strictly speaking, there cannot be a decree for the specific performance of a contract to make a will, since such an instrument is, by its nature, revocable by the promisor during his life, and cannot be made by him after his death. It has long been recognized that courts of equity may grant relief in a form that is usually equivalent to a decree of specific performance of a contract to leave property by will, after the death of the defaulting promisor, by fastening a trust upon his estate in the hands of those taking it with notice of such contract or by devise or descent. Jurisdiction in the equity court in such cases does not rest upon any distinction between real estate and personal property, but rather upon the ground of the inadequacy of an action at

law. *Ohlendiek v. Schuler,* 299 Fed. 182; *Id.* 30 Fed. (2d) 5; Annotation, 69 A. L. R. 26; *Robinette v. Olsen,* 114 Neb. 728, 209 N. W. 614; 58 C. J. 1060.

A third contention of the defendants is to the effect that an action against an executrix of an estate for the recovery of money only may not be maintained. Section 30-801, Comp. St. 1929, provides in part as follows:

"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, and such actions as are permitted in this chapter."

This action is not one of those expressly permitted by the chapter in which the above mentioned section occurs. Neither is it an action for the recovery of money only, within the meaning of said section. As above shown, this is an action to impress a trust or to create a lien upon the property of an estate in the hands of those who have taken it without consideration. Actions to foreclose a lien voluntarily created by the deceased before his death, such as a mortgage, or to foreclose a lien upon the property of the deceased coming into existence without his consent but before his death, such as a mechanic's lien, have as their primary purpose the recovery of money only, yet no one would contend that such actions are not maintainable against an executor of the estate of a deceased person. This action is primarily against the defendants as individuals, the executrix being joined as a defendant merely because she still has possession of a part or all of the property of the estate. *Brownell v. Anderson,* 117 Neb. 652, 222 N. W. 55; *Parker v. Luehrmann,* 126 Neb. 1, 252 N. W. 402; 24 C. J. 746. It has been held that the personal representative merely holds the property of the deceased in trust as against a contract such as the one alleged in this case, and that, if such personal representative has parted with possession of the property affected, the personal representative is not even a necessary party to such an action as this. See annotation, 69 A. L. R. 104, division II, subhead j.

Whether or not the services performed by the plaintiff were of such a character as to cause their value to be incapable of measurement by a pecuniary standard does not appear from the petition. The petition fails to state the period of time that the plaintiff agreed to perform services for the testator. However, the petition is not attacked by the defendants on account of such failure. Such period of time might have an important bearing upon the question of whether or not the plaintiff had an adequate remedy at law, assuming that the contract she alleges was ever made. The briefs of the plaintiff and of the defendants deal almost exclusively with questions of which disposition herein has been made. The defendants, in their brief, do not discuss the question of whether or not the plaintiff had such an adequate remedy at law as to bar the maintenance of this action. What effect the admission of the second will to probate after time for filing claims had elapsed has upon the defense of an adequate remedy at law is not discussed in the defendants' brief. We have chosen to dispose of this case solely upon the questions presented in the briefs of the parties. The briefs do not disclose that the petition is vulnerable upon demurrer.

For reasons above given, the decree of the trial court is reversed and the cause remanded for further proceedings in conformity hereto.

REVERSED.

ANTON MIRATSKY ET AL., APPELLANTS, V. BESEDA ET AL., APPELLEES.

297 N. W. 94

FILED MARCH 21, 1941. Nos. 30944, 30945.

1. **Negligence.** Where a structure, the collapse of which causes an injury, is shown to be under the management of a defendant, and the collapse is such as in the ordinary course does not happen if those who have its management use proper care, the collapse affords reasonable evidence, in the absence of explanation by the defendant, that it arose from want of care.

2. ———. The above rule is not applicable where there is direct evidence as to the precise cause of the collapse and all the facts and circumstances attendant upon the occurrence clearly appear.
3. ———. The above rule is not applicable to a defendant unless it appears that the structure, the collapse of which caused the injury, was wholly and exclusively in the possession and under the management of the defendant.

APPEAL from the district court for Douglas county: JOHN W. YEAGER, JUDGE. *Affirmed in part and reversed in part.*

Fischer, Fischer & Fischer, for appellants.

James T. English and *Crofoot, Fraser, Connolly & Stryker, contra.*

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

SIMMONS, C. J.

These cases present the question, does the rule of *"res ipsa loquitur"* apply?

In June, 1938, the defendant corporation, Katolicka Sokol, sponsored a gymnastic exhibition for which an admission fee was charged. For that purpose, it rented and paid for the use of grounds of the defendant Beseda. The defendant Katolicka Sokol erected temporary bleachers on the grounds, so arranged that there were six rows of seats, each elevated behind the other. Plaintiffs attended the exhibition, paid their admissions, were directed to seats in the bleachers and sat on the third row from the top. The lower rows of seats were fully occupied. Just as the exhibition was starting, the seats moved to the right, the bleachers collapsed to the ground and plaintiff Bessie Miratsky was injured. The method of construction of the seats and the cause of the collapse are not shown.

Plaintiff Bessie Miratsky sues for her injuries; plaintiff Anton Miratsky, the husband of Bessie, sues for his expenses and loss of his wife's services. The cases were consolidated for trial.

At the close of plaintiffs' case in chief, the defendant Katolicka Sokol moved for a directed verdict, for the reason that the evidence was entirely insufficient to sustain a verdict against it, and the defendant Beseda moved for a dismissal, for the reason that the evidence was insufficient to warrant a verdict against it. The trial court sustained both motions. The cases were consolidated on appeal.

In *Welsh v. Jefferson County Agricultural Society*, 121 Neb. 166, 236 N. W. 331, this court held: "While one who operates a place of public amusement or entertainment is held to a stricter accountability for injuries to patrons than owners of private premises generally, he is not the insurer of the safety of patrons, but owes to them only what, under the particular circumstances, amounts to ordinary and reasonable care. * * * The only question remaining in this case is whether the bench which broke, injuring the plaintiff, was properly constructed for the purpose for which it was intended, or was the defendant negligent in its construction. * * * In such a case, what is ordinary and reasonable care under the particular circumstances is ordinarily a question for the jury."

Plaintiffs rely upon the doctrine of *res ipsa loquitur*, and, admitting that no actual negligence was proved, contend that negligence sufficient to make a *prima facie* case could be implied from the collapse of the structure itself.

The rule is stated as follows: "Where the thing which caused the injury complained of is shown to be under the management of defendant or his servants and the accident is such as in the ordinary course of things does not happen if those who have its management or control use proper care, it affords reasonable evidence, in the absence of explanation by defendant, that the accident arose from want of care." 45 C. J. 1193. See 20 R. C. L. 185, sec. 156.

Here the bleachers were under the management and control of the defendant Katolicka Sokol. The plaintiff Bessie Miratsky had an implied invitation not only to enter the grounds where the exhibition was staged, but also to occupy a seat in the stands provided by the man-

agement for the use of its patrons. She had a right to rely upon the safe condition of the seat provided for her. In the ordinary course of things, such bleachers do not collapse if proper care is used in their construction and maintenance. The collapse of the bleachers affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care. See *Fox v. Bronx Amusement Co.*, 9 Ohio App. 426; *Larrabee v. Des Moines Tent & Awning Co.*, 189 Ia. 319, 178 N. W. 373.

The defendant relies upon *Welsh v. Jefferson County Agricultural Society, supra,* and in particular upon the sentence in the opinion, "This is not to say, however, that the doctrine of *res ipsa loquitur* applied." This court did not there reject the rule. The statement is that it did not apply to the case there determined. In the *Welsh* case, the manner of the construction of the bench, the material used, and the cause of its collapse, were testified to by plaintiff's witnesses.

The rule is not applicable, "where there is direct evidence as to the precise cause of the accident and all the facts and circumstances attendant upon the occurrence clearly appear." 45 C. J. 1206. See *Knies v. Lang,* 116 Neb. 387, 217 N. W. 615.

The rule of *res ipsa loquitur* applies to the case so far as the defendant Katolicka Sokol is concerned. The trial court erred in directing a verdict in its favor.

As to defendant Beseda, a different situation exists. It rented the ground to the Katolicka Sokol. It did not own the bleachers. It did not construct them. It did not manage them or control them. Before the rule can be applied, "It must appear * * * that the negligent cause or thing which produced the injury complained of was wholly and exclusively in the possession, and under the control or management, of defendant." 45 C. J. 1214. The trial court did not err in sustaining the motion to dismiss made by defendant Beseda.

As to the defendant Katolicka Sokol No. 1 of South Omaha, the cause is reversed and remanded for further

proceedings. As to the defendant Beseda, the judgment of the trial court is affirmed.

AFFIRMED IN PART AND REVERSED IN PART.

RUDOLPH BLUM, APPELLANT, V. CHRIST F. VOSS ET AL., APPELLEES.

297 N. W. 84

FILED MARCH 21, 1941. No. 30969.

1. **Fraudulent Conveyances.** In equity mere lapse of time less than the period fixed by the statute of limitations may not bar a suit by a creditor to set aside a debtor's fraudulent conveyance of land, where the rights and the obligations of the parties remain unchanged and the fraud undiscovered.
2. ———. A creditor's inexcusable delay in taking steps to set aside a debtor's deed to land as fraudulent, though less than the time fixed by the statute of limitations, may bar such relief, where, in the meantime, the debtor's grantee, while in possession of the land, relying on her title without knowledge of the creditor's claim, discharged a mortgage and other liens on the land.
3. **Notice.** "Possession of land is notice to the world of the possessor's rights therein." *Draper v. Taylor*, 58 Neb. 787, 79 N. W. 709.
4. ———. Possession of land is notice to the world of all possessory interests of which inquiry of the possessor would elicit knowledge.
5. **Fraudulent Conveyances.** In a suit by a creditor to set aside deeds to land as fraudulent, his means of knowledge of the interests of the party in possession, by search of the public records and by inquiry, may be the same in equity as knowledge itself.

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

Paul I. Manhart and *Dewey Hanson*, for appellant.

Gross & Crawford and *James J. Gleason, contra.*

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

ROSE, J.

This is a suit in the nature of a creditor's bill to cancel a series of deeds to a 120-acre farm in Sarpy county near Chalco and to subject the real estate conveyed to the payment of a judgment on the ground that the deeds were fraudulent conveyances executed by grantors with the intent to defraud the judgment creditor, within the meaning of the statute declaring such conveyances void. Comp. St. 1929, sec. 36-401.

On a 1,000-dollar note dated April 28, 1931, maturing April 28, 1932, and bearing 8 per cent. interest until due and 10 per cent. interest thereafter until paid, Rudolph Blum, payee, brought an action in the district court for Douglas county February 24, 1936, and recovered February 15, 1937, a judgment for $1,475 against the maker, Christ F. Voss. A transcript of this judgment was filed in the office of the clerk of the district court for Sarpy county February 23, 1937, and an execution was issued thereon the same day and returned *nulla bona* March 2, 1937.

Christ F. Voss held the legal title to the farm November 10, 1932, when it was encumbered by a 12,000-dollar mortgage subject to foreclosure for nonpayment of delinquent instalments of debt and for failure of mortgagor to pay interest and taxes. Rudolph Blum, judgment creditor and plaintiff in equity herein, alleged that the following conveyances of title were executed by the grantors without consideration with intent to defraud the debtor's creditors of their rights; November 10, 1932, warranty deed from Christ F. Voss and wife to their daughter, Hazel M. Nelsen, for the recited consideration of one dollar and love and affection, an instrument recorded November 12, 1932; January 9, 1933, quitclaim deed from Hazel M. Nelsen and husband, Marinus Nelsen, to Fred H. Voss, brother of Hazel M. Nelsen, for the recited consideration of one dollar, an instrument recorded January 16, 1933; January 14, 1933, quitclaim deed from Christ F. Voss and wife to Fred H. Voss, for the recited consideration of one dollar and other valuable consideration, an instrument recorded Feb-

ruary 6, 1935; April 23, 1935, quitclaim deed from Fred H. Voss and wife to Blanche M. Voss, for the recited consideration of one dollar and other valuable consideration, an instrument recorded April 23, 1935.

The defendants herein are Christ F. Voss, Hazel M. Nelsen, Marinus Nelsen, Fred H. Voss and Blanche M. Voss. The fraud and the intent to defraud pleaded in the petition were denied in answers alleging good faith of defendants in their transactions with each other and laches barring the equitable relief sought by plaintiff. Upon a trial of the cause the district court found the issues in favor of defendants and dismissed the suit. Plaintiff appealed.

Plaintiff insists on appeal that he made a case for equitable relief by reliance on the presumption of fraud and of fraudulent intent arising from the conveyance of grantors to relatives; by evidence of the unpaid debt owing by the initial grantor to plaintiff; by insufficient proofs of considerations for the deeds purporting to convey title; by interference with the right of the judgment creditor to levy on and sell the land under the execution; by reliance on the land as security for the note without knowledge of the deeds.

Defendants rely for affirmance of the judgment dismissing the suit on evidence overthrowing any presumption of fraud or of fraudulent intent; on evidence of the sufficiency of the considerations for the transfers of title; on evidence of good faith in the transactions without knowledge of the unpaid debt evidenced by the 1,000-dollar note and by the judgment thereon. In addition defendants argue that plaintiff's cause of action is barred by laches.

If laches is a complete defense, the proper decision may be reached on appeal without determining other controverted issues. In equity mere lapse of time less than the period fixed by the statute of limitations may not alone bar a suit by a creditor to set aside a debtor's fraudulent conveyance of land, where rights and obligations of the parties remain unchanged and the fraud undiscovered, but a creditor's inexcusable delay in commencing proceedings neces-

sary to the setting aside of a debtor's deed to land as fraudulent, though less than the time fixed by the statute of limitations, may bar such relief, where, in the meantime, a grantee of the debtor was in possession of the land without knowledge of the creditor's claim and discharged a mortgage and other liens on the land. The circumstances and conditions under which a creditor delays action to enforce his claim against a debtor are material inquiries in determining the issues of laches. 27 C. J. 764; 4 Pomeroy, Equity Jurisprudence (4th ed.) sec. 1442; *Montgomery v. Gardner*, 71 Atl. (R. I.) 67; *Coyne v. Sayre*, 54 N. J. Eq. 702, 36 Atl. 96; *Dakota Trust Co. v. Headland*, 57 N. Dak. 810, 224 N. W. 220.

Plaintiff accepted the 1,000-dollar note of Christ F. Voss April 28, 1931. It fell due April 28, 1932, but no legal action to enforce payment was commenced until February 24, 1936. Judgment on the note was recovered in the district court for Douglas county February 15, 1937. He testified he relied on the Voss land as security for the note; thought the land was clear; had not searched the records and did not know of the 12,000-dollar mortgage or of the deeds in question until January 22, 1935. Overwhelming evidence, however, is to the contrary. He resided in Chalco, Sarpy county, January 22, 1935, and had been managing officer of a bank there for many years. Christ F. Voss owed the bank $2,000 on a note and plaintiff was directed by the banking department to take it out of the assets as unbankable paper. Instead of the note for $2,000, plaintiff took a new note in his own name for $1,000 and a new note payable to the bank for the same amount, both signed by Christ F. Voss. Plaintiff's unpaid judgment is based on the first of these two notes. The official discrediting of the original note suggested an inquiry into the maker's solvency. If plaintiff then thought the farm was unencumbered, his sagacity as a banker would naturally have prompted him to demand a mortgage on the Voss land or other security or to seek prompt relief in law or equity. No such steps were taken. He delayed legal action until February

24, 1936, though he owned land in the immediate neighborhood of the Voss farm and resided near it. Blanche M. Voss, the last of the grantees named in the series of deeds assailed by plaintiff as fraudulent, resided with her husband on the Voss farm continuously during all their married life—a period of 19 years. This possession was notice to the world of the possessors' rights in the land. *Draper v. Taylor*, 58 Neb. 787, 79 N. W. 709. The possession included notice of all interests of which inquiry of those in possession would elicit knowledge. *Dengler v. Fowler*, 94 Neb. 621, 143 N. W. 944. The deeds and the mortgage on the land were disclosed by the public records. Such readily available means of knowledge were in equity the same as knowledge itself. 27 C. J. 764. Plaintiff did not excuse delays or defeat the operation of laches by testifying to lack of knowledge he was bound to ascertain. The evidence does not show that he was misled or deceived by defendants into sleeping on his rights.

Blanche M. Voss testified that she accepted her deed relying on her title without knowledge of the debt evidenced by the note held by plaintiff; that she acted in good faith in her transactions and did not intend to defraud plaintiff or any other creditor of the debtor. The circumstances indicate the truth of her testimony. The evidence proves that, during the delay of plaintiff in asserting his claim, in making his charges of fraud and in bringing his suits, Blanche M. Voss, in possession of the land, relying upon her title without knowledge of his claim, procured the satisfaction and cancelation of the 12,000-dollar mortgage by payments amounting to $4,800 from her own funds and from the proceeds of two new mortgages executed by her on the same land, one for $2,500 and one for $5,000. After an examination of the evidence from every standpoint, the conclusion is that the relief in equity sought by plaintiff is barred by laches.

AFFIRMED.

ROYAL TIRE SERVICE, APPELLANT, V. GEORGE W. BELL COMPANY: HENRY J. LINDEMAN, INTERVENER, APPELLEE.
297 N. W. 88

FILED MARCH 21, 1941. No. 30967.

1. **Garnishment.** The claim of a judgment creditor against the garnishee in a garnishment proceeding can rise no higher than that of defendant as the principal debtor.
2. ———. The deposit of a cashier's check by a third person to enable defendant to comply with a requirement that a bid at a letting of a public contract must be accompanied by a deposit of 5 per cent. of the bid to insure its performance, if accepted, is not subject to garnishment by a judgment creditor of defendant where his bid was not accepted and the defendant had no title to the cashier's check or the fund it represented.
3. ———. The judgment creditor in a garnishment proceeding who has attached a cashier's check in the hands of a third person is not a *bona fide* purchaser for value, but is a mere volunteer who takes only such a right as belonged to the judgment debtor.

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

Howard Saxton, for appellant.

Harold C. Linahan, W. W. Wenstrand, Edward Sklenicka, Frank C. Heinisch, James M. Patton and *Finlayson, Burke & McKie, contra.*

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

CARTER, J.

In this case the Royal Tire Service caused a garnishment in aid of execution to be issued against the city of Omaha and the First National Bank of Omaha, it being alleged that each of said garnishees had funds in its possession belonging to the judgment debtors, George W. Bell and George W. Bell Company. One Henry J. Lindeman intervened and claimed to be the owner of the property garnished. From an order finding that the intervener was the owner of the garnished property, the Royal Tire Service appeals.

It appears that on November 30, 1934, the Royal Tire Service obtained a judgment against George W. Bell and the George W. Bell Company in the amount of $2,697.88. Subsequently, an execution was issued and returned wholly unsatisfied. The record shows that the city of Omaha had advertised for bids on certain paving projects in the city, which bids were to be received by the city on March 7, 1939. George W. Bell, doing business under the name of Independent Gravel and Construction Company, desired to bid upon this work, but found himself unable to post a bond or certified check for 5 per cent. of the bid as required by the city to insure performance of the contract if he proved to be the successful bidder. The intervener, Henry J. Lindeman, agreed to assist Bell in complying with this requirement, and on the morning of March 7, 1939, intervener purchased a cashier's check for $400 from the First National Bank of Omaha and delivered it to Bell, who posted it in accordance with the city's requirement. Bell was not a successful bidder, and on March 13, 1939, before the cashier's check was returned, the Royal Tire Service caused a garnishment summons to be issued and served upon the city of Omaha and the First National Bank. The trial court decided that the $400 cashier's check was the property of the intervener, Henry J. Lindeman, and consequently not subject to garnishment to pay the judgment against George W. Bell. It is the correctness of this order that we are called upon to determine.

The evidence clearly sustains intervener in his contention that he advanced the $400 for the purpose of enabling Bell to comply with the requirement of the city that a cashier's check in the amount of 5 per cent. of the bid accompany the bid. It is a fundamental rule that the claim of a judgment creditor against the garnishee in a garnishment proceeding can rise no higher than that of defendant as the principal debtor. *Cahn v. Carpless Co.*, 61 Neb. 512, 85 N. W. 538. The right of the Royal Tire Service is measured by the rights that Bell had in the fund at the time of the service of the garnishment summons.

We think the case is controlled by the principle announced in *Beaston v. Portland Trust & Savings Bank,* 89 Wash. 627, 155 Pac. 162. In that case plaintiffs brought an action against the Payette Timber & Milling Company to foreclose loggers' liens. After the property was placed in the hands of a receiver by the court, the milling company sought to secure the release of the property by procuring the Portland Trust & Savings Bank to issue its cashier's check payable to the sheriff as receiver, to be used in lieu of the property if the milling company lost the suit and the property could not be returned. The sheriff indorsed the check and delivered it to the clerk of the court, who cashed it and held the money in its stead. Judgment was later returned for the milling company. Plaintiffs, having recovered a money judgment for $1,625, thereupon caused the clerk of the court to be served with garnishment process. The cashier's check was deposited by the Portland Trust & Savings Bank to be applied to the satisfaction of the claims of the plaintiffs in the foreclosure action in case plaintiffs prevailed. But the plaintiffs did not prevail in that action and the court in holding that the proceeds of the cashier's check belonged to the Portland Trust & Savings Bank said: "But, without pursuing the inquiry further, we think it clear that the money was deposited for a special purpose, without intent on the part of the depositor to part with title unless necessary to be used for that special purpose. Were the contract, therefore, between the milling company and the bank, the milling company could not retain the money. The judgment debtors of the milling company by garnishing the money acquired no greater rights in the money than the milling company itself possessed, and, since the latter had no rights, the garnisheeing creditors acquired none." See, also, *Hamm Brewing Co. v. Flagstad,* 182 Ia. 826, 166 N. W. 289.

It is evident from the record that intervener did not intend to loan the $400 to Bell. As between Bell and intervener, Bell had no rights in the cashier's check which he could successfully assert. In the event that Bell's bid was

accepted and he failed to perform it, intervener of course knew that it would be used by the city as compensation for the breach of contract. In case the check was not used for the special purpose for which it was deposited, intervener would naturally expect its return to him. The fact that the cashier's check was made payable to the city of Omaha and not to Bell is some evidence that Bell was not invested with ownership or title to the fund represented by the cashier's check. We think the applicable rule is: The deposit of a cashier's check by a third person to enable defendant to comply with a requirement that a bid at a letting of a public contract must be accompanied by a deposit of 5 per cent. of the bid to insure its performance, if accepted, is not subject to garnishment by a judgment creditor of defendant where his bid was not accepted and the defendant had no title to the cashier's check or the fund it represented.

The courts have generally held that, where money is deposited in lieu of bail by a third person to secure the release of one charged with crime, it is not conclusively regarded as defendant's money, and when the purpose of the deposit is accomplished, the money should be returned to such third person as the owner. *Campbell v. Reno County,* 97 Kan. 68, 154 Pac. 257. See, also, *Wright & Taylor v. Dougherty,* 138 Ia. 195, 115 N. W. 908. Such situation is analogous to the one at bar.

We accept the view that the deposit of the cashier's check was special, it having been made to accomplish a particular purpose. When that purpose was accomplished the owner was entitled to a return of his deposit, whether it be a cashier's check or cash. The judgment creditor contends that it is entitled, as the result of the garnishment of the cashier's check, to all the rights of a *bona fide* holder for value before maturity. With this statement we are not in accord. The plaintiff in a garnishment proceeding is not a *bona fide* purchaser for value. He is a mere volunteer who takes only such a right as belonged to the defendant, and no more. When the bid of defendant Bell was not accepted by the city, he had no further interest in the check. He

having no interest, the judgment creditor could obtain none by his garnishment proceeding.

We find no error in the judgment of the trial court.

AFFIRMED.

IN RE APPLICATION OF MILLER.
EMMA GLADYS CLARKE, INTERVENER, APPELLEE, V. ROBERT L. CLARKE, APPELLANT: LOUISA GERTRUDE CLARKE MILLER, EXECUTRIX, ET AL., APPELLEES.

297 N. W. 91

FILED MARCH 21, 1941. No. 30971.

1. **Divorce.** A divorce decree awarding the wife $15 a month for the support of minor children, where there have been no proceedings to review or revise within the time provided therefor, is a final judgment and becomes a lien on the real estate of the husband in another county as soon as a transcript of the decree is filed in such other county.
2. ———. A decree for child support, rendered in a suit for a divorce, does not become dormant because of the failure to issue execution thereon for more than five years.
3. ———. Where a wife intervenes in a partition suit to assert her lien on the husband's interest in the real estate being partitioned, it is not necessary for her to plead and prove that she had no adequate remedy at law.
4. ———. Where the effect of an award for child support is to grant one sum for each month for the maintenance of more than one minor child during their minority, it will be construed, in the absence of a modification by the court which awarded it, to provide for the monthly payment of such sum until the youngest child attains his majority.
5. ———. Under such a decree, the fact that one or all of such minor children became self-supporting before attaining majority is a proper basis for an application to modify the award in the court which granted it, but it cannot be raised in a suit to foreclose the judgment lien.

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

Sterling F. Mutz, for appellant.

Robert M. Armstrong and *Munger & Rhodes, contra.*

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

CARTER, J.

This is a suit in equity brought in the district court for Nemaha county by Emma Gladys Clarke to impress a lien upon the interest of Robert L. Clarke in the estate of Sarah Elizabeth Clarke, his mother. As a result of a partition sale, the interest of Robert L. Clarke was determined to be $434.86, which amount is being held until the result of this suit is determined. The trial court held that Emma Gladys Clarke had a valid lien on the fund and ordered it paid to her. From this order the defendant, Robert L. Clarke, appeals.

The record shows that on August 20, 1928, Emma Gladys Clarke obtained a divorce from Robert L. Clarke, by the terms of which he was required to pay $15 a month to the plaintiff for the support of their two minor children, Glen and Earl. An execution was issued on August 29, 1928, in an attempt to collect the amount then due under the decree, which was returned wholly unsatisfied. On June 26, 1934, the decree was transcribed to and filed in the office of the clerk of the district court for Nemaha county. The decree was again transcribed and filed in Nemaha county on February 3, 1939. The only payments shown to have been made on the decree are $30 on October 6, 1928, $15 on October 23, 1928, $8 on April 22, 1931, and $10 on September 30, 1934. It is alleged that the sum of $1,110.90 remains due and unpaid, and that this amount is a lien upon the interest of Robert L. Clarke in the estate of his mother.

Appellant contends that the decree awarding support money for the care and maintenance of the minor children can be enforced only by the tribunal which granted it. This court had adopted a contrary view. In a similar case we stated that such a decree in favor of the wife, awarding $15 a month during the minority of two children, where the term of court has ended and there have been no proceed-

ings to review or revise, is a final judgment and becomes a lien upon the real estate of the husband in another county upon the filing of the transcript of the judgment in such county. *Wharton v. Jackson,* 107 Neb. 288, 185 N. W. 428. See *Cipera v. Chmelka,* 87 Neb. 482, 127 N. W. 874. See, also, Comp. St. 1929, sec. 42-319. It is fundamental that a real estate lien is ordinarily enforceable in the county where the property is located.

Appellant contends that the statute of limitations is a bar to a recovery for the support of Glen Clarke due to the fact that he reached his majority more than five years prior to the filing of the petition in intervention in this suit. The contention is also advanced that the statute of limitations begins to operate against each instalment as it accrues. A decree for child support in a divorce action is not a judgment within the meaning of section 20-1515, Comp. St. 1929, which provides that a judgment on which execution has not issued for five years shall become dormant and shall cease to operate as a lien on real estate, nor is it a judgment within the meaning of section 20-1420, Comp. St. 1929, which provides for the revivor of a dormant judgment. This court has held that a decree of foreclosure of a mortgage is not a judgment within the meaning of section 20-1515, Comp. St. 1929. *Jenkins Land & Live Stock Co. v. Kimsey,* 99 Neb. 308, 156 N. W. 499. We have also held that such section of the statute does not apply to a decree for the sale of specific real property. *Herbage v. Ferree,* 65 Neb. 451, 91 N. W. 408. An examination of the opinions in those cases reveals that decisions of the supreme court of Ohio under a similar statute were relied on and followed. An examination of the decisions of that state on the point now before us discloses that the rule herein announced is supported by the holdings in *Lemert v. Lemert,* 72 Ohio St. 364, 74 N. E. 194, and *Peeke v. Fitzpatrick,* 74 Ohio St. 396, 78 N. E. 519. We conclude that the statute of limitations is not a defense under the record in this case.

Appellant contends that the petition in intervention should have been dismissed because of a failure to plead

and prove that intervener had no adequate remedy at law. We think it is self-evident that intervener had no adequate legal remedy. She had a valid lien on the interest of Robert L. Clarke in the real estate. The land had been ordered sold in a partition proceeding. Unless her rights were asserted they would be endangered. Certainly, intervener should be permitted to assert her lien under such circumstances without pleading or proving that she had no adequate remedy at law. She is entitled to the benefit of the lien given her by section 42-319, Comp. St. 1929, regardless of other available remedies, it being an express statutory remedy, cumulative in character.

The trial court found that the "judgment and decree have not been paid and satisfied and that there is due to the intervener thereon from the defendant, Robert L. Clarke, a sum greatly in excess" of defendant's share in the estate. The original divorce decree provides "that the defendant pay into the office of the clerk of this court for the support and maintenance of the said minor children the sum of $15 per month beginning on this date." The decree discloses that there were two minor children. The period for which the payments are to be made is not provided by the decree, nor are the ages of the minor children or the dates on which they reach their majority stated. From an examination of the decree itself we are unable to determine the amount due thereon. Intervener offered evidence to establish the amount due under the divorce decree by showing that Glen and Earl Clarke reached their majorities on July 27, 1932, and September 13, 1937, respectively. We think this was a proper procedure. While the only court having jurisdiction to modify the decree is the court in which such decree was entered, yet the parties are privileged to show the termination of the decree by evidence dehors the record. The authority conferred by statute to provide in a divorce decree for the support of children of the marriage has application only to minor children. The plain meaning of the statute as to children is that provision for their maintenance shall be limited to the period of

minority. Words to that effect are a part of the statute by necessary implication. The allowance of child support to a wife necessarily terminates when the children reach their majority by operation of law. The termination of the decree may be shown by evidence in the foreclosure proceeding in the same manner as proof of payment of the decree or satisfaction of the lien may be shown in such action. In a similar case the Wisconsin supreme court said: "Since evidence *aliunde* the record was necessary to show the fact that the lien created by the judgment to enforce payment to the plaintiff on account of the maintenance of the children had been fully discharged by payment for the full period of their minority, as directed, it was proper to apply to the court for a formal order adjudging such satisfaction and discharging the judgment in that regard. Upon the proofs made such an order should have been granted." *Boehler v. Boehler*, 125 Wis. 627, 104 N. W. 840.

Appellant contends that the allowance should be reduced from $15 to $7.50 when the elder of the two children reached his majority. This amounts to a modification of the decree over which the court entering it has exclusive jurisdiction. Where an award for child support is made in one amount for each succeeding month for more than one child, it will be presumed to continue in force for the full amount until the youngest child reaches his majority. The proper remedy, if this be deemed unjust, is to seek a modification of the decree in the court which entered it on the basis of the changed circumstances.

Appellant also urges that the minor children became self-supporting, or partially so, at the age of 19 years. This also is a matter which, if established, would call for a modification of the decree in the court which entered it. It cannot be properly asserted in this proceeding.

The amount due on the decree, including attorney's fees and costs, is $1,370.90, not including interest. Payments admitted by the pleadings and shown by the evidence are $63, leaving a balance due of $1,307.90. Intervener having a lien for this amount against defendant's interest in the

land, the trial court properly ordered his interest amounting to $434.86 applied as a payment on the decree.

AFFIRMED.

IN RE ESTATE OF JOHN WESLEY FINES, SR.
LAURA CHENEY, APPELLANT, V. CARL FINES ET AL., APPELLEES.
297 N. W. 86

FILED MARCH 21, 1941. No. 31080.

1. **Courts.** "The party or parties appealing shall file with the transcript a præcipe which shall state the court from which the appeal is taken, the date of the judgment appealed from, the names of all parties and their relations to the case as they appeared in the court below. The præcipe shall also specify the party or parties appealing and designate all others made parties to the appeal as appellees." Rules of the Supreme Court, rule 7, sec. 1,
2. **Appeal.** All parties to a joint judgment, or those who may be affected by the modification or reversal thereof, must be made parties in a proceeding in error or on appeal to the supreme court, and a failure so to do is ground for dismissal, if the objection is seasonably made.

APPEAL from the district court for Buffalo county: BRUNO O. HOSTETLER, JUDGE. *Motion to dismiss appeal sustained.*

Minor & Minor, for appellant.

H. G. Wellensiek, contra.

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

YEAGER, J.

This case comes to this court on appeal from the district court for Buffalo county, Nebraska. It has been presented on a motion to dismiss the appeal.

The details necessary to a determination of the motion are the following:

John Wesley Fines, Sr., died testate on March 1, 1939, and Carl Fines and John W. Fines, Jr., his sons, duly qualified as executors under the will. These executors were also trustees for Lillian M. Bentley, a daughter of the deceased, under the will of Zerlda Fines, deceased. Zerlda Fines was the deceased wife of John Wesley Fines, Sr. As executors, Carl Fines and John W. Fines, Jr., filed an inventory in the estate of John Wesley Fines, Sr.

Thereafter, Laura Cheney filed an application in the probate proceeding to require the executors to file an additional inventory. In the application she charged that there were assets of the estate which had not been included in the inventory.

A hearing was had on the application for additional inventory, and the county court made lengthy findings dealing with numerous claimed transactions and conditions. The court also ordered restoration to the assets of the estate an item of $1,500 for the reason that it was withdrawn without authority, and ordered the executors to file within a reasonable time an additional inventory showing other assets of the estate in addition to those enumerated in the original inventory.

From this order of the county court the executors appealed to the district court wherein, after trial, the judgment of the county court was reversed.

From the judgment of the district court Laura Cheney has brought the case on appeal to this court. In the action in this court Carl Fines and John W. Fines, Jr., as executors of the estate of John Wesley Fines, Sr., are not made parties. As such they are left out entirely. It is sought to make Carl Fines and John W. Fines, Jr., parties to this appeal in their individual and personal capacities, whereas in the county court and in the district court they were not parties in any such capacity. Lillian M. Bentley is not made a party in this court at all, and neither are Carl Fines and John W. Fines, Jr., made parties as trustees for Lillian M. Bentley. Carl Fines and John W. Fines, Jr., as executors of the estate of John Wesley Fines, Sr., and as trustees for

Lillian M. Bentley, and Lillian M. Bentley, were all parties who might be affected by the modification or reversal of the judgment of the district court.

This is clearly violative of section 1, rule 7, Rules of the Supreme Court, which is as follows:

"The party or parties appealing shall file with the transcript a præcipe which shall state the court from which the appeal is taken, the date of the judgment appealed from, the names of all parties and their relations to the case as they appeared in the court below. The præcipe shall also specify the party or parties appealing and designate all others made parties to the appeal as appellees."

It is further violative of an unbroken line of decisions of this court which holds that all parties to a joint judgment, or who may be affected by the modification or reversal thereof, must be made parties in proceeding in error or appeal to the supreme court, and a failure so to do is ground for dismissal, if the objection is seasonably made. *Wolf v. Murphy*, 21 Neb. 472, 32 N. W. 303; *Hendrickson v. Sullivan*, 28 Neb. 790, 44 N. W. 1135; *Curten v. Atkinson*, 29 Neb. 612, 46 N. W. 91; *Consaul v. Sheldon*, 35 Neb. 247, 52 N. W. 1104; *Andres v. Kridler*, 42 Neb. 784, 60 N. W. 1014; *Polk v. Covell*, 43 Neb. 884, 62 N. W. 240; *Richardson v. Thompson*, 59 Neb. 299, 80 N. W. 909; *Barkley v. Schaaf*, 110 Neb. 223, 193 N. W. 267; *Reilly v. Merten*, 125 Neb. 558, 251 N. W. 114; *Castek v. Tully*, 127 Neb. 657, 256 N. W. 506; *Donisthorpe v. Vavra*, 134 Neb. 157, 278 N. W. 151; *Heinisch v. Travelers Mutual Casualty Co.*, 135 Neb. 13, 280 N. W. 234; *Kansas City Life Ins. Co. v. Neverve*, 135 Neb. 630, 283 N. W. 378.

It follows then that the motion of the appellees to dismiss the appeal should be, and is, sustained.

MOTION TO DISMISS APPEAL SUSTAINED.

IN RE ESTATE OF GEORGE A. MCEACHEN.
FIRST NATIONAL BANK OF WISNER, APPELLANT, V. JAMES A. MCEACHEN, ADMINISTRATOR, APPELLEE.
297 N. W. 153

FILED MARCH 28, 1941. No. 30991.

Limitation of Actions. An action on a promissory note, payable to a bank, was barred by the statute of limitations. The maker died, having a small balance in a checking account to his credit in the payee bank at the time of his death. The bank applied the balance in the checking account to the note and filed the same as a claim against the estate of the maker. *Held*, that the payment was not voluntarily made and that the bar of the statute was not removed.

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

Zacek & Nicholson, for appellant.

Burr R. Davis, contra.

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

SIMMONS, C. J.

August 7, 1931, George A. McEachen made, executed and delivered to the plaintiff his promissory note in the sum of $4,400, payable on demand, and bearing interest at 8 per cent. per annum. At that time, McEachen carried a checking account with plaintiff's bank, to which deposits and withdrawals were made. March 10, 1932, the balance in the account was $1.46. McEachen died August 13, 1938. September 16, 1938, defendant was appointed administrator. January 13, 1939, the bank, acting solely on its own motion, debited the bank account with the amount of $1.46, indorsed that amount as a payment on the note, and presented the note as a claim against the estate. The defendant plead the bar of the statute. The county court and the district court held that the claim was barred.

The precise question presented is: Did the action of the bank, in applying the balance due on the checking account

as a payment on the note, remove the bar of the statute so as to permit a recovery against the estate of the maker? We conclude that it did not.

Plaintiff argues that a bank deposit is considered pledged by operation of law for the payment of the depositor's matured debt, that the deposit is in the nature of a pledge of collateral security, that it had the right to apply the balance, due on the deposit, upon the indebtedness of the depositor to it, that the depositor is charged with knowledge of that right, that such application after the depositor's death is equivalent to a voluntary payment by the debtor, and removes the bar of the statute.

The applicable statutory provision is: "In any cause founded on contract, when any part of the principal or interest shall have been voluntarily paid, or an acknowledgment of an existing liability, debt, or claim, or any promise to pay the same shall have been made in writing an action may be brought in such case within the period prescribed for the same, after such payment, acknowledgment, or promise." Comp. St. 1929, sec. 20-216.

Prior to 1913 the word "voluntarily" was not in the statute. It appears to have been inserted by the commission for revision. Prior to that time, however, the act had been construed to require that the payments be voluntary.

This court, in *Kyger v. Ryley,* 2 Neb. 20, considering the question of whether an alleged payment removed the bar of the statute, said: "The case wants the very first element of a valid payment to take the case out of the statute, which is an intelligent, or at least conscious, consent on the defendant's part, that what was due to him should be applied on his debt."

In *Whitney, Clark & Co. v. Chambers,* 17 Neb. 90, 22 N. W. 229, this court said: "A part payment in order to bar the statute must be equivalent to an acknowledgment of an existing liability or to a promise to pay the same."

In *Moffitt v. Carr,* 48 Neb. 403, 67 N. W. 150, this court said: "Part payment * * * is a voluntary payment made by the debtor himself or by some one authorized by him to

make the payment; and that a payment made on a debtor's note by the sale of his property on execution, or under any legal process whatever, is not such part payment" as the Code declares may remove the bar of the statute.

In *Bosler v. McShane,* 78 Neb. 86, 110 N. W. 726, this court, referring to the statute as it then existed, said: "This cannot be construed so as to permit a payment made by a volunteer, nor a payment made through the agency of legal proceedings" to remove the bar of the statute. On rehearing it was said (78 Neb. 91, 113 N. W. 998): "It is generally recognized that any payment made as a result of legal proceedings, or that is made as the result of the operation of law, is not held a voluntary payment."

The commission on revision, in inserting the word "voluntarily" in the statute, merely clarified the statute to conform to the prior decisions of this court.

Assuming, but not deciding, that the applying of the balance due on the deposit to the note was a payment, can it be said to have been "voluntarily" made?

A voluntary payment is one that is intentionally and consciously made. It calls for the free exercise of the will. It involves the element of assent and an acknowledgment of the existence of the debt. It is not contended that a dead man can make such a voluntary payment. It cannot be successfully contended that either the debtor or creditor intended that this small balance was held as collateral to the note so as to constitute a pledge, the application of which to the note would avoid the bar of the statute.

The judgment of the trial court is

AFFIRMED.

STATE, EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. I. C. BACHELOR, RESPONDENT.

297 N. W. 138

FILED MARCH 28, 1941. No. 30791.

Attorney and Client. Upon the record submitted, it is by this court ordered: That those parts of the report of the referee in this case wherein it is determined that Bachelor is not guilty of the charges contained in counts three, four, six, eight and nine of of the complaint filed herein, be, and the same hereby are, approved and confirmed; that the parts of such report wherein Bachelor is adjudged guilty of the offenses charged in counts one, two, five and seven of such information, and his conduct is criticized and questioned as to counts three and eight, be, and hereby are, disapproved and set aside, and as to each of said counts one, two, five and seven, said Bachelor is adjudged not guilty.

Original proceeding by the state, on the relation of the Nebraska State Bar Association, to disbar the respondent. *Judgment for respondent.*

Walter R. Johnson, Attorney General, and *Rush C. Clarke,* for relator.

Harry F. Russell, for respondent.

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

EBERLY, J.

This is a proceeding to disbar I. C. Bachelor, a resident of McCook, Red Willow county, Nebraska, who is 76 years of age, was admitted to the Nebraska Bar on May 21, 1891, and who is now a member of the Nebraska State Bar Association. The State of Nebraska, on the relation of the Nebraska State Bar Association, acting by and through the complaint committee of the fourteenth judicial district of Nebraska, filed a complaint in writing setting forth, in substance, that an informal complaint had been made to said committee of claimed professional misconduct on the part of I. C. Bachelor of McCook, Nebraska, a member of the

Nebraska State Bar Association. Upon informal investigation a majority of the aforesaid committee determined "that there are reasonable grounds for said complaint," and we "do therefore, for the purpose of having a full and complete investigation of the charges heretofore made against said member, charge and complain as follows:" Then follow nine counts, each properly and specifically setting forth transactions in which participation by Bachelor is alleged as culpable and constitutes unprofessional conduct on his part. This complaint is formally subscribed by two members of the complaint committee. The third member, being a witness to a number of the transactions, did not sign the complaint. The complaint, as such, is not verified by the oaths of the committee members and this practice is not deemed improper. This complaint covers eight typewritten pages.

To this complaint, Bachelor, as respondent, filed his answer in writing, positively verified under oath, which denies "each and every allegation in each count not herein specifically admitted," and further pleads specifically to the charges contained in each of the nine counts of the complaint, substantially taking issue with the allegations therein which charge or tend to charge the respondent with unprofessional conduct in his capacity as an attorney at law which would subject him to disbarment.

As provided by the rules of this court, a referee was duly appointed, and hearings were had on the issues thus formed. The complainant was represented by the attorney general's office and the respondent by his attorney. The referee has filed his report in which the respondent is adjudged guilty on the first, second, fifth, and seventh counts; but in effect not guilty on the third, fourth, sixth, eighth and ninth counts; though notwithstanding, as to count three, the express finding of the referee is: "The evidence in support of this count is, in my opinion, insufficient to show by itself a cause for disbarment or any moral turpitude." Yet, he adds, "It is, however, an additional circumstance which may be considered as throwing some light upon the fitness of

the respondent to engage in the practice of law." As to the charges contained in the eighth count, the referee states his determination in the following manner: "It is therefore my conclusion that, standing alone, this count and the evidence in support thereof would be insufficient to sustain a disbarment proceeding, but, taken in connection with other proven counts, shows a method of dealing with his clients' money which is in violation of Canon 11 of the Canons of Professional Ethics, and such as tends to bring discredit upon the profession in general."

The conclusion of the referee's report is:

"It is therefore recommended, That the name of I. C. Bachelor be stricken from the roll of attorneys and counselors at law of the State of Nebraska, and his admission to the Bar of the state be canceled and annulled."

The question presented by the referee's report, stated briefly and comprehensively, is, does the record before us sustain the disposition recommended by the referee?

We have here presented essentially a civil proceeding, and the recognized rules governing that practice are controlling.

"The order of admission is the judgment of the court that the parties possess the requisite qualifications as attorneys and counselors, and are entitled to appear as such and conduct causes therein. From its entry the parties become officers of the court, and are responsible to it for professional misconduct. They hold their offices during good behavior, and can only be deprived of it for misconduct ascertained and declared by the judgment of the court after opportunity to be heard has been afforded. (*Ex parte Heyfron*, 7 How. (Miss.) 127; *Fletcher v. Daingerfield*, 20 Cal. 430.)" *Ex parte Garland*, 4 Wall. (U. S.) 333, 378.

"The attorney and counselor being, by the solemn judicial act of the court, clothed with his office, does not hold it as a matter of grace and favor. The right which it confers upon him to appear for suitors, and to argue causes, is something more than a mere indulgence, revocable at the pleasure of the court, or at the command of the legislature.

It is a right of which he can only be deprived by the judgment of the court, for moral or professional delinquency." *Ex parte Garland, supra.*

Chief Justice Marshall of the supreme court of the United States announced the doctrine of the importance of the enforcement of the accepted rules of evidence in civil proceedings in the following language:

"It was very justly observed, by a great judge, that 'all questions upon the rules of evidence are of vast importance to all orders and degrees of men; our lives, our liberty, and our property are all concerned in the support of these rules, which have been matured by the wisdom of ages, and are now revered from their antiquity, and the good sense in which they are founded.' One of these rules is, that 'hearsay' evidence is, in its own nature, inadmissible. That this species of testimony supposes some better testimony which might be adduced in the particular case, is not the sole ground of its exclusion. Its intrinsic weakness, its incompetency to satisfy the mind of the existence of the fact, and the frauds which might be practiced under its cover, combine to support the rule that hearsay evidence is totally inadmissible." *Queen v. Hepburn,* 7 Cranch (U. S.) 290.

So too, "The power (to disbar), however, is not an arbitrary and despotic one, to be exercised at the pleasure of the court, or from passion, prejudice, or personal hostility; but it is the duty of the court to exercise and regulate it by a sound and just judicial discretion, whereby the rights and independence of the bar may be as scrupulously guarded and maintained by the court, as the rights and dignity of the court itself." *Ex parte Secombe,* 19 How. (U. S.) 9.

A court of recognized standing has announced, in substance, the following rule, as applicable to proceedings of disbarment: In such a proceeding, where a denial is made of the charges, the common-law rules of evidence apply. The accused is not to be tried upon affidavits, but is entitled to confront the witnesses, subject them to cross-examination, and to invoke the well-settled rules of evidence. See *In re Eldridge,* 82 N. Y. 161.

In harmony with the principles supported by the foregoing authorities cited, this court in the case of *In re Newby,* 82 Neb. 235, 252, 117 N. W. 691, in an opinion by Letton, J., involving disbarment of an attorney on a charge of participation in a forgery, employed the following language, which was unanimously approved: "While the proceedings in this matter are not criminal in their nature, in view of the momentous consequences to the person charged, involving his means of obtaining a livelihood from his profession and his reputation as an honest and honorable man, the presumption of innocence applied, and his culpability must be established by at least a clear preponderance of the evidence. The court should be satisfied to a reasonable certainty that the charges are true. *State v. Wines,* 21 Mont. 464; *In re Parsons,* 35 Mont. 478; *In re Smith,* 73 Kan. 743. In fact, a New York court held that, 'the deprivation for life of a man's vocation should only result from grave malpractice, established beyond a reasonable doubt.' *Matter of Mashbir,* 44 N. Y. App. 632, 60 N. Y. Supp. 451."

The application made of the doctrine thus announced clearly appears in the final paragraph of the opinion in such *Newby* case, which reads as follows:

"We cannot say that we are satisfied from the evidence that he (Newby) is innocent of the charges made against him, nor can we say that we are satisfied to a reasonable certainty of his guilt. The mind of the court being in this condition, it is our duty to give Mr. Newby the benefit of the doubt, and to hold that the charges have not been sustained by the evidence to such an extent as to warrant the infliction of the severe penalty that must inevitably have followed had we been fully satisfied of his guilt."

The most serious charge made against Bachelor, and of which he was found guilty by the referee, is contained in the first count of the specifications on which he was tried. In it, in effect, he is charged with having become a party to the crime of arson, committed by Jake Degele, by unlawfully and feloniously burning and destroying the larger of two dwelling-houses situated on the SW¼ of the SW¼

of section 33, township 3 north, range 28 west of the 6th P. M., in Red Willow county, Nebraska. Degele, the record discloses, pleaded guilty to this charge of arson, and was sentenced thereon to confinement in the state penitentiary. So far as disclosed by the record before us, no criminal charges have been instituted against Bachelor in relation to the commission of this crime of arson. The real property here involved, including the larger house thereon, which was thus destroyed, was, at and prior to its destruction, owned by the wife of Jake Degele, and had been inherited by her from a former husband, since deceased. Two dwelling-houses were situated on this property, the larger being the one thus burned and destroyed, and the smaller occupied by Mrs. and Mr. Degele as a family home. It thus clearly appears that the real estate with which we are here concerned constituted the statutory separate estate of the wife, whose name does not otherwise appear in this record than as the wife of Jake Degele. The record also sustains the conclusion that at some time in the past this real estate, including the two dwelling-houses thereon, had been mortgaged to secure the repayment of a loan, the exact amount of which the proof does not disclose, and default in the payment thereof had been made; that foreclosure proceedings had been instituted thereon, and a decree of foreclosure had been duly entered; that in due course of time an order of sale was issued on this decree and the premises were sold pursuant to the decree; that Bachelor was then employed, and in behalf of Degeles filed objections to such sale, which, on hearing, were sustained by the district court and such sale vacated and set aside. The mortgaged premises had then been readvertised and again sold, and these proceedings were awaiting confirmation by the district court. Just prior to the time set for confirmation the larger dwelling-house was destroyed by fire, as to which Mr. Degele later pleaded guilty to a charge of arson. There is a dearth of evidence as to the insurance involved in this fire. Neither the original policy nor a copy thereof appears in evidence. The name of the insurer is not given. The

name of the "assured" is not expressly established, save as we may infer it from the facts of the record as an entirety. The amount of insurance on the destroyed dwelling-house is not shown with exactness, and while the proof indicates that there was a settlement made by the insurance company, the amount by it paid, and to whom, is not disclosed. The evidence is undenied that Bachelor has never seen the policy. The parties interested in this present proceeding appear to be in general agreement that the improvements on the mortgaged property had been insured against fire, and that, under the terms of the insurance policy then in force, the larger dwelling-house on the premises was insured in an amount that exceeded, in a substantial sum, the total indebtedness against the property as evidenced by the real estate mortgage securing the same. Therefore, in view of all the facts disclosed by the evidence in the record, and the further fact that we, of necessity, take notice of the ordinary course of business and the common methods by which it is transacted, we shall assume, as a working hypothesis in this case, that at the time of the destruction of the larger dwelling by fire a valid policy of fire insurance existed, in which Mrs. Degele, as owner in fee simple, is named as assured, and which in proper terms agreed to indemnify the assured against loss or damage by fire to the larger dwelling-house in a sum in excess of the total amount secured by the real estate mortgage; that attached to such insurance policy was the usual real estate mortgage clause by the terms of which loss under the terms of such policy was payable to the mortgagee named therein as its interest might appear. It is the theory of the prosecution in this proceeding that in this situation Bachelor, with knowledge thereof, inspired, advised, counseled and influenced Jake Degele, while the relation of client and attorney existed between them, to feloniously burn the larger house for the purpose of receiving the insurance money arising therefrom, and with it pay off the mortgage indebtedness and thus redeem the entire real estate from the lien of the foreclosure decree.

Jake Degele, then a convict incarcerated in the state penitentiary, being produced as a witness for the prosecution at the regular hearing of this proceeding before the referee, testified, with reference to the dwelling-house destroyed by fire on these premises, as follows: "Q. Did you ever have a talk with Mr. Bachelor before the fire with reference to the burning of one of the houses on your farm? A. No. Now don't ask me any more questions, because I ain't going to answer them unless I can get an attorney to tell me what to do."

Pursuant to notice duly served, Degele's deposition had been taken by the prosecution, prior to this appearance before the referee, in which, in response to queries propounded by the attorney general's office, he had testified as follows:

"Q. When did you set fire to this house with reference to that confirmation? A. I set fire to it in the morning. Q. The morning of the 21st of September, 1938? A. Yes. Q. How long had this foreclosure action been pending against you in the district court? A. It come up and we took the nine months stay as the law allowed us and then it was advertised and sold once and the judge wouldn't let it go through so it had to be advertised again. Q. It was pending how long? A. Two years. Q. Who represented you as your lawyers in that foreclosure action? A. Mr. I. C. Bachelor. Q. Who is here in the room at this time? A. Yes. Q. Now before you burned this house, as you have testified, did you ever talk with Mr. Bachelor about burning the house? A. No. Q. Did you ever have any conversation with him in which that was mentioned? A. No; I never did. Q. Did he at any time advise you to burn this house or any property on your farm? A. No. Q. Did he know before you burned the house that you were going to do so? A. No, sir. Q. Now you afterwards pleaded guilty to arson in connection with that? A. I did."

This deposition was received in evidence.

Bachelor was also sworn and testified in his own behalf. He clearly and unequivocally denied all knowledge of, or

participation in, the commission of the crime of arson, of which Degele had pleaded guilty. He specifically denied having in any manner inspired, advised, or counseled the commission of the same, and also denied all knowledge of intent on the part of his client to commit the same.

The prosecution, after Degele, their witness, had testified as hereinbefore set forth, continued a cross-examination of him with reference to oral and written contradictory statements previously made by him, as to the burning of the building, but admittedly not made in the presence of Bachelor, not claimed to have been in proceedings to which the latter was a party or present, and in which he was entitled to no rights of cross-examination. This cross-examination of Degele included testimony given by him before the state board of pardons, a transcript of which was offered and received in evidence. It may be said that every statement thereof and therein which in any manner tended to incriminate Bachelor was then, in this cross-examination, wholly repudiated by Degele as untrue and wholly inconsistent with the actual facts. It would serve no purpose to set forth this evidence thus admitted and concerning which this witness was cross-examined. Considered with reference to the actual issues presented by count one of the charges here under consideration, this evidence thus introduced by the prosecution, by and in aid of this cross-examination of their own witness, was clearly within the well-established rule of exclusion as hearsay. The authority for, and limited object to be attained by, the introduction of this line of proof is discussed in *Masourides v. State*, 86 Neb. 105, 125 N. W. 132, and *Erdman v. State*, 90 Neb. 642, 134 N. W. 258, both cases being later modified by rule of this court in *Penhansky v. Drake Realty Construction Co.*, 109 Neb. 120, 190 N. W. 265. See, also, *Lewis v. Miller*, 119 Neb. 765, 230 N. W. 769; *Mason v. Reynolds*, 135 Neb. 773, 284 N. W. 257; *Blochowitz v. Blochowitz*, 122 Neb. 385, 393, 240 N. W. 586. If this line of evidence was properly received, a question which the record before us does not impose upon us the duty of determining, still its effectiveness and pro-

bative force is limited solely to the credibility of Degele. "Evidence of such contradictory statements is admitted only to discredit the witness; it is not affirmative evidence of the facts stated." 3 Jones, Evidence, Civil Cases (4th ed.) 1564. See, also, *Branford Trust Co. v. Prudential Ins. Co.*, 102 Conn. 481, 129 Atl. 379, 42 A. L. R. 1450; 28 R. C. L. 633, sec. 219.

In the text just above quoted from, at page 1591, it is said: "Finally, attention is invited to the probative effect of impeaching testimony consisting of contradictory or inconsistent statements of witnesses. It often happens that such testimony is of vital importance in its effect upon the credit of the witness; and it is not infrequent that jurors fail to understand that such testimony is only received to affect the credibility of witnesses. In other words, the impeaching testimony does not establish or in any way tend to establish the truth of the matters contained in the contradictory statements." 3 Jones, Evidence, Civil Cases (4th ed.) 1591. See, also, *Law v. Fairfield*, 46 Vt. 425; *Jensen v. Michigan C. R. Co.*, 102 Mich. 176, 60 N. W. 57; *Seller v. Jenkins*, 97 Ind. 430; *Davis v. Hardy*, 76 Ind. 272.

It follows that, giving full force and effect to all the testimony in the record relating to the charges contained in count one of the charges and specifications against Bachelor, there is not a scintilla of competent evidence which in any way tends to sustain the allegation that he inspired, participated in, or counseled the commission of the crime of arson. Nor is Bachelor subject to criticism on account of the promptness with which he undertook the collection of the insurance money. There is not in the entire record a word of proof which tends to impute to Mrs. Degele prior knowledge of, approval of, or the slightest participation in, the crime of arson committed by her husband. She was the owner of the destroyed property, and as such was the "assured" named in the policy originally issued on her real estate, and was entitled to the insurance money, in the absence of prior knowledge of, or participation in, the crime of arson. Existing marital relations did

not of themselves deprive her of her rights. We have clearly announced this rule:

"The mere fact that the wife was present when a tortious act is committed by her husband raises no presumption that the act was committed by him as her agent, even though the act has some connection with or reference to her separate estate, when it is not shown that she participated, nor that she encouraged or instigated him to do the act, and where there is no other evidence of agency." *Carnahan v. Cummings,* 105 Neb. 337, 180 N. W. 558.

And, in an insurance case, where the insurance company sought to defend on the basis that the destructive fire had been caused by the husband, this court announced the rule:

"That an insured building was burned by a third party is no defense in an action on the policy, in the absence of a showing that the party insured was privy to such burning." *Union Ins. Co. v. McCullough,* 2 Neb. (Unof.) 198, 96 N. W. 79.

It is obvious that Bachelor, under the facts of this situation so far as revealed by the record before us, was justified in acting without hesitation or delay to secure the collection of the amount due on the insurance policy. It thus clearly appears that there has been an entire failure of proof to sustain the charges contained in count one of the charges in this case.

The second count of the charges against Bachelor, in effect, is that during the trial of a case commenced in the county court of Red Willow county, Nebraska, on November 21, 1932, upon a promissory note of $250, bearing date September 1, 1931, made and delivered to the Farmers & Merchants State Bank of McCook, payee named therein, by I. C. Bachelor and M. G. Welch, respondent Bachelor on February 3, 1933, introduced in evidence a check of which the following is a copy:

"Farmers & Merchants State Bank,
"McCook, Nebr. 7/27-1931. No.———
"Pay to the order of Farmers & Merchants Bank $62.00
"Sixty Two & no/100 Dollars
"For——— I. C. Bachelor."

That affixed thereon at the time this instrument was received in evidence was what all parties recognize as the official "paid" stamp of the Farmers & Merchants State Bank of McCook, which by perforation in this check clearly discloses that this check had been paid by that institution on "1/27/31," which clearly proclaims that the check had been paid January 27, 1931, by the drawee named therein. This instrument had no indorsements on the back thereof. It is now claimed that the original check fairly discloses that the date thereon had been changed from "1/27/31" to "7/27/31;" that Bachelor introduced the check in evidence in support of his claim that the sum of $62, in controversy, had by means of this check been transferred or paid to the Farmers & Merchants State Bank of McCook prior to the giving of the note in suit, while another note was held by this bank to which the note in suit was in the line of renewals, but which amount so paid had never been credited on his indebtedness by the bank, and that he was entitled to credit of that amount on the note in suit. The gist of the charge contained in this second count is that "The respondent offered said check in evidence, and claimed the same as a credit upon said note in suit, with the knowledge that the check had been altered, and that same was a fraud, and that by so doing the respondent herein was and became guilty of unprofessional conduct."

The referee found: That this charge "is sustained by the evidence;" that "the check itself is in evidence and shows conclusively that it has been altered" as to date thereof; that "a figure '7' has been made with a pen over the original figure '1,' but the perforations and marks of the canceling machine show that the check was paid by the bank on '1/27/31.' * * * The original bank statement does not show any charge against the respondent's bank account of $62 on July 27, 1931; the respondent was the only one to be benefited by the introduction of this check and the credit sought thereby. The respondent admits receiving this check from the bank with his other canceled checks, and that it was continuously in his possession from

the time it was returned by the bank until it was introduced in evidence." Therefore, the referee determined, in view of the claim for credit made by the accused, that the conclusion of his guilt must be deemed established "beyond a reasonable doubt."

We do not approve of this determination of the referee, nor are we in accord with his conclusion as to the force and effect of the evidence upon which it is based. It is true there is in evidence what purports to be a ledger sheet of the I. C. Bachelor checking account with the Farmers & Merchants State Bank of McCook, Nebraska. The sufficiency of its general foundation for admission as evidence might be seriously questioned, but we do not raise that question now. But the first entry shown on this ledger sheet, exhibit 5 as it is designated by the reporter, is July 9, 1931, and the last entry made thereon is September 26, 1931, and discloses a credit balance of $2.05. We understand from the record of the entire cause that this account closes with the bankruptcy of the bank. And it may be said that among 87 checks entered on this exhibit 5 there are none of the denomination of $62. But it will be remembered that this $62 check bears the official "paid" stamp of the bank as of "1/27/31" and that no ledger sheet covering the period from January 27, 1931, to July 8, 1931, both inclusive, was introduced in evidence or forms any part of the record. Bachelor's sworn testimony is that with reference to exhibit 5 he filed a claim in the receivership proceeding of this bank based on his claim that exhibit 5 was incorrect and that the bank was indebted to him in an amount that exceeded the balance shown by his account of $2.05 at the time of the "closing" of the bank, and that the district court, after hearing, allowed his claim in excess of $100, which was paid him. If this statement is in error the court records were easily available where this hearing was had and would have disclosed that fact. It appears, however, the statement remains unanswered in the record. On the contrary we note the following indorsement on the back of the $250 note of September 1, 1931, a part of the

records in this case: "April 29, 1932. Set-off by order of the Dist. Court $100.16." While this may be said to be consistent with Bachelor's statement, it does not necessarily confirm it. But it would seem that, when bank records are successfully impeached, positive inferences may not be drawn from omissions therein contained, but the payment of the $62 check must be deemed to be established, so far as this record is concerned, solely by the "paid" stamp now appearing thereon. Bachelor's contention fairly appears from the following excerpt of his cross-examination:

"Q. Now, what I want you to say now, when do you now say you gave that check, July 27th, 1931, or January 27th, 1931? A. Well, I gave the check at the time that it was marked paid; I am quite certain. Q. That was some four months before the original note had been executed by you, wasn't it? A. No; no, I had given several notes to the bank. Q. And you are not able at all to in any way account for the alteration of that check? A. No, sir; I don't know how it became altered; I know that I never altered it."

What actually occurred at the trial of this county court case on February 3, 1933, was that Bachelor was sworn as a witness and testified as to the claimed payment of $62, to which he claimed credit. At the conclusion of his testimony the check, exhibit 4, was offered by respondent generally as a part of his testimony. There is no evidence that the instrument was then read to the court by the accused. Bachelor handed it to the counsel representing the plaintiff receiver. This attorney passed it to the county judge presiding, who received it in evidence, and after he had looked at the face of the check the county judge said the date had been altered. There is evidence in the record that Bachelor challenged the correctness of this statement, and vehemently denied that any alteration had been made of the check by him. It appears that the matter of the "paid" date thereon was not discussed at this time. It is obvious that Bachelor's culpability, if such there be, in the use made by him of this instrument, must be determined by the legitimate inferences which that document at the time and place

as used will support. This is not claimed to be a forged instrument, but is concededly genuine, save only it is charged that the date of the same has been fraudulently altered. If then it be conceded, for the purpose of argument, that it is in part a forged instrument, still the use of the check as evidence of what the unaltered parts thereof establish beyond a reasonable doubt could hardly be said to establish the moral depravity of one who made use of it as proof to establish the truth.

We are here dealing with a check after it has served its purpose, and after the transfer of money directed by its terms has been fully accomplished and the instrument itself returned to the maker.

"Although mere bookkeeping entries by the drawee bank, with reference to a check or order, are mere evidence of payment, through which the court may look to determine the exact facts with reference to payment, where the bank receives the check, marks it 'paid,' debits the account of the maker, and returns it, this is not a mere booking entry, but constitutes a payment." 9 C. J. S. 698, sec. 349.

We assume that the presence of the drawee bank's "paid" stamp on the face of this check at least affords *prima facie* evidence of its actual payment. If this check, when and as introduced in evidence, giving full force and effect to its probative force, established and tended to establish only admitted facts and facts wholly consistent with truth, then its use as proof cannot be deemed a "fraudulent" use, nor can the instrument itself be characterized as a "fraud." What was the evidential force and effect of this check?

The date written by the drawer upon his check is no evidence of the date the drawee bank will pay it. Under the record in this case, accepting the "paid" stamp in the form of perforations affixed to the check in controversy as the sole competent evidence of the act of payment by the drawee bank found in the record, it constitutes the only evidence binding upon it and carries no implications beyond those clearly expressed by it. It does not imply that the money thus paid was received and applied, or required to be ap-

plied, to any particular purpose. It sustains no implication that the $62 transferred by the check and received by the payee bank was to be applied on the drawer's indebtedness to the drawee bank then existing. It only and clearly evidences that the check was "cashed" on "1/27/31," a fact which no one now questions.

The bank check in the instant case is in the usual form and, after having been returned to the drawer by the drawee bank, its legal evidential effect was determinable by the rule announced in *Ottens v. Fred Krug Brewing Co.*, 58 Neb. 331, 78 N. W. 622: "A bank check in the usual form is not, even when paid and returned to the drawer, an acknowledgment that the money therein mentioned has been received for, and applied to, a particular purpose."

Its terms clearly evidence as a fact that the check in controversy was cashed by the drawee bank on "1/27/31." At that point its probative force ends. *Ottens v. Fred Krug Brewing Co., supra.* This conclusion is equally inevitable whether the check be deemed to bear the date "1/27/31" as its proper date of issue, or to be properly dated "7/27/31." It necessarily follows that the change of date, if such there was, was wholly immaterial.

"An alteration of a written instrument after its execution by one party thereto, without the knowledge or consent of the other, which neither varies its meaning nor changes its legal effect, is an immaterial alteration, and will not invalidate the instrument." *Fisherdick v. Hutton,* 44 Neb. 122, 62 N. W. 488.

But even where a written instrument shows upon its face a material and obvious alteration, the presumption of law is that such alteration was made before the instrument was issued and delivered. *Dorsey v. Conrad,* 49 Neb. 443, 68 N. W. 645; *Colby v. Foxworthy,* 80 Neb. 239, 114 N. W. 174; *Collins v. Hughes & Riddle,* 134 Neb. 380, 278 N. W. 888; *Strang State Bank v. Union Lumber Co.*, 120 Neb. 384, 232 N. W. 732.

There is no affirmative evidence as to the condition of the date of issue when this check (more than ten years ago)

was presented to and paid by the drawee bank, now insolvent. We have no definite evidence as to how long this check was held by the drawee bank after its payment or the exact date when it was actually returned to the drawer. We have no evidence that the fact of this payment was ever entered upon the records of this insolvent institution or whether or not it had been at any time carried by this insolvent institution as a cash item. There is evidence in the record that at the time of the appointment of the bank receiver Bachelor's ledger account was erroneous and approximately $100 out of balance. The present condition as to the date of issue of this check first came to light on February 3, 1933. The question then arose on the trial of the case of Luikart, Receiver, v. Bachelor *et al.*, wherein Bachelor challenged the truth of the charge of alteration and emphatically insisted that he had in no manner altered or caused the change to be made in the date of issue of the check. By limitation of this record, essentially so far as questions of fact are concerned, we are restricted to the face and terms of the check, from which we find at most an irregularity. This instrument bears date of July 27, 1931. It is stamped as paid by the drawee bank on January 27, 1931. Thus it clearly appears on the face of this check now, as well as when offered in evidence in 1933, that the date of issue now written thereon is an "impossible date." This in turn invokes the application of the rule: "An impossible date raises a presumption of *ante* or *post* dating; but not of alteration." 1 Ency. of Evidence, 788.

It follows that the only legal purpose served by the introduction of the check in controversy was the establishment of the date and amount of payment made thereon by the drawee bank. This constituted the inherent nature as well as limitation of the proof offered. The effect of its receipt in evidence was to accept it as proof as to date and amount of payment only within the limitation suggested. *Ottens v. Fred Krug Brewing Co.*, 58 Neb. 331, 78 N. W. 622. So considered the date of issue upon this check was wholly immaterial and the check itself was neither a fraud,

nor the employment thereof by an attorney a fraudulent use, for the limited facts it established were strictly consistent with the truth. What actually happened and its actual legal effect controls and governs, and that wholly unaffected by doubts and suspicions, if any, otherwise arising concerning the true purpose of respondent. For it is a well-established rule that "An immaterial alteration is not made material simply by the intent to give thereby a different effect to the instrument, if such intent is not in fact effectuated by the alteration." *Robinson v. Phoenix Ins. Co.*, 25 Ia. 430. Putting the same principle in slightly different form: "If an alteration is immaterial, the intent with which it was made is immaterial." *Fuller v. Green*, 64 Wis. 159, 24 N. W. 907. It follows that we must hold that the record before us wholly fails to establish culpability on part of the accused of the offense charged in the second count of the complaint herein.

The referee has determined that the charge contained in the fifth count of the complaint filed in this proceeding was sustained by the proof adduced, and that the respondent was thereby convicted of unprofessional conduct in violation of the twenty-fifth Canon of Professional Ethics. The subject of the twenty-fifth Canon is "Taking Technical Advantage of Opposite Counsel; Agreements With Him." It is respondent's acts as an attorney at law representing a corporation known as the "Fair Price Oil Company" that are challenged, and the questioned transactions occurred as early as 1932. There are no written records nor any evidence in writing relating to the same contained in the record before us. We have a single witness testifying in behalf of the state, and the respondent is the sole witness in his behalf.

It appears that in the early days of 1932 the Altitude Petroleum Company sued the Fair Price Oil Company for something in excess of $500. With reference to this transaction the attorney for the Petroleum Company testifies as follows: "As I recall it, the first occasion I saw Mr. Bachelor was at the county judge's office; he had filed an answer,

I believe, in the case and, as I said a moment ago, I think the time was early in 1932, and he told me that there was no one present, as I remember; and he asked that I not take judgment against the Fair Price Oil Company. He stated that the company wasn't making any money; that they were going to cease business and sell out what they had on hand, their equipment. He stated that the gas pumps were to be turned back to a company I believe he said was in South Dakota. They had been sold, he said, to the Fair Price Oil Company under conditional sales contract. He further stated that the tin building which was situated on a rented lot and which constituted the service station was being sold to the Coryell Oil Company, I believe, and the only thing they had was some gasoline which was to be sold. He said that after the gasoline tax was paid he thought there would be between three and four hundred dollars left, and that he would pay that entire amount to our law firm as attorneys for the Altitude Petroleum Company."

This proposition was then orally accepted, and the Altitude Petroleum Company "didn't take judgment."

It may be noted, in passing, that section 7-107, Comp. St. 1929, provides in part:

"An attorney or counselor has power; * * * Second. To bind his client by his agreement in respect to any proceeding within the scope of his proper duties and powers; but no evidence of any such agreement is receivable, except the statement of the attorney himself, his written agreement signed and filed with the clerk, or an entry thereof upon the records of the court."

See, also, *Rich v. State Nat. Bank*, 7 Neb. 201; *German-American Ins. Co. v. Buckstaff*, 38 Neb. 135, 56 N. W. 692; *Anderson v. Walsh*, 109 Neb. 759, 192 N. W. 328.

A number of other conversations on this subject were admittedly held between the representative of the Altitude Petroleum Company and the respondent, but lapse of time has necessarily created a lapse of memory on the part of all concerned.

The state's witness testified as follows: "Q. Now, did you later have any conversation with Mr. Bachelor about it? A. Well, it was on the—there was several occasions from that time on until May. I can recall the next to the last and the last occasions, but I don't recall the times in between except that I have a recollection of having gone to see him."

There is no evidence in the record as to the actual amount of gasoline on hand at the time of this oral agreement. We have no proof of the amount of unpaid gasoline tax referred to. We do not know how much money net the Fair Price Oil Company may have received when it sold the gasoline, but the undisputed evidence is that the amount realized therefrom was applied upon its indebtedness, and that Bachelor personally received no part thereof. There is evidence in the record that, after the affairs of the Fair Price Oil Company had been liquidated and its assets exhausted, Mr. Bachelor, personally, orally assumed the duty of making a settlement of the amount due to the Altitude Petroleum Company on account of the gasoline supposedly on hand, out of the proceeds of a certain Michigan real estate mortgage (his own private property) which he hoped to collect, but which subsequently proved uncollectible.

The evidence in this record is silent as to any concealment of facts on the part of Bachelor, or of any absence from this jurisdiction by him. Admittedly no attempt to enforce the claim of the Altitude Petroleum Company other than shown herein has been made as against Bachelor. In this connection there is an unexplained silence of more than seven years. No reason is claimed or shown as to why this matter was not presented to this court promptly, or within a reasonable time, where, in the natural course of events, competent testimony that once must have existed would have been available to have fully disclosed the entire transaction.

Without special reliance upon any of the provisions of our statute of limitations as applicable, but from the entire record, it is obvious that there has been such a natural

impairment of evidence by the effect of passing time that justice and good government will not be furthered or promoted by further consideration of this charge. It is, therefore, considered and adjudged that the same be dismissed with prejudice.

The seventh count of the complaint is based upon the claim "That in March, 1934, one John Dike was a tenant on certain real estate in Frontier county, Nebraska, owned by one R. R. Reed and one E. C. Aegerter; that some rent being in arrears, and suit for possession of the land being threatened, the said Dike employed respondent as his attorney, and gave to him the amount of $125 for the purpose of tender of that amount to the said landlords; * * * that the respondent herein never in fact made said tender as required by his employment but appropriated all of said money to his own use, except the sum of about $35 * * *." The respondent joined issue upon the foregoing allegations.

Upon the evidence adduced the referee, in effect, concludes that the respondent in this transaction is guilty of unprofessional conduct as charged, and that the offense involves moral turpitude.

As to the exact nature and extent of this Frontier county litigation and the factual issues connected therewith, the present record affords us little information. It arose out of the provisions of a certain lease of agricultural lands in Frontier county, Nebraska. The lease is not in evidence, its duration does not appear, the property covered by the instrument is not described with certainty, and the contention of the parties to the litigation are, as set forth in the testimony, indefinite. As to Dike's obligation to pay rent, his testimony is, in part: "Well, I was supposed to give $250 a year but with permission of Dr. Reed (a coowner and lessor) I was allowed to subrent half." This Dr. Reed, testifying as to a reduction of rent to the sublessee, stated: "Well, I suppose the other tenant didn't pay as much. Of course, the lease was made out to Mr. Dike for so much for the pasture rent. He couldn't handle it all.

The other tenant paid direct to me, but it was really up to him (Dike) to see it was paid." Further, "Q. (By attorney for State) In other words, you let the other man pay whatever he wanted because you were looking to Dike? A. Well, the lease was made to him; didn't feel like making any concessions when we had to get him off." Dike, on direct examination, testified that in 1934 he was a tenant on Dr. Reed's farm in Frontier county, and that he became involved in some litigation with the owners of the farm. He further testifies: "I got behind a little in my rent. Some other folks wanted the place; I couldn't find a place so I offered to pay," but an action was commenced against him apparently for possession, and he employed Bachelor as his attorney, no definite compensation being agreed upon. His evidence is that his attorney and himself discussed the proposition about making an offer of settlement, and an attempt to secure a settlement by the attorney was expressly authorized. Dike's testimony is, "He (Bachelor) asked me if I had made a legal tender. I asked him how he meant it, legal tender; he said present the cash; I said no, I had promised Dr. Reed to pay him two year's cash money; he had refused. Mr. Bachelor said, 'You give me the money and I will go and make a cash tender.' * * * Well, I gave him a check for $125. In the meantime Dr. Reed had reduced the rent to the neighbor. The other part of the pasture was $70. Bachelor said it wasn't right to charge one $70 and the other $125. He said, 'If he won't take $70, I will give him $125.' " This answer is reiterated in the following testimony: "Q. What did you say and what did he (Bachelor) say? A. Well, I said I was willing to pay my rent; I was wanting to pay the $125. He says, 'No, that isn't fair to charge one extra and the other $125.' I said, 'I can't get a place; I want to stay; I am willing to pay my rent.' He said, 'I will offer him $70; if he won't take it I will give him $125.' He offered him $70; of course they refused."

The entire record, in connection with the surrounding circumstances of the respective parties, establish that the

facts testified to by Dike constituted a clear agreement that the formal tender of $70 should be made by Bachelor, that it should be kept good by him, and the $55 remaining should be retained by Bachelor to enable him, if possible, to secure and complete a settlement with the landlords on the basis of the payment of the $125 in cash. As to a time limit for performance, the parties agreed upon no definite period, except possibly there is implied a limitation fixed by the final determination of the litigation to recover possession of the occupied premises from Dike, then pending, or shortly to be commenced, which might render further retention of these moneys by Bachelor unnecessary. But until that condition came into existence Bachelor's retention of the funds, under the terms of that understanding, would not involve any violation of his duties as an attorney, and would not, at least *prima facie,* involve any lack of loyalty to his client. There is no question that the tender of the $70 was promptly made by Bachelor to Reed, and that for the purpose of "keeping it good" that amount was deposited with the McCook National Bank, as contemplated by all the parties. Indeed, there is evidence in the record that this deposit in the bank was made in the presence of both of these parties. Some time later this amount was withdrawn from such bank by or in the presence of Dike and Bachelor, and undisputed evidence in the record appears to be that, after such withdrawal, Bachelor and Dike together appeared at the office of Dr. E. T. Molzahn and requested permission to deposit this sum of $70 with him in his safe. The doctor placed or caused this money to be placed in an envelope on which was indorsed a memorandum of the transaction, which together were placed in his safe, and which money was retained by Molzahn for a considerable period of time. Finally, Mr. Dike and Mr. Bachelor appeared together and requested that the money be turned over to them and it was then turned over to Mr. Bachelor and Mr. Dike. The record does not contain any reason for transfer of the money from the bank to the safe of a private individual. However, this court will take judicial no-

tice of the enactment of chapters 16, 17 and 65, Laws 1933, as well as the general conditions existing which, by that legislation, were sought to be remedied. Therefore, on the basis of the testimony presented by the state in support of this count seven, we find no failure on the part of the accused to perform all required acts relative to a legal tender of money entrusted to him by his client for that purpose. But it is agreed on part of all that the tender thus made was not accepted.

The determination of this question of tender, as well as the final conclusion of the litigation with which it was connected, leaves only for our consideration that part of count seven which sets forth that the respondent "appropriated all of said money ($125) to his own use, except the sum of about $35." It will be noted that when the Frontier county litigation had been finally terminated all moneys in the hands of Bachelor or under his control, held for the purpose of making tender or securing a settlement, ceased to have impressed upon them the characteristics of funds held for a special purpose. To the extent of his reasonable charges and disbursements, respondent was entitled to an attorney's lien thereon, as "upon money in his hands belonging to his client." Comp. St. 1929, sec. 7-108. See *Van Etten v. State,* 24 Neb. 734, 40 N. W. 289.

Entitled to full credit for his reasonable charges and disbursements upon the $125 here in dispute, the fundamental question is, did Bachelor overcharge his client Dike in 1934 or the early months of 1935? The evidence upon which the facts are to be determined is entirely oral, and was first produced on trial in January, 1940, in a proceeding first begun in August, 1939. But in its case in chief the state, over objections, was permitted to introduce proof in support of this seventh count that Dike had paid Bachelor $10 on March 27, 1934, and $20 on May 4, 1934. If we assume that these payments, so testified to, were intended by the payer to be applied on attorney fees and disbursements made in the Frontier county cases, which fact it was the state's evident purpose to establish, they, in effect, in-

creased respondent's accountability under count seven of the complaint from the $125 alleged to $155 at the time of trial. These two payments are not covered by the pleading of the state, nor embraced therein. This amounted to a denial of due process to respondent, as he was compelled thereby to meet charges not included in count seven. At least it must be conceded that the proper application of the principle as to "*allegata et probata*" has been ignored. Under these circumstances, if the requirements of good pleading and ordinary rules of procedure are to be deemed waived in this proceeding, evidence tendered by Bachelor of other substantially contemporaneous employments by this client, in addition to the Frontier county cases, should be received and given due consideration, notwithstanding they may not be referred to in his written answer to the complaint.

Bachelor's contention is that a full settlement of this matter of his services to Dike was made, but his evidence, while not in effect retracting or negativing this claim, yet, due to lack of recollection of details, the weight of his testimony is seriously impaired. His proof, speaking generally, is certainly unsatisfactory, possibly due to a failing memory and lapse of time. This failure of memory seems to be exhibited not only by Bachelor, but by Dike also.

Taking up the subject of the $55 which Bachelor was permitted to retain for the purpose, if possible, of making a settlement, Bachelor testifies as follows: "The $55, if I received any portion of that $55, Mr. Dike has my receipt for it. Q. Just a minute here—I want this here; do you deny or admit you received that other $55? A. I don't even deny or admit. Q. You plead *nolo contendere* about getting that $55? A. No, sir; I say if I got any portion of that $55 Mr. Dike has my receipt."

On this subject, Dike testifies, in part, as follows: "Q. Now, did you ever get any part of your $125 back? A. I got some, yes; I don't know just the total. I got a $15 check; I got some $2 in cash, $5 in cash, $10 for rocking chair. Q. Just a minute—there was $15, $2 in cash, $5 in cash, $10

for a rocking chair? A. $4.35 for twenty five gallons of gas, $1.84 for ten gallons of gas, $1.83 for five gallons of gas; there were a few groceries; the Northup store that I haven't any account of, I don't know just what that was. * * * Q. You have testified to getting some groceries; how did that come about? A. Well, we were, of course, very hard up. I kept asking Mr. Bachelor for some money which I knew Dr. Reed had not got. He said, 'My credit is good at Northup's,' and I could get it charged to his account. I forgot how many we did get. Q. Was it enough to pay you? A. No; no, I don't think it was over three or four dollars at a time, and I don't believe over two or three times; I don't remember. Q. Would you say just nine or twelve dollars? A. Somewhere around there, it has been so long ago."

Witness Dike thus makes a dubious admission that he has actually received $52.02, or somewhere around there, on the $55 claim he now makes. As we have seen, it is Bachelor's contention that the $55 item was settled between the parties soon after the cashing of the $125 check in March, 1934; that the items amounting to $52.02 were advanced by him to his client, relying on the $70 of his client's moneys still on deposit as his security. But he also claims that these groceries so furnished by him amounted to between $15 and $20, which would raise the credit to which he is entitled on that score to from $55 to $60. We infer from the entire record that from $10 to $20 of the moneys received by Bachelor from his client was for court costs, and that the same *may* have been paid out by him for that purpose. Dike's evidence is positive that he personally paid but $4 for something which we may assume, without definite proof, to be for costs of litigation. We can take judicial notice that to institute an action of forcible detention in the county court, and try the same in that court, prosecute an appeal to the district court, keep it on the docket of the latter court for some eleven months approximately, and have it terminate with an order of dismissal, will inevitably subject the losing party to a burden of taxed costs. But here we have no reliable evidence as to the amount of these

costs as taxed, how much of the same, if any, was paid by Bachelor, or the actual amount thereof, if any, paid by Dike. The costs actually taxed and paid on these Frontier county cases, if material and relevant to the present proceeding, are a matter of public record, and, assuming the public officers involved have performed their statutory duties, should have been established by unimpeachable evidence. This was not done by either Dike or Bachelor.

Returning now to the payments or advancements admittedly made by Bachelor to Dike, it is obvious that without reference to the conflicting reasons and purposes for their having been made as claimed by these parties, these payments or advancements were actually made and Bachelor is entitled to credit therefor. This reduces the amount of Bachelor's accountability to $70. Against this sum he is entitled to have credited his reasonable charges and disbursements as attorney for Dike, made in the Frontier county cases. These services were not performed in this court, and, as to proof of the extent, nature and value thereof, we are limited to the record before us.

It appears that, after the recital of certain facts pertaining to the duties performed by him in connection with the Frontier county cases, Bachelor gave the following testimony: "Q. Do you have an opinion what the fair and reasonable value of the legal services you rendered Mr. Dike? A. Yes. * * * A. At least $100. Q. And in your answer you claim that you have had a settlement with Mr. Dike; is that true? A. Yes, sir. Q. And did you settle on an agreed basis; reach an agreement which he accepted? A. He accepted it. Q. And so far as you know the transaction was closed, was it not? A. Absolutely. Q. When the settlement was made it was satisfactory to both yourself and Mr. Dike, so far as you know? A. So far as I know. Q. And did he acknowledge it was in full satisfaction? A. He did; to the best of my recollection, I got a receipt, but I haven't had time to go through those. The receipt was given to me when I was out of the office; I haven't gone through those files, but I think some place I have got a receipt. Q. You never

got any money from Mr. Dike to cover your costs that you have testified to, your expenses, your attorney's fees, and advances which have been testified to by Mr. Dike other than the—what was paid in the payments made by Mr. Dike of $125, $10 and $20? A. No; that was all. Q. Just to clear up one thing; how long did Mr. Dike stay on that place after the forcible entry and detainer action was started? * * * A. He stayed until the next year; I think it was about a year or a little more, but I kept him on the place. He moved off—he moved off before the case was finally determined in the district court. * * * Q. When this settlement was made, it was your understanding it was a final settlement of that entire transaction? A. It was a final settlement; yes."

Dike was not recalled after this testimony was given and this proof as to the final settlement stands undenied in the record. It must be conceded that the attorney himself is a competent witness to prove the value of his services performed.

There is also testimony in the record on the subject of the value of the services performed from Lafayette D. Hurley. This witness is an attorney at law. He occupied the same law office with Bachelor during the pendency of the Frontier county cases. He witnessed the office work and office consultation with the client Dike and knew of course the absences from his office by respondent in connection therewith, and the general nature of the services performed. He testified as follows:

"Q. From your own professional knowledge, have you an estimate of the value of Mr. Bachelor's services in that connection? * * * Q. Have you such an opinion? A. I have. Q. Will you state what your opinion is as to the value of Mr. Bachelor's services in the Dike case? A. $150 for the services that he performed in that case."

While this evidence as to value is not necessarily binding on this court, it is competent and for our consideration. There is no other expert evidence in the record on this subject and the evidence, if believed, fully and properly accounts for the entire $125 he is alleged to have misappro-

priated. Indeed, it also includes the additional $30 which was paid him in connection therewith. This is not in the nature of an action to recover back compensation paid to an attorney. Even if so considered, the general rules as to the recovering back of payments made apply to the recovery by a client of fees paid by him to an attorney. It seems in the absence of fraud a client cannot recover a fee voluntarily paid for services fully performed, the beneficial results of which he has received and accepted. It would seem unjust that a bar committee should be permitted to question what is binding upon the client. There is no evidence that Dike ever sought to recover from Bachelor, by legal proceeding, any portion of the fund now claimed, though it must be conceded that to a judgment, if one were obtained based on this claim, there would be no exemptions thereto. Comp. St. 1929, sec. 20-1558.

Bachelor was born on the 22d day of July, 1863; has practiced law since May 21, 1891; and the undisputed evidence is that previous to the filing of the present charges he has never been charged with unprofessional conduct, nor with the commission of a crime. In view of the entire record, we find that the accused is not guilty of the offense charged in count seven, nor guilty of any moral turpitude in connection therewith.

It is, therefore, considered by this court that those parts of the report of the referee in this case wherein it is determined that Bachelor is not guilty of the charges contained in counts three, four, six, eight and nine of the complaint filed herein be, and the same hereby are, approved and confirmed; that the parts of such report wherein Bachelor is adjudged guilty of the offenses charged in counts one, two, five and seven of such information, and his conduct is criticized and questioned as to counts three and eight, be, and hereby are, disapproved and set aside, and as to each of said counts one, two, five and seven, said Bachelor, upon the record before us, is adjudged not guilty.

The motion for his disbarment is, therefore, denied.

JUDGMENT FOR RESPONDENT.

JOHNSEN, J., not participating.

RUDOLPH BLUM, APPELLANT, V. CLARENCE W. TRUELSEN ET AL., APPELLEES.
297 N. W. 136

FILED MARCH 28, 1941. No. 31025.

Judgment. Under the record presented, the doctrine of *res judicata* applies.

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

Paul I. Manhart and *Dewey Hanson,* for appellant.

William R. Patrick, contra.

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

MESSMORE, J.

In the case of *Blum v. Truelsen,* 136 Neb. 896, 287 N. W. 782, a suit on a promissory note against Clarence W. Truelsen and his father, Henry T. Truelsen, for the amount of $1,150, the jury returned a verdict against the son only, in the amount of $874. In the opinion this court said: "It was an open question whether the father signed that note without consideration, and it was submitted to the jury on the evidence, under proper instructions, and the jury found that the son alone was liable on the note. We think we are bound by that verdict." The opinion then discussed the amount of the verdict and analyzed a reason therefor, citing authority from this court to the effect that "When the jury fail to add interest in the verdict returned, the court may make the proper computation and include the amount of the interest in the judgment, without any amendment of the verdict whatsoever." The court held that the verdict and judgment were not sustained by the evidence, and reversed and remanded the case for further proceedings in harmony with the opinion.

It is obvious that the verdict of the jury, releasing Henry T. Truelsen, the father, and the entry of such judgment by the trial court were not disturbed in the opinion. The

opinion further disclosed to the district court that the proper computation should be made; that is, why the cause was remanded for further proceedings in harmony therewith.

The plaintiff filed a motion for rehearing and brief in support thereof, attacking that part of the holding permitting the jury to release Henry T. Truelsen on the note. The motion for rehearing was denied. The mandate of this court was issued to the district court. The district court on a hearing thereon adjudged that the plaintiff recover from Clarence W. Truelsen the sum of $2,138.40, interest and costs, thus computing the amount of the judgment, as required by the opinion.

While the plaintiff contends that the entire case was reversed, he does not assail the recovery as against the defendant Clarence W. Truelsen. Henry T. Truelsen departed this life, and the plaintiff made application to have the district court revive the action in the name of his executor and heirs. This application was denied; hence this appeal, brought for the purpose to again attack that part of the holding in the opinion of *Blum v. Truelsen, supra,* dismissing defendant Henry T. Truelsen from liability on the note.

The plaintiff in this appeal raises the same propositions that were considered in the motion for rehearing, in attacking that part of the judgment releasing Henry T. Truelsen from liability on the note. This court determined the issue so raised when the motion for rehearing was denied.

"It is a fundamental principle of jurisprudence that material facts or questions which were in issue in a former action, and were there admitted or judicially determined, are conclusively settled by a judgment rendered therein, and that such facts or questions become *res judicata* and may not again be litigated in a subsequent action." 30 Am. Jur. 920, sec. 178. In the instant appeal the subject-matter has been fully determined in the opinion in *Blum v. Truelsen, supra,* and by the motion for rehearing therein, and cannot be again litigated.

AFFIRMED.

IN RE ESTATE OF SARAH WULLSCHLEGER STEININGER. BRYAN MEMORIAL HOSPITAL, APPELLANT, V. JOHN F. STEINMEYER, ADMINISTRATOR, APPELLEE.

297 N. W. 159

FILED MARCH 28, 1941. No. 31005.

1. **Trial.** "In outlining the issues to be submitted to the jury, the court should limit the issues to such as are controverted and are supported by evidence. Issues presented by the pleadings, but not supported by evidence, should not be submitted to the jury. To do so is calculated to confuse and befog the real issues of fact which they are to determine." *Koehn v. City of Hastings*, 114 Neb. 106, 206 N. W. 19.
2. **Evidence: NONEXPERT OPINION.** "If the mental condition of a person becomes a material subject of inquiry, a nonexpert witness may be permitted to state his opinion concerning that condition if he is shown to have had a more or less extended and intimate acquaintance with such person and gives the facts and circumstances upon which the opinion is based. The weight to be given such testimony is a question for the jury, to be considered by them in connection with the credibility and intelligence of the witness, and his opportunities for observation." *Kehl v. Omaha Nat. Bank*, 126 Neb. 695, 254 N. W. 397.
3. **Subscriptions.** If the mental capacity of the maker of an "estate pledge" to make such pledge becomes an issue, the question is one for determination by a jury.

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

G. E. Hager, for appellant.

Max G. Towle and *E. R. Smith, contra.*

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

YEAGER, J.

Sarah Wullschleger Steininger died intestate in Lancaster county, Nebraska, on July 11, 1938. Thereafter, John F. Steinmeyer was appointed and duly qualified as administrator of her estate. After the appointment of the administrator, the Bryan Memorial Hospital, hereinafter referred to as appellant, filed a claim against the estate in the amount

of $4,000, which claim was based on a written instrument, and which instrument has been variously denominated an "estate pledge," a "note," a "pledge" and an "agreement." The instrument is in form and content as follows:

"Date Febr. 7 1934 $4,000.00

"Bryan Memorial Hospital
"Lincoln, Nebr.

"In consideration of my interest in the Bryan Memorial Hospital of the Methodist Episcopal Church, and of the gift of Mr. W. J. Bryan and Wife, and of others subscribing to this fund, we severally and jointly, binding our separate estates therefor, hereby pledge and promise to pay to the Treasurer of the Board of Trustees of the Bryan Memorial Hospital, aforesaid, the sum of

Four Thousand and 00/100 Dollars $4,000.00

upon the following terms and conditions:

"1. This pledge shall be due and payable at the time of my decease and shall be paid out of the proceeds of my estate. May at the Donor's option be paid by deeding Real Estate or the assigning of real estate Mortgages or both at the equivalent of the above named amount. Except as it relates to the Gage County Mortgage and the University Place Property.

"2. This pledge shall bear interest at the rate of ....% per annum, from .....192.....

"Witness J. Jacob Name Sarah Wullschleger Steininger Steininger

"Solicitor F. E. Sala (indorsed on margin)"

The administrator filed objections in the county court. A hearing was had and the county court allowed the claim. From the judgment of the county court the administrator, hereinafter to be referred to as appellee, on behalf of the estate appealed to the district court. In the district court the appellant herein filed a petition. To the petition the appellee herein did not file new objections, but by stipulation of the parties it was agreed that the objections filed in the county court, with an amendment allowed in the district court, should stand as the objections to the petition. To the

objections as stipulated a reply was filed. On the issues thus joined a trial was had to a jury which resulted in a verdict and judgment in favor of the objector, appellee herein. From the judgment of the district court, appellant has prosecuted an appeal to this court. Twelve assignments of error are set forth in the brief.

It is urged that the verdict is contrary to the law and the evidence, and complaint is made that the court erred in giving certain instructions and in refusing to give one tendered by the appellant.

Appellant contends that in instruction No. 1 the trial court, instead of setting forth the issues tendered by appellee which found support in the evidence, erroneously set forth all of the claims contained in the objections filed, some of which were not supported by any evidence. Appellant insists that the court should have submitted only those supported by evidence. In order to determine this question it has been necessary to examine the objections and the instruction. The examination shows that the objections are without chronological arrangement; and the instruction, in the statement of the issues tendered, follows quite closely the petition. As we interpret the instruction, it sets forth the following tendered issues:

The claim of the appellant herein should be disallowed for reasons that (1) it is contrary to law, (2) there is no indebtedness, (3) the instrument on which the claim is based was secured by fraud, undue influence and false promises, (4) the instrument was executed upon the express promise that the deceased would receive hospitalization at the hospital of appellant free of charge, and (5) at the time the instrument was executed the deceased was mentally incompetent to make the pledge represented by the instrument.

In the same connection appellant states that the trial court, in instruction No. 3, attempted, but ineffectively, to define and limit the issues presented by No. 1. Instruction No. 3 limited the consideration of the jury to three of the grounds of objection set forth by appellee. They are: (1)

That the pledge was secured from the deceased by the exercise of undue influence by an agent or agents of appellant; (2) that, at the time the pledge was signed and executed, deceased was mentally incompetent to make the pledge; and (3) that the pledge was secured from the deceased upon a promise of an agent or agents of the appellant that she would receive care and hospitalization during her lifetime without cost to her, which was refused. It is urged also that this instruction defines issues unsupported by evidence.

A determination of this question has required an examination of the entire record in this case. In the light of the conclusion arrived at from the examination of the evidence, it is not necessary to discuss the question of whether or not instruction No. 1 submits issues broader in scope than those submitted in instruction No. 3, since it is clear that instruction No. 3 clearly submitted issues not supported by any evidence.

As already pointed out, the court submitted the objection that the pledge was secured from the deceased by the exercise of undue influence, and also the objection that it was obtained under an agreement for hospitalization, which agreement was breached. Was there any evidence to support these two propositions? We think not.

On December 27, 1924, on the solicitation of F. E. Sala, the deceased signed an estate pledge payable to the appellant out of her estate after death for $7,000. On February 7, 1934, she signed the pledge which is the basis of this action for $4,000, whereupon the first pledge was surrendered under a written promise by deceased that, if at any time during her lifetime she was in a position to do so, she would pay the $3,000 waived in the new pledge or the one for $4,000 made in 1934. The action is on the 1934 obligation, but all of the evidence as to undue influence, and as to agreement for hospitalization, relates to the 1924 obligation which was canceled by the 1934 obligation, and there is no word of direct testimony or competent testimony from which a reasonable inference could be drawn that conditions attaching to the first instrument should attach to the second.

The only information the record discloses as to execution and delivery of the second instrument is that deceased, with her husband, went to the office of Ernest M. Bair in the Citizens Bank at University Place, and there executed the instrument and took it away with her, and that some time after F. E. Sala delivered it to the hospital. How, when or under what circumstances the instrument came into the hands of Sala is not disclosed in the evidence. Appellee inferentially denies that the instrument was signed at the place and under the circumstances testified to, but offers no other explanation or information.

The only evidence bearing on the question of undue influence was to the effect that in 1934 the attitude of deceased toward church, religion and ministers was such that she could be subjected to undue influence. The only evidence relating to an agreement for hospitalization was by witnesses, relatives of deceased, and to the effect that the agent of the appellant had come to them and urged that they make pledges to the hospital, and that if they would do so then the hospital would agree to furnish to them free hospitalization the same as it had agreed with the deceased. These occurrences testified to were after the pledge of deceased made in 1924, but years before 1934. In addition, witnesses were allowed to testify, over objection, substantially, that deceased stated during the latter days of her life that she would have nothing further to do with the hospital, that she had paid her bills and that she owed the hospital nothing, and that the hospital had not kept its agreement with her. What agreement she had in mind is not identified.

It becomes clear then that the trial court submitted issues for determination which were not supported by any evidence. That this was error can hardly be questioned. This court said in *Koehn v. City of Hastings*, 114 Neb. 106, 206 N. W. 19: "In outlining the issues to be submitted to the jury, the court should limit the issues to such as are controverted and are supported by evidence. Issues presented by the pleadings, but not supported by evidence,

should not be submitted to the jury. To do so is calculated to confuse and befog the real issues of fact which they are to determine." This holding has been followed in the later cases of *Lewis v. Miller,* 119 Neb. 765, 230 N. W. 769; *Stiefler v. Miller,* 120 Neb. 6, 231 N. W. 153; *Miller Rubber Products Co. v. Anderson,* 123 Neb. 247, 242 N. W. 449.

On account of the error contained in instruction No. 3, without further discussion of instruction No. 1, a reversal of this case is required. We are of opinion though that the case must be remanded for a new trial. The evidence indicates that the objection that deceased was incompetent to make the pledge for $4,000 in 1934 was a proper issue for submission to a jury. Several witnesses closely associated with the deceased, who related the history of their associations and acquaintances with deceased, were allowed to, and did, express opinions as to whether or not deceased was mentally competent to execute such an obligation at the time this one was executed. Some on behalf of appellee expressed the opinion that she was not competent, and, on the other hand, some on behalf of appellant expressed the opinion that she was. This evidence presented an issue for determination by the jury on the former trial, and will require submission and determination on a new trial of the case.

In *Kehl v. Omaha Nat. Bank,* 126 Neb. 695, 254 N. W. 397, this court said: "If the mental condition of a person becomes a material subject of inquiry, a nonexpert witness may be permitted to state his opinion concerning that condition if he is shown to have had a more or less extended and intimate acquaintance with such person and gives the facts and circumstances upon which the opinion is based. The weight to be given such testimony is a question for the jury, to be considered by them in connection with the credibility and intelligence of the witness, and his opportunities for observation." The rule as announced in this case was approved and followed in *In re Estate of Bartmess,* 128 Neb. 408, 258 N. W. 877; *Davidson v. First American Ins. Co.,* 129 Neb. 184, 261 N. W. 144; *Bankers Life Ins. Co. v. Aron,* 133 Neb. 187, 273 N. W. 280.

This determination upon the issues presented by instructions discussed and the evidence renders unnecessary a decision upon the other assignments of error. Most of them are disposed of by this determination. Those not disposed of are not likely to arise on a new trial. A discussion of them here would be academic and would serve no useful purpose.

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

REVERSED.

STATE, EX REL. PHOENIX LOAN COMPANY, APPELLANT, V. FRANK MARSH, SECRETARY OF STATE, APPELLEE.
297 N. W. 551

FILED APRIL 7, 1941. No. 31223.

1. **Appeal.** This court has the inherent power in the exercise of its appellate jurisdiction to award an injunction for the purpose of protecting the subject-matter of an appeal and preserving the *status quo* of the parties in their relation thereto, where the judgment finally rendered would otherwise be ineffectual and moot.
2. ———. Such power will not be exercised by the court unless it is indispensable to the protection of the rights of the party asking it and the means are at hand to fully protect the rights of adverse parties.
3. ———. Where it is shown that irreparable damage will result to the applicant if a restraining order be not granted pending the appeal, and it appears that a bond will afford ample protection to adverse parties, a restraining order may properly issue in aid of the appellate jurisdiction of the court upon the giving of a bond conditioned as required by the court.

APPEAL from the district court for Lancaster county: ELLWOOD B. CHAPPELL, JUDGE. *Motion for injunctive relief sustained.*

Leon, White & Lipp, Bernard S. Gradwohl and *Loren H. Laughlin,* for appellant.

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

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

CARTER, J.

This is an application for injunctive relief pending appeal. The record shows that the relator, Phoenix Loan Company, is a corporation engaged in the business of making chattel loans pursuant to the provisions of sections 45-112 to 45-123, inclusive, Comp. St. 1929, and by reason of a license issued thereunder. On February 28, 1941, the respondent, secretary of state, refused to issue upon application, and after a hearing, a renewal license to relator to engage in the small loan business for the year commencing March 1, 1941. Relator thereupon commenced this action for a peremptory writ of mandamus requiring the respondent to issue the license, and that in the interim a mandatory restraining order issue enjoining the respondent from interfering with or molesting the relator's business or from prosecuting any criminal or other complaint or proceeding arising out of the refusal of respondent to issue the license pending a hearing on the merits. The trial court issued the restraining order as prayed. On April 1, 1941, after a trial on the issues, the trial court entered a decree dismissing relator's petition, dissolving the temporary mandatory restraining order and denying a peremptory writ of mandamus. From this decree relator appeals. The application for injunctive relief pending appeal was thereupon filed in this court.

It is the contention of relator that, unless its business is protected by this court pending the appeal, large financial loss will be sustained and its investments and patronage imperiled. It is pointed out that relator has conducted a small loan business at 1713 Jackson street, Omaha, Nebraska, under a license granted by respondent's predecessor in office; that it has loans outstanding in excess of $75,000 and has made a substantial investment in money,

time and effort. It has also committed itself to leases and contracts which will likewise be placed in jeopardy if the continuity of relator's business is interrupted. Relator also alleges that it is a criminal offense to engage in the small loan business without a license and all loans made pursuant to the terms of the statute, chapter 45, Comp. St. 1929, are uncollectible at law or in equity either as to principal or interest, if a license therefor be not obtained. Relator alleges that it will be compelled to suspend business and suffer irreparable damage unless the relief prayed for is granted and, if such prayer be not granted, any relief resulting from the appeal will be empty, ineffective and moot.

We are of the opinion that an appellate court has the inherent power to issue such supersedeas or restraining orders as may be necessary to protect or enforce its jurisdiction, or to protect the *status quo* pending the appeal to prevent irreparable pecuniary damage. And as the same right necessarily exists in the district court, the appellate court may, in a proper case, when such restraining order has not been dissolved by the district court, continue in force the orders of the district court having for their objective the same purposes during the pendency of the appeal.

In a similar case in the federal court, the following situation existed: The postmaster general issued an order barring certain publications of the Masses Publication Company from the mails. The United States district court, after suit was brought in that court to test the validity of the order, granted an injunction *pendente lite* and the defendant appealed. In overruling the motion to stay the injunction, and ordering the stay continued in force, the court said:

"Such stays, granted by the trial judge, are not uncommon; I have, myself, awarded not a few. They rest on the belief that doubtful questions of law, or difficult contests of fact (or both) are presented by the record, and that the relations of the parties, or exigencies of business are such that (perhaps by the giving of security) no injury will

result from letting matters remain in *statu quo* (except for opinion filed) until decisive action can be had in the court of appeals.

"There can be no difference in principle, between such an application to the trial judge, and a similar one addressed to a member of the appellate court. * * *

"Defendant's situation, however, is quite different. The order appealed from, if complied with, fulfils the whole object of suit. If reversed, no restitution or restoration of *status quo* is possible; and in my judgment the appeal becomes a futility, presenting to the appellate court nothing but an interesting moot point. * * * I * * * therefore strongly incline to the view that this is the rare instance in which an appeal without a stay is not only futile, but legally impossible; yet the statute gives the absolute right of appeal." *Masses Publishing Co. v. Patten,* 245 Fed. 102, 157 C. C. A. 398.

In *Union Sawmill Co. v. Felsenthal Land & Townsite Co.,* 84 Ark. 494, 106 S. W. 676, the court said: "It has been the practice of this court to issue injunctions *pendente lite* or writs of supersedeas pending litigation, when the justice of the case required the *status quo* to be preserved."

In *Northwestern Improvement Co. v. McNeil,* 98 Wash. 1, 167 Pac. 115, it appears that the trial court issued a restraining order when suit was started, but sustained a demurrer to the petition and refused a temporary injunction when the case was heard on the merits. The dissolution of the restraining order was not superseded by the appeal. The court, in sustaining an application for a supersedeas continuing the restraining order in effect pending the appeal, said: "That this court has inherent power to grant, in aid of its appellate jurisdiction, writs of this character is settled law in this jurisdiction. * * * The power, however, is one that will be exercised with caution, and only in those cases where such an order is necessary to preserve the fruits of the appeal in the event that the appeal should prove successful."

In *Bier v. Clements,* 95 Wash. 505, 164 Pac. 82, the court,

in granting a restraining order pending an appeal from an order denying an injunction, said: "We think that little need be said, in view of the facts we have above noticed, to show that, in the exercise of its sound discretion, this court should now make such order as will effectually restrain respondents from proceeding further in the signing, sealing, execution, issuance or negotiation of the bonds in question pending the disposition of this case upon appeal. No material hardship can come to respondents by such a supersedeas, while great and irreparable injury might result to appellant for want of such a supersedeas, in view of the fact that the bonds proposed to be issued are negotiable in form and apparently will carry upon their face such evidence of their negotiability, regularity, and power of the county officers to issue them as to render it highly probable that they would become absolute binding obligations evidencing a debt of Benton county, if they should fall into the hands of innocent holders."

In a similar case the supreme court of Washington said: "Without further reviewing the showing as to the damage incident to the denial of this application to the logging company, because of the stopping of its logging operations and its consequent inability to fulfil its contracts for the delivery of logs, and the character and amount of damage to respondent's lands because of their value and character in the operation of the logging railway, it appears to us that the application should in justice and equity be granted. It must be recognized as an established rule in this state that a trial court cannot be required, as a matter of strict right, to grant an order staying a prohibitory injunction pending an appeal to this court. That it has an inherent discretionary power so to do is recognized by *State ex rel. Burrows v. Superior Court*, 43 Wash. 225, 86 Pac. 632, and *Lund v. Idaho & Washington N. R.*, 48 Wash. 453, 93 Pac. 1071. The power being discretionary, will not be controlled by the mandate of this court; and hence, upon its denial, this court must act, if at all, in aid of its appellate jurisdiction. That this court, in aid of its appellate jurisdiction or

in the exercise of its original jurisdiction, has all the inherent equity powers of the lower court in the exercise of its jurisdiction will hardly be denied. It was so held in *State ex rel. Barnard v. Board of Education,* 19 Wash. 8, 52 Pac. 317, 67 Am. St. 706, 40 L. R. A. 317, and in the *Lund* case where, after an appeal had been perfected from a decree granting a prohibitory injunction, this court entered its order suspending the injunction during the pendency of the appeal, being moved so to do in order to maintain the existing status and to preserve the fruits of the appeal to appellant." *Campbell Lumber Co. v. Deep River Logging Co.,* 68 Wash. 431, 123 Pac. 596. See *Gibbons v. Ross,* 167 S. W. (Tex. Civ. App.) 17; *Houston, B. & T. Ry. Co. v. Hornberger,* 141 S. W. (Tex. Civ. App.) 311; *Cohen v. L'Engle,* 24 Fla. 542, 5 So. 235; *Goodall v. Brite,* 1 Cal. (2d) 583, 36 Pac. (2d) 190; *Tulare Irrigation District v. Superior Court,* 197 Cal. 649, 242 Pac. 725.

An authoritative text states the rule as follows: "While, as already shown, appellate courts or judges are ordinarily not vested with original jurisdiction in the matter of granting injunctions, express authority being necessary for the exercise of such jurisdiction, such a court may in the exercise of its appellate jurisdiction award an injunction for the purpose of protecting the subject-matter of the appeal, and preserving the *status quo* of the parties in their relation thereto, so that the judgment rendered will not be ineffectual. Nevertheless, the power to issue the injunction should not be exercised unless it is indispensable to the protection of the rights of the party asking it." 32 C. J. 289.

We think the case before us is one which warrants the protective action of this court. Unless a restraining order be issued, the property of relator will be irreparably damaged and imperiled, and any relief obtained by the appeal would be ineffectual and moot. The rights of the respondent can be protected by a bond, properly conditioned and ample in amount. While it is true that the issuance of a restraining order pending an appeal to protect or enforce the

jurisdiction of the court, or to protect the *status quo* of the parties to prevent irreparable pecuniary damage, should be sparingly used, yet in a proper case if the purposes of justice require it and the means are at hand to fairly protect the appellee, such powers of the court should be exercised to make the appeal effectual.

For the reasons herein stated, the respondent will be temporarily restrained during the pendency of the appeal from in any manner interfering with or molesting the relator in connection with its small loan business and from prosecuting any complaint or proceeding arising out of the denial by said respondent on February 28, 1941, of a license to carry on said business, upon giving bond in such amount and conditioned as required by the restraining order issued herewith.

MOTION FOR INJUNCTIVE RELIEF SUSTAINED.

NELL G. LANGDON, APPELLEE, V. LOUP RIVER PUBLIC POWER DISTRICT, APPELLANT.

297 N. W. 557

FILED APRIL 9, 1941. No. 31015.

1. **Affirmance.** The record is examined and the judgment of the trial court holding void and canceling an option is affirmed.
2. **Contracts.** In an action in equity for rescission or cancelation, the failure to return or offer to return the consideration will not preclude relief, where the consideration is merely money paid, the amount of which can be credited in partial cancelation of the injured party's claim, and where it is patent that a tender, if made, would be rejected, an equity court having jurisdiction to award relief to both the plaintiff and defendant, and to specify the conditions under which relief will be granted.

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

Francis P. Matthews, William P. Kelley, August Wagner and *C. N. McElfresh,* for appellant.

Crofoot, Fraser, Connolly & Stryker, contra.

Heard before SIMMONS, C. J., ROSE, PAINE, MESSMORE and YEAGER, JJ., and CHAPPELL, District Judge.

SIMMONS, C. J.

This case presents three questions which may be outlined as follows:

1. Did the court err in rendering a decree holding void and canceling an option for an easement?

2. Did the court err, while holding the case under advisement, in permitting the plaintiff to withdraw her rest and offer evidence of a tender to return the consideration paid?

3. Did the court err in retaining jurisdiction to enter "further orders"?

Plaintiff is the owner of farm land, suitable for suburban development, near the city of Omaha. November 25, 1938, the plaintiff and her husband executed an agreement granting an option to the defendant for one year for a right of way and perpetual easement for the construction and maintenance of a transmission line across her property. The consideration paid for the option was one dollar. The price to be paid for the easement was fixed by schedule in the option and included, "Two Pole Structure in Cultivated Land * * * 20." The amount paid for the option was to be credited on the final settlement. In the spring of 1939, defendant tendered the easement for execution, together with $19 to pay for one structure. On several occasions plaintiff and her husband refused to sign the easement. Defendant recorded the option and, without the actual knowledge of the plaintiff, entered upon the land and built the structure and transmission line.

Shortly after plaintiff discovered that the line had been built, she filed her petition, praying that the option be declared null and void, and the cloud of the option removed from her title to the land; that defendant be required to remove the transmission line or institute condemnation proceedings; prayed for damages in the sum of $5,000, and for equitable relief.

The petition is based upon the proposition that one Clark, agent of the defendant, by false and fraudulent representations of material facts which were believed and relied upon by plaintiff and her husband, induced plaintiff and her husband to execute the option. These false representations were alleged to be that the line was being built by the government; that it had fixed the price of the right of way payments; that the plaintiff could not successfully oppose the government; that practically all landowners along the right of way had signed similar options; that the wires would be 60 feet in height; that there would be no danger therefrom; that the construction would enhance the value of the land because of the availability of cheap electricity; that the construction would not depreciate the value of the property; that the line would not be constructed on the east 20 acres of the tract, which was considered by the plaintiff to be the most desirable for a building site; that the option was a preliminary paper and that the more important paper would be the easement. The petition then sets out wherein the representations were false; the plaintiff's reliance upon the representations; the refusal to sign the easement; the construction of the line without permission, in part across the east 20 acres of the tract, and her damage.

Defendant alleges the execution of the option, the tender for execution of the easement and the balance due thereunder, the construction of the line, and denied generally the allegations of the petition. By cross-petition, defendant pleads full performance of the option contract, and prayed for specific performance of the option agreement and equitable relief.

The matter was tried on the 24th and 25th of January, 1940. Subsequent thereto the court made general and special findings in favor of the plaintiff, and particularly found that the option was obtained by means of false and fraudulent misrepresentations of fact which were relied upon by the plaintiff. The court declared the option void, and ordered the defendant to remove its structures unless

within 60 days it instituted and prosecuted condemnation proceedings and complied with the final order therein. Defendant's cross-petition was dismissed.

The first question presented is the sufficiency of the evidence to sustain the judgment. It will not be reviewed in detail. In the main, plaintiff's evidence sustained and defendant's evidence denied the allegations of the petition. It was in conflict on most questions of fact. In many general respects it was similar to that reviewed by this court in *Sic v. Loup River Power District,* 136 Neb. 506, 286 N. W. 700. The evidence was sufficient to sustain the conclusion of the trial court and no sufficient reason appears to set that conclusion aside.

The second question presented arises from the following situation. Plaintiff did not plead a rescission or an offer to return the consideration of one dollar which was paid when the option was executed. At the close of the trial, January 25, 1940, both parties rested and the case was taken under advisement. On February 13, 1940, and before the court had announced a decision, plaintiff filed a motion to withdraw her rest and to introduce further evidence. Over objection of the defendant, the motion was granted. It was thereupon stipulated that on February 12, 1940, plaintiff tendered one dollar to defendant, and the tender was refused, and that such a tender prior thereto had not been made. It does not appear that this question of a tender was called to the attention of the court or plaintiff prior to the taking of the case under advisement. From the briefs in this case, we gather that this situation (described by the defendant as a "legal defect") was first raised, after the parties had rested, in defendant's brief to the trial court. Be that as it may, defendant contends that this action was an irregularity and an abuse of discretion, prejudicial to the defendant. Defendant does not contend that, had a tender been made either before or during trial, it would have been accepted, nor does defendant contend that it has in any way changed its position as a result of the failure to tender a return of the consideration. Obviously

the defendant would not have accepted the tender if it had been made before or during the trial of the cause.

The giving of a notice of rescission was not necessary. This court has held: "When a party seeks to rescind a contract by his own act, he must give the other party notice; but when he seeks the aid of a court for that purpose, the bringing of the action is sufficient disaffirmance for the purpose of the action." *Geise v. Yarter*, 112 Neb. 44, 198 N. W. 359. See, also, *Edgar v. Skinner Packing Co.*, 112 Neb. 752, 200 N. W. 992.

Was it necessary, under the facts alleged by plaintiff, to plead and prove a tender, as a repayment, of the consideration?

This court has said: "That which the attitude of the party to whom tender is due unmistakably shows to be vain and useless may be dispensed with in rescission cases of this kind." *Prime v. Squier*, 113 Neb. 507, 203 N. W. 582.

The better rule appears to be that, in an action in equity for rescission or cancelation, the failure to return or offer to return the consideration will not preclude relief where the consideration is merely money paid, the amount of which can be credited in partial cancelation of the injured party's claim, and where it is patent that a tender, if made, would be rejected, an equity court having jurisdiction to award relief to both the plaintiff and defendant, and to specify the conditions under which relief will be granted. Restatement, Contracts, sec. 480; 5 Pomeroy, Equity Jurisprudence (2d ed.) 4764; 13 C. J. 621; 17 C. J. S. 921, sec. 439; 12 Am. Jur. 1031, sec. 451. Under the facts of this case, no equitable reason exists to require the plaintiff to do more than she has done. No prejudice to the substantial rights of the defendant has occurred.

The third question presented arises as follows: The trial court at the conclusion of its decree stated: "The court retains jurisdiction of this case for the purpose of entering any further order that it may deem necessary in the premises, and for the purpose of awarding to plaintiff

a reasonable sum for rental value for the use of her property during the period defendant has maintained its structures and transmission lines on and across the property of plaintiff without right or authority."

Plaintiff does not complain that the trial court failed to dispose of the litigation in a manner satisfactory to her. No reason appears for the court to retain jurisdiction to enter further orders. It does not appear, nor should it be inferred, that the defendant will fail or refuse to obey the decree of the court. The question of the value of the use of the premises was not an issue at the trial. Evidence was not offered on that question. Additional questions that may arise between the parties should be determined on proper pleadings and evidence and not upon a reservation of jurisdiction for further orders. This part of the decree is considered to be improper and it is set aside.

AFFIRMED AS MODIFIED.

FEDERAL LAND BANK OF OMAHA, APPELLANT, V. LYDIA M. PLUMER, APPELLEE.

297 N. W. 541

FILED APRIL 9, 1941. No. 30978.

1. **Husband and Wife.** Where the contract of a married woman does not in express terms bind her separate estate for payment of a debt partially secured by a mortgage in which she is a mortgagor, the question of her intention to do so, if put in issue by pleadings in a foreclosure suit, must be determined as a fact from all the evidence and the surrounding circumstances.
2. **Mortgages.** The legislative act of 1933, taking from the district courts the power to enter a deficiency judgment in a foreclosure suit, does not apply to a mortgage executed before that restriction was imposed and was not then due nor in litigation. Comp. St. Supp. 1939, sec. 20-2141.

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

Franklin L. Pierce, Philip M. Wellman, William W. Graham and *Moran & James,* for appellant.

William H. Pitzer and *Marshall Pitzer, contra.*

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

ROSE, J.

The question for determination is whether Lydia M. Plumer, defendant, bound her separate estate for the payment of a 25,000-dollar loan procured by her from the Federal Land Bank of Omaha, plaintiff. The loan was evidenced by a note for that amount and secured by a mortgage on the east 320 acres of section 7, township 8 north, range 12, Otoe county. Both instruments were dated February 24, 1927, and signed by Lydia M. Plumer and her husband, Lee E. Plumer, the former name above the latter. For defaults in payments of debt and interest due on the mortgage, the district court for Otoe county, at the suit of plaintiff, decreed foreclosure May 11, 1937. Under the decree the sheriff sold the mortgaged land to plaintiff December 5, 1938, and the sale was confirmed December 9, 1938. The debt, interest and costs exceeded the purchase price to the extent of $10,425.83. For this deficiency plaintiff sought by motion to recover a judgment against Lydia M. Plumer. The issues of coverture and of personal liability of the wife for the deficiency were raised by pleadings. The trial court heard the parties at length, made findings in favor of Lydia M. Plumer and overruled the motion for a deficiency judgment. Plaintiff appealed.

Plaintiff contends that defendant, Lydia M. Plumer, procured the loan personally and secured it by mortgage on her own land; that she incurred the debt in the course of her separate business or occupation and on the faith and credit of her separate property; that she contracted the debt with reference to farming in which she was engaged on her own account at the time she borrowed the $25,000 from plaintiff; that the evidence so proves and that the judgment to the contrary cannot be permitted to stand. Plaintiff relies on proof of these facts and on the following provisions of statute:

"A married woman, while the marriage relation subsists, may bargain, sell and convey her real and personal property, and enter into any contract with reference to the same in the same manner, to the same extent, and with like effect as a married man may in relation to his real and personal property." Comp. St. 1929, sec. 42-202.

"Any married woman may carry on trade or business, and perform any labor or services on her sole and separate account; and the earnings of any married woman, from her trade, business, labor, or services, shall be her sole and separate property, and may be used and invested by her in her own name." Comp. St. 1929, sec. 42-203.

In support of the judgment below counsel for Lydia M. Plumer, defendant, calls attention to the statute which provides:

"The property, real and personal, which any woman in the state may own at the time of her marriage, and the rents, issues, profits, or proceeds thereof, and any real, personal, or mixed property, which shall come to her by descent, devise, or the gift of any person except her husband, or which she shall acquire by purchase or otherwise, shall remain her sole and separate property, notwithstanding her marriage, and shall not be subject to disposal of her husband, or liable for his debts." Comp. St. 1929, sec. 42-201.

In connection with the law thus quoted, reference is made by counsel for defendant to evidence tending to prove the following facts: The note and mortgage were signed by both wife and husband. The land mortgaged was the husband's estate by title from his parents, not from her parents. He conveyed it to his wife by deed June 21, 1919, without consideration. The deed was recorded without her knowledge June 23, 1919. She never had possession of the deed. The title was reconveyed by her to her husband February 20, 1928, without consideration. Plaintiff was notified of the transfer. The husband, Lee E. Plumer, assumed the mortgage and requested notice of maturing instalments of the debt. The wife, Lydia M. Plumer, never made any payments on the note or mortgage nor was she

ever asked to do so. She testified that in executing the note and the mortgage she had no intention of charging her separate estate with the debt evidenced by the note; that she understood her separate estate to be property in her own name and that she did not consider the mortgaged land a part of her separate estate. Neither the note nor the mortgage executed by defendant contained a clause binding her separate estate for repayment of the loan. Defendant was in possession.

From testimony tending to prove the facts outlined and from documentary evidence of similar import, counsel for defendant argue that inquiry of defendant while in possession of the land would have elicited knowledge that the property mortgaged did not belong to her separate estate and that the real owner was her husband, Lee E. Plumer; that plaintiff did not rely on her ownership of the property as security or look to her separate estate for payment of the note and mortgage; that she held title for her husband to procure a loan for payment of his debts; that the land was his; that he was the principal debtor, his wife at most a surety, binding herself only to the extent of her interest in the identical land encumbered by the mortgage.

The position thus taken is defended by impressive argument, but the evidence on the other side of the controversy also must be examined before a conclusion is reached. Where the contract of a married woman does not in express terms bind her separate estate for payment of a debt partially secured by a mortgage in which she is a mortgagor, the question of her intention to do so, if put in issue by pleadings in a foreclosure suit, must be determined as a fact from all the evidence and the surrounding circumstances. *Fidelity & Deposit Co. v. Lapidus*, 136 Neb. 473, 286 N. W. 386. It is shown by the evidence that when Lydia M. Plumer, defendant, applied to plaintiff for her loan February 2, 1927, and when she signed the note and the mortgage February 24, 1927, she was individually engaged in farming on her own account and in her own name. In that enterprise she owned extensive farm lands

and farming implements. She herself engaged tenants and collected rents, sold her crops and received checks in payments. The title to the mortgaged land stood in her own name on the public records from the time she acquired it in 1919 until she reconveyed it to her husband February 20, 1928. The record contains nothing to indicate her husband was not free to transfer this land to his wife as a gift in 1919. The application to plaintiff for the loan was made by defendant herself in her individual name. She offered her 320 acres of land as security for the 25,000-dollar loan. In the application she made in substance the following statements over her own signature: Was in possession of the land; knew of no claims that might give rise to any adverse claim of possession; indebtedness incurred for agricultural purposes totaling $22,200 owing to the Union Central Life Insurance Company, Farmers Bank of Dunbar and Otoe County National Bank, to be paid with proceeds of loan; occupation or business, farming; owned 4,280 acres of land valued at $312,000; owned farming implements sufficient to farm 800 acres; income from lands for 1925, $12,000. The statements in the application were guaranteed to be true and correct. The loan was granted. The following facts are also shown by the evidence: From the proceeds of the loan plaintiff deducted $1,250 for land bank stock and drew its check payable to "Lydia M. Plumer and A. E. Stocker, Secy, Treas." for $23,750. The check was indorsed by both payees and deposited in the Otoe County National Bank to the credit of "Lydia & Lee Plumer," less $250 for association charges, a credit of $23,500. From funds in this deposit two or three notes owing by Lee E. Plumer to the Otoe County National Bank were paid and individual notes aggregating $16,360 owing by Lydia M. Plumer to the Otoe County National Bank were also paid from the same funds. Among them was a note for $14,260, signed alone by her. She testified, however, that it was given to take up an indebtedness of her husband. It was nevertheless her obligation to the bank. She testified also that she did not get any proceeds of the

other notes or of the loan. This testimony was given after the spirited controversy over her personal liability for the 25,000-dollar debt arose. Previous documentary evidence over her own signature that her loan was procured for her agricultural purposes still remains.

It would be ascribing too much to foresight to infer from the facts and circumstances of this case that the husband deeded his 320 acres of land to his wife June 21, 1919, for the purpose of enabling her to procure for him a loan February 24, 1927. She made use of her title, possession and ownership to procure the loan in her own name as evidenced by her statements over her own signature. It seems more reasonable to infer that her title was absolute as it was used by her and as shown by the public records and by her own conduct. An inference that inquiry of her, while in possession of the land before the loan was made, would have elicited the fact that her husband was the real owner is not warranted by the circumstances. Such a disclosure would quite likely have prevented the loan. It seems more logical to infer that inquiry would have elicited what is stated in her application.

Examination and consideration of all the oral testimony and the documentary proofs lead to the conclusion that the preponderance of the evidence requires findings that Lydia M. Plumer, defendant, owned in her own name and in her own right the 320 acres of land described in the mortgage when executed; that she contracted the debt evidenced by the note with reference to her separate property and with reference to her own trade or business; that she intended to bind her separate estate for payment of the note and mortgage and did so.

The legislative act of 1933, taking from the district courts the power to enter a deficiency judgment in a suit to foreclose a mortgage, does not apply to the present case for the reason the mortgage was executed before that restriction was imposed and was not then due nor in litigation. Comp. St. Supp. 1939, sec. 20-2141; *Filley v. Mancuso*, 135 Neb. 403, 281 N. W. 850.

The judgment is reversed and the cause remanded to the district court, with directions to enter a deficiency judgment in favor of plaintiff and against Lydia M. Plumer, defendant, for the deficiency shown by the record as it now stands.

REVERSED.

IN RE ESTATE OF BEN F. VETTER.
WILLIAM A. STEWART, JR., EXECUTOR, APPELLANT, V. DELLA CRAIG VETTER, APPELLEE.
297 N. W. 554

FILED APRIL 9, 1941. No. 31132.

1. Appeal. Section 30-808, Comp. St. 1929, means that an executor is not required to give bond when he appeals in his representative capacity, but if he appeals to protect his individual interests he is required to give bond, the same as any litigant.
2. ———. The right of an executor to appeal without giving an appeal bond is properly raised by a motion to dismiss.

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

Allen, Requartte & Wood, T. W. Carroll, Jr., and *William A. Stewart, Jr.*, for appellant.

Frank M. Johnson, contra.

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

PAINE, J.

This case comes before this court at this time on a motion of the attorney for Della Craig Vetter, in which he moved the court to dismiss the appeal of the executor of the estate of Ben F. Vetter, deceased, on the ground that the executor failed to furnish an appeal bond, under section 20-1914, Comp. St. 1929. The motion is resisted by the executor on the ground that he is not required to file an appeal bond, under section 30-808, Comp. St. 1929.

The transcript sets out the proceedings in the county court for Dawson county. From this county court transcript, it appears that an antenuptial agreement was made March 5, 1934, between Ben F. Vetter, of Lexington, and Della Craig, in which antenuptial agreement appears a paragraph saying that if at any time during the marriage relation differences arise, so that they cannot live together as husband and wife and have any peace of mind, and that a separation must necessarily take place, the parties agree to waive all right, claim, or interest in and to the property of the other, both real and personal, and agree to release the other upon demand from any obligation to support, and, in case of divorce, from all obligations to pay alimony.

On March 8, 1934, the parties were married. On November 10, 1938, Ben F. Vetter executed his last will and testament, in the second paragraph of which he gave his wife their home in Lexington, with all household goods therein, and gave to his attorney, William A. Stewart, Jr., $15,000 in trust for the use and benefit of his wife, Della Craig Vetter, the income thereof to be paid her during life, and at her death said $15,000 should be divided among his heirs, as set out in the residuary clause.

On June 12, 1939, the said will was admitted to probate, and on October 17, 1939, the widow filed an election, refusing to accept the provisions of the will, and electing to take the widow's allowance and homestead, and all other provisions to which she was entitled under the law, to which election William A. Stewart, Jr., the executor, objected and alleged that the antenuptial agreement was a valid and binding contract, and that her attempted election was void.

In her answer she alleged that the antenuptial agreement was void, because it was not fairly or honestly made; that he had neglected to disclose to her his property; that she went to the office of William A. Stewart, Jr., in Lexington, about 8 o'clock in the evening, and signed said paper without any knowledge of what it contained, or of

the amount and value of his property, and that the agreement was void because it is in furtherance and facilitation of divorce, and that it is unfair, inequitable and fraudulent.

On April 3, 1940, a hearing was had on said matter in the county court for Dawson county, and the court found that the antenuptial contract involved is invalid and should be set aside as void.

Upon appeal, the district court on June 24, 1940, entered a decree that the antenuptial contract entered into March 5, 1934, was void and of no force and effect, on the ground that it was unfair and unreasonable. The motion for a new trial being overruled, the executor filed notice of appeal, and on November 18, 1940, filed his transcript and bill of exceptions in this court.

On January 15, 1941, Frank M. Johnson, as attorney for the widow, Della Craig Vetter, filed a motion to dismiss the appeal on the ground that the executor has failed to furnish an appeal bond, as provided for in section 20-1914, Comp. St. 1929, and also as required by rule 8 (b) of this supreme court, and, further, that the executor in his representative capacity has no interest in the election of Della Craig Vetter to take under the statute rather than under the will, and therefore has no appealable interest from the order and decree of the district court, and is not entitled to prosecute the appeal in his representative capacity, at the expense of the estate, without an appeal bond, for the proposed appeal by the executor does not come within the statute which permits an executor or administrator to appeal in certain cases without the necessity of furnishing the statutory bond.

In the brief of the executor we are cited to section 30-808, Comp. St. 1929, which provides: "Every executor or administrator who may have given bond in this state, with surety as provided by law, shall be authorized in all cases of appeal from one court to another, by him made, to prosecute the same without filing an appeal bond, such appeal to be prosecuted in the district court as appeals are now taken from courts of justices of the peace;" and to *Kerr v.*

Lowenstein, 65 Neb. 43, 90 N. W. 931, and *In re Estate of O'Brien,* 80 Neb. 125, 113 N. W. 1001, in which it was held that no appeal bonds were required.

This was held in *In re Estate of Dovey,* 99 Neb. 744, 157 N. W. 915, to govern when a judgment was rendered against him in his representative capacity, but an *administrator as such* cannot appeal from final order unless affected in his representative capacity.

In the case of *In re Estate of Raymond,* 124 Neb. 125, 245 N. W. 442, we dismissed an appeal by an executor for the reason that the executor could not have been aggrieved or injuriously affected by the order in question, and hence had no such standing as authorized him to prosecute an appeal.

In the case of *Merrick v. Kennedy,* 46 Neb. 264, 64 N. W. 989, it was held that an executor may appeal from an adverse decision of the county court to correct an error or mistake in the settlement of his former account.

It was said in the case of *In re Langdon,* 102 Neb. 432, 167 N. W. 571, that the section referred to only means that executors are not required to give bond when they appeal in their representative capacity, but that when they appeal to protect individual interests they should give the same bond that is required of other litigants.

In the case of *In re Estate of Mathews,* 125 Neb. 737, 252 N. W. 210, Judge Eberly stated that, when an appeal is taken by an executor in furtherance of his individual interests from a final order entered in the county court, he must give bond like all other suitors.

The decree entered by the district court in the case at bar provided that the antenuptial contract between these parties was null and void; next, that the widow had the right to elect to take under the law rather than under the will.

In what way was the action of the county court, or the affirmance of the same by the district court, a final order made against the executor? In what manner is the executor affected, harmed or prejudiced by the ruling of the district

court? 2 C. J. 973, defines "aggrieved" as follows: "Having suffered loss or injury; damnified; injured. An aggrieved party or person is one who is injured in a legal sense, one who has suffered an injury to person or property."

As we view it, this final order is in the nature of an order of distribution, and will result in the devisees receiving a different amount, as the widow has elected to take her share under the law. It does not appear to the court that the executor should be permitted to prosecute an appeal which is practically for and on behalf of some of the heirs without giving the same bond as one of the heirs would have to give if they had appealed. The right of an executor to appeal in his representative capacity without giving any bond is properly raised by a motion to dismiss. Dame, Probate and Administration, sec. 655.

In the case of *In re Estate of Craig,* 101 Neb. 439, 163 N. W. 765, Judge Rose said that the administrator was not representing the estate, but was seeking to protect his own individual interests, and that the appeal from the county court to the district court was properly dismissed.

"In an appeal from a final order of the county court in probate proceedings by an administrator, in furtherance of his individual interests, he is required to execute and file a bond like other suitors," was stated by Judge Good to be the law in the case of *In re Estate of Runyon,* 111 Neb. 635, 197 N. W. 417. See, also, *Greb v. Hansen,* 123 Neb. 426, 243 N. W. 278.

It may be contended that the executor has a right of appeal because the will provides that he is a trustee of certain funds to be held for the benefit of the widow. But it is properly argued that the executor has no interest in the trust until after the widow's right to elect has been determined. That is a statutory right that cannot be denied her. If her election is held to be good, then all of the trust provisions of the will thereupon fail. The widow's right of election is paramount to any provisions that are made for her under the will. Even if the executor would receive some compensation from the administration of the trust, that is

not a sufficient reason to permit him to take an appeal in his representative capacity.

The real parties in interest are the brothers and sister of the deceased, and they have not appealed. The judgment of the district court affects them, and not the executor. If the executor, for any personal reasons, desired to appeal, he was required to furnish an appeal bond, the same as any other interested party would be required to do.

Therefore, we sustain the motion, and dismiss the appeal of the executor.

APPEAL DISMISSED.

STATE, EX REL. RICHARD C. HUNTER, ATTORNEY GENERAL, PLAINTIFF, V. OMAHA MOTION PICTURE EXHIBITORS ASSOCIATION ET AL., DEFENDANTS.

297 N. W. 547

FILED APRIL 9, 1941. No. 30189.

1. **Lotteries.** For a scheme to be a lottery, it must contain the elements of chance, prize and consideration.
2. ———. It is not necessary that every participant directly pay a consideration in order for a lottery to exist.
3. ———. A game does not cease to be a lottery because some, or even many, of the players are admitted to play free, if others continue to pay for their chances.
4. ———. The scheme known as "Prosperity Club," described in the opinion, includes the necessary elements of chance, prize and consideration to constitute it a lottery.

Original proceeding by the state, on the relation of the attorney general, to enjoin defendants from carrying on a lottery. Injunction granted. *On citation for contempt, defendants are found guilty.*

Walter R. Johnson, Attorney General, and *Clarence S. Beck,* for plaintiff.

Irvin C. Levin and *Richard E. O'Brien,* for defendants.

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

CARTER, J.

On June 26, 1937, a temporary injunction was granted by this court enjoining the defendants herein, and others, "from in any way or manner carrying on, promoting or conducting or permitting or allowing or suffering within their places of business or in connection with their operation of Omaha motion pictures, the scheme, plan and system commonly referred to as 'Bank Night' now being carried on and conducted by defendants in connection with their operation of motion picture theatres in Omaha, Douglas county, Nebraska." On June 10, 1940, a suggestion of contempt was filed by W. W. Wenstrand, city solicitor of the city of Omaha, which called this court's attention to the fact that certain of the defendants were carrying on and promoting a gift enterprise or lottery, commonly referred to as "Prosperity Club," in violation of the injunction order entered against them by this court. A citation for contempt was issued, the defendants served with process and the answers of defendants filed in due time. The attorney general thereupon moved for a judgment on the pleadings, which motion is now before the court for decision.

It is conceded by the pleadings that "Prosperity Club" operates in substantially the following manner: Membership in the "Prosperity Club" is obtained by registration upon a yellow card without paying any money or purchasing an admission ticket. Membership cards are numbered and a corresponding number is deposited in a permanent receptacle from which the winning number is selected by lot. In order to be eligible for the award which is made each Wednesday night at 9 p. m., the member must register on a white card on the day of the drawing. The white cards are obtainable only in the theatres sponsoring the club without the payment of money or the purchase of a ticket. Only a member who has filled out a yellow card, thereby entitling his number to be placed in the permanent receptacle from which the drawing is made, and who has registered on the day of the drawing by filling out a white

card at one of the participating theatres, is eligible to receive the specified prize which is in no event less than $500. It will be noted that the privilege to enter the contest without the purchase of a ticket or other cost is offered to every one.

It is fundamental in order for a scheme to be a lottery that three elements must exist. First, there must be a distribution of property by chance, commonly referred to as a prize. Second, the prize must be awarded by lot or chance. Third, the participants must have paid consideration for the chance of winning the prize. Unless all three elements are present, the lottery laws have no application. In the present case the first two elements are conceded to be present. The question is whether the element of consideration exists.

An amendment to the Constitution in 1934 provides: "The legislature shall not authorize any games of chance, lottery, or gift enterprise." Const. art. III, sec. 24. The legislature has defined a lottery in the following language: "Whoever opens, sets on foot, carries on, promotes, makes or draws, publicly or privately, any lottery or scheme of chance, of any kind or description, by whatever name, style or title the same may be denominated or known * * * shall be fined in any sum not exceeding five hundred dollars." Comp. St. 1929, sec. 28-962. We said in *State v. Fox Beatrice Theatre Corporation,* 133 Neb. 392, 275 N. W. 605: "This legislation was enacted in a form to include every scheme operating as a lottery without regard to form or kind." When the question presented is one of enforcing criminal responsibility, or of refusing to aid in a transaction alleged to be within the statutory prohibition, the courts will ordinarily construe liberally the provisions relating to lotteries so as to include all schemes which appeal to the gambling propensities of men. See 38 C. J. 305. It would be difficult to state with exactness all the plans or schemes that fall within the statutory definitions of a lottery. We shall not attempt to do so. The term "lottery" is generic in nature and best left without exact definition, because "No sooner is it defined by a court than ingenuity

evolves some scheme within the mischief discussed, but not quite within the letter of the definition given." *People v. McPhee*, 139 Mich. 687, 103 N. W. 174. Generally speaking, it is a scheme which tends to induce one to pay or agree to pay a valuable consideration for a chance to draw a prize.

Ordinarily, a person mentally competent, who is not trying to defraud his creditors, may give away his property as he pleases. Even if the gift is by chance, it is immaterial so long as he alone can lose by the transaction. It is only when other people are induced to give up consideration in the hope of obtaining greater returns that the law becomes concerned in protecting people from dissipating their money by gambling against odds which usually are not fully appreciated. If every participant spends money or contributes something of value for a chance to win a prize, consideration is clearly present. We held in the "Bank Night" cases that consideration may still be present where all the participants are not required to pay a consideration. *State v. Omaha Motion Picture Exhibitors Ass'n*, 133 Neb. 89, 274 N. W. 397; *State v. Fox Beatrice Theatre Corporation*, 133 Neb. 392, 275 N. W. 605. See, also, *Glover v. Malloska*, 238 Mich. 216, 213 N. W. 107; *Brooklyn Daily Eagle v. Voorhies*, 181 Fed. 579; *Society Theatre v. Seattle*, 118 Wash. 258, 203 Pac. 21. The present scheme does not require any one to pay a consideration. Such was the case also in the "Bank Night" cases. The practical operation shows, however, that more people do purchase tickets to the theatres and that the profits of the business increase without a change in the merit of the entertainment. The hope of a prize is the motivating inducement to the larger attendance which results in larger profits. Buyers of tickets buy more than a ticket to the show itself. They make it possible by increased income for defendants to pay a prize. This contribution is the consideration required to make the scheme a lottery under the statute, even though many may participate without purchasing a ticket. Advertisements to the effect that membership and eligibility are free and that

the gratuitous giving of awards is a good-will gesture and requires no consideration on the part of those participating are nothing more than an attempt to mask the true character of the scheme for the purpose of circumventing the injunction order heretofore issued by this court. The "Prosperity Club" scheme as operated by the defendants includes every evil of an ordinary lottery, camouflaged as it is by the appearance of innocence and respectability. Its purpose is not to give away the prize as a gift. It is conceived in the hope of financial gain. It is merely an inducement to try one's luck in a gamble for comparatively large stakes. As a disguised lottery, pretending that it has all the virtues of good advertising, it attracts thousands of persons who would have nothing to do with it as an unmasked lottery.

"A game does not cease to be a lottery because some, or even many, of the players are admitted to play free, so long as others continue to pay for their chances. The court pointed out that the test was not whether it was possible to win without paying for admission to the theatre, but whether that group who did pay for admission were paying in part for the chance of a prize." *Iris Amusement Corporation v. Kelly,* 366 Ill. 256, 8 N. E. (2d) 648. And in *State v. Eames,* 87 N. H. 477, 183 Atl. 590, the court said: "The problem presented by 'Bank Night' and similar schemes is to determine whether it is an evasion of the statute or an avoidance of it, and this question is essentially one of fact. In answering this question we do not propose to close our eyes to reality. The test by which to determine the answer to this question is not to inquire into the theoretical possibilities of the scheme, but to examine it in actual, practical operation. If, as the state contends in its brief (although this contention does not appear to be borne out by the agreed facts), 'the great majority of people pay for such privilege,' then it is an evasion and as such is not to be countenanced." See, also, *State v. Lipkin,* 169 N. Car. 265, 84 S. E. 340.

The element of price or consideration is present. As was said in *Commonwealth v. Wall,* 295 Mass. 70, 3 N. E. (2d)

28, we should look at this thing realistically and sensibly. We know that those within the theatre pay for any chance any one outside may have to win. We know also that a registered member, who does not buy a ticket to the theatre, must sign the white card on the day of the drawing, obtainable only in the lobby of a participating theatre. The object of the defendants is to fill the theatre, not the lobby. The requirement that a member present himself in the theatre lobby on the day of the drawing to sign a card in order to be eligible for the drawing is merely an ingenious device to circumvent this court's order without losing the benefit that accrues from a careful nursing of mass gambling. The evils which our Constitution and laws attempted to guard against are all present. "There is the excitement of drawing a lucky number with its attendant exultation for one fortunate individual; there is depression and disappointment for a thousand losers, many of whom must think enviously of what they could do with so much money had they won it, and there is the constant temptation to continue to play in the hope of winning. We have thus created cupidity, envy, jealousy and temptation—the very things sought to be avoided by that enlightened public policy of most of the world which has outlawed lotteries." *Iris Amusement Corporation v. Kelly,* 366 Ill. 256, 8 N. E. (2d) 648.

A close examination reveals that the plan now before us is an evasion and not an avoidance of the law. Theoretical possibilities are not sufficient to overcome the practical effect of the plan. The contentions of the defendants are merely an advocacy that the letter of the law shall black out the spirit of the legislation.

An attempt has been made, after each decision of this court, to produce by the ingenuity of those who desire to profit from the gambling instinct to streamline the plan with a view of concealing by name and technical operation and other fallacious pretenses one or more of the elements necessary to make it a lottery, gift enterprise, or game of chance. The latest of these dressed up schemes bears the

glamorous title of "Prosperity Club." But on close inspection it is nothing more or less than a lottery with all its attendant vices and evils which our Constitution and laws have forbidden in language plain and clear.

It is evident to us that "Prosperity Club" was originated as a wilful and contumacious attempt to avoid the provisions of the injunctive order heretofore entered in this case. The defendants, the Omaha Motion Picture Exhibitors Association, William A. Singer, William Miskell, Sam Epstein, Ralph Goldberg, and Tri States Theatre Corporation, are hereby adjudged to be in contempt of this court in operating the plan commonly referred to as "Prosperity Club," and each of said defendants is hereby fined the sum of $200, to be paid into this court for the benefit of the county of Douglas, Nebraska, in accordance with the provisions of section 20-1072, Comp. St. 1929. Upon failure of the defendants to pay said sums into court, together with the costs of the suit, within 30 days from the entry of the final order of this court in this proceeding, the attorney general shall apply to this court for such orders as may be necessary to obtain a compliance therewith.

JUDGMENT ACCORDINGLY.

YEAGER, J., not participating.

L. A. RICKETTS, TRUSTEE, V. LINCOLN SAFE DEPOSIT COMPANY: FIRST TRUST COMPANY OF LINCOLN, APPELLEE, EDWARD C. WACKLER, TRUSTEE, ET AL., APPELLANTS.

297 N. W. 544

FILED APRIL 9, 1941. No. 30996.

1. **Mortgages.** If mortgage deeds of trust do not confer power upon trustee, after acquiring title to the mortgaged property, to sell and convey it to obtain cash to pay the bonds, a court of equity, to promote and protect the interests of bondholders, has inherent power to authorize a sale by the trustee.
2. ———. A reorganization plan presented in connection with an application by a trustee for the approval of a sale of the trust property must be fair and equitable to all bondholders who do not desire to enter into the plan.

3. ———. It is proper for an equity court in passing upon the reasonableness of a sale of trust property to consider any reorganization plan submitted in determining whether such sale should be approved or disapproved. Unless it be fair and equitable to all bondholders it should be rejected.
4. ———. The consideration of a reorganization plan in connection with an application to an equity court for approval of a sale of trust property is a proper exercise of equity jurisdiction to protect minority bondholders from financially strong majority bondholders, or to protect majority bondholders from those who attempt to create a nuisance value for their bonds by obstructing reorganization.
5. Equity. Ordinarily, equity rules are not fixed and rigid in order that equity courts may be free to mold remedies to fit the conditions with which they have to deal.

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

Harry R. Ankeny, for appellants.

Hall, Cline & Williams and *Littrell & Patz, contra.*

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

CARTER, J.

This is an appeal from an order of the district court for Lancaster county, authorizing the First Trust Company as successor-trustee to execute and deliver to the Liberty Theatre Building Corporation, for a consideration of $5,000, a release of mortgage on a leasehold interest in the real estate described in the mortgage.

The record shows that on June 25, 1917, Frank D. Eager became the owner of a 99-year lease on the Liberty Theatre Building in Lincoln. On June 15, 1928, Frank D. Eager and wife mortgaged their leasehold interest in the property to the Lincoln Safe Deposit Company for $80,000, represented by 123 bonds which were sold to investors. On June 15, 1933, the mortgage became in default with $69,000 in bonds outstanding and unpaid. In order to prevent a foreclosure of the mortgage and to facilitate the leasing of a portion of the premises for a period of 20 years at an ad-

vantageous rental, a large majority of the bondholders organized the Liberty Theatre Building Corporation with the understanding that bondholders would exchange their bonds for a corresponding amount of stock in the corporation. Holders of bonds totaling $63,000 exchanged their bonds for stock. The appellants, Edward C. Wackler, Earl B. Anderson and Margaret Anderson, holders of the remaining bonds totaling $6,000, refused to make the exchange. It appears that the prospective lessee of the theatre in the building was insisting that the defaulted mortgage on the 99-year leasehold interest be released before an agreement for the leasing of the theatre be made. In other words, the prospective lessee was willing to make the lease, knowing that the terms of the 99-year lease must be met, but was unwilling to do so with the defaulted mortgage unreleased and a continuous threat to his peaceful possession of the premises.

The lessee of the 99-year lease, as a part of the transaction, assigned his interest in the lease to the Liberty Theatre Building Corporation and continued to act as manager of the building without further compensation. With this situation existing, the First Trust Company, as successor-trustee for bondholders under the provisions of the mortgage, petitioned the district court for an order authorizing such successor-trustee to release the mortgage on the 99-year leasehold interest for a consideration of $5,000. The appellants filed objections to the making of such an order and, after the prayer of the trustee was granted by the district court, appealed to this court.

There is no satisfactory evidence in the record that the mortgage lien on the 99-year leasehold estate had a value in excess of the $5,000 offered. The record shows that the building was barely paying its own way. A forced sale of the 99-year lease, already impaired by defaults, would bring but little on the open market. That the leasing of the theatre for 20 years would be beneficial to the holders of the bonds is not successfully disputed, whether the mortgage be foreclosed or the building operated by the new

corporation. The question to be determined, therefore, is the power of the district court to make the order as distinguished from the wisdom of its issuance.

It is the contention of appellants that the rights of the parties are determined solely from the terms of the mortgage agreement and that the order granted by the district court constitutes an impairment of contract. It is doctrine generally announced that a bondholder cannot be compelled to accept something different than that for which he contracted. *Rudell v. Union Guardian Trust Co.*, 295 Mich. 157, 294 N. W. 132. But this is not always so. An authoritative text-writer states an exception in the following words: "When a large majority of the parties interested in an insolvent corporation have made mutual concessions and sacrifices in order to salvage the wreck, and have agreed upon a mode of reorganization directed toward that purpose wherein fair and reasonable provisions have been made for all interests, it is seldom that a way is not found for blocking the maneuvers of a bondholder or unsecured creditor who, by refusing to join the agreement, or by attempting to assert his abstract contractual rights, would create an obstruction value to his bonds or claims for the purpose of being bought off to his advantage over others with like rights." 3 Jones, Bonds & Bond Securities (4th ed.) sec. 1507. We think the foregoing principle is analogous to the situation here presented. In the instant case, more than 90 per cent. of the bondholders desire the benefits of the proposed plan. Many of them have advanced funds for the payment of taxes and other obligations to clear the way for its performance. The mortgagor has voluntarily surrendered the mortgaged property and has thereby saved the time and expense of a foreclosure suit. The personal liability of the mortgagor has been preserved for the benefit of all bondholders. The rights of the appellants against the successor-trustee are the same as they would have against a trustee in possession of the mortgaged property after a foreclosure. Appellants contend, however, that they are entitled to have the mortgage foreclosed and

the security sold at judicial sale. We think this contention was properly answered in *Gates v. Boston & N. Y. Air Line R. Co.*, 53 Conn. 333, 5 Atl. 695, wherein that court said: "The plaintiff's contention in this behalf rests upon his assumption that he has a constitutional property right to have the property appropriated in the manner claimed by him. In making this claim the plaintiff ignores, or subordinates to his own claim, both the private rights of his cobondholders and public rights vested in trust in the state. * * * So too in relation to the other bondholders, it is manifest that each bondholder enters into contract relation with each and all of his cobondholders. His right to appropriate the security in satisfaction of his bond in such lawful manner as he may choose, is modified by the same existent right in every other holder. His absolute right of control is limited not only by the express provisions of the bond and mortgage, but also in great measure by the peculiar nature and character of the security."

In a very similar case the supreme court of Illinois said: "Where, as here, the sale of the property on foreclosure is a step in a reorganization project, which project the bondholders have an absolute right to engage in if it be a fair plan, it is difficult to see how a court of equity could fairly and adequately consider the approval of the foreclosure sale without also considering the reorganization plan. Certainly, if such a plan is proposed, it would appear that in a court of equity only may the greatest protection to all concerned be assured. Whether the sale price is adequate or inadequate may depend upon the plan of reorganization open to all bondholders. * * * Certainly, there can be no violation of contract rights arising out of an assumption of jurisdiction of the reorganization plan by a court of equity. No one is required to join the depositing committee. The sale has been decreed, and all who do not desire to join the plan may take their share of the proceeds in cash. * * * The purpose of this purchase, as stated in the plan, is to place a merchantable title into the liquidating trust, so as to render possible the execution of the plan of liqui-

dation. * * * The court is concerned with the fairness of the bid as to those bondholders who have not adopted the plan. In this it must be borne in mind, however, that nondepositing bondholders are not to be aided in an effort to create a maneuvering value for their bonds or give them a nuisance value by attempting to obstruct reorganization. * * * The chancellor had, however, wide discretion in the matter of approval or disapproval of this sale. * * * The record contains no evidence that a resale would bring a sufficiently larger amount to net a substantially larger sum to the nondepositing bondholders, after paying the expenses of both sales." *First Nat. Bank v. Bryn Mawr Bldg. Corporation,* 365 Ill. 409, 6 N. E. (2d) 654.

Summarizing the situation, we find that holders of more than 90 per cent. of all the outstanding bonds have accepted the reorganization plan. Many of these have advanced funds to protect the interests of all the bondholders. Mutual concessions and sacrifices have been made to facilitate the completion of the plan. The mortgagor has voluntarily surrendered the mortgage security without impairing his personal liability. The sale price of the mortgaged property is not shown to exceed the $5,000 bid, nor is it shown that a resale, judicial or otherwise, would bring a greater sum. All who do not care to join in the plan are free to take their share of the proceeds of the sale in cash. And above all, the plan of reorganization is fair and equitable to all the bondholders. Under these circumstances a court of equity having jurisdiction of the trust may properly order the sale of the mortgaged property and authorize the trustee to release the lien of the mortgage upon payment of the price bid.

It is true that precedent does not exist in this state for the entry of such an order. In the federal courts it has been comparatively common for them to take notice of reorganization plans in foreclosure suits and to withhold final judgment until some fair and open plan of reorganization was submitted and substantially agreed upon. Many state courts have followed the same principles. The juris-

diction of such courts arose from the necessity of adapting new remedies to new conditions. Equitable modes of relief are not and must not become fixed and rigid. Equity courts must be free to mold remedies to fit the conditions with which they have to deal. We conclude that the action of the trial court was in all respects correct.

AFFIRMED.

STATE, EX REL. PLATTE VALLEY IRRIGATION DISTRICT, APPELLANT, V. ROY L. COCHRAN, GOVERNOR, ET AL., APPELLEES.
297 N. W. 587

FILED APRIL 9, 1941. No. 31114.

1. **Mandamus.** It is only when there is no room for controversy as to the right of the applicant, and when from the nature of the facts set forth in the supporting affidavit a court can take judicial knowledge that a valid excuse cannot be given, that a peremptory writ of mandamus may issue without notice.
2. ———. When it does not clearly appear that a valid excuse cannot be given, a court has no power to issue a peremptory writ of mandamus without notice, and a writ so issued is void.
3. ———. An action to obtain a writ of mandamus is not begun until a motion and affidavit, or a petition verified positively, is filed in the district court, and a notice that the writ would be applied for at a certain time and place, before any papers have been filed, confers no jurisdiction to issue a peremptory writ in a case where notice is required.

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

Hoagland, Carr & Hoagland, for appellant.

Walter R. Johnson, Attorney General, and *John Riddell, contra.*

Beeler, Crosby & Baskins, amici curiæ.

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

CARTER, J.

This is an appeal by the relator from an order of the district court for Lincoln county vacating and setting aside a peremptory writ of mandamus.

The record shows that relator filed an affidavit and petition for a peremptory writ of mandamus on August 14, 1940, alleging that it was the owner of an appropriation of water from the North Platte river for irrigation purposes for 300 cubic feet of water per second of time with a priority date of May 31, 1884. It is alleged that the governor, state engineer and chief of the bureau of irrigation, the officers charged by law with the supervision and control of the public waters of the state, have failed and neglected, and on the date of the filing of the affidavit and petition failed and neglected, to enforce the irrigation laws of the state by requiring junior appropriators of water on the North Platte river and its tributaries above the headgate of the relator irrigation district to close their headgates and canals to permit the water of the stream to flow down to the intake of relator's canal, thereby depriving relator of irrigation water to which it was entitled by virtue of its appropriation. Among the junior appropriators alleged to be wrongfully taking water from the stream is the Platte Valley Public Power and Irrigation District, which will be referred to as the public power district. The public power district has appropriations dated January 13 and February 8, 1934, and March 8, 1937. In order to divert its appropriation from the stream, a diversion dam was constructed at Keystone, Nebraska, on the North Platte river above the headgates of the irrigation district. The affidavit and petition state that demands were made upon the bureau of irrigation to release the water above the public power company's diversion dam prior to the filing of the petition and that such demands were refused. The affidavit and petition were thereupon filed and a peremptory writ of mandamus granted without notice on August 14, 1940. The writ directed the respondents to immediately issue an order, releasing to the relator irrigation district a

continuous flow of 100 cubic feet of water per second of time from the public power company's diversion dam as long as there is any quantity of water behind the diversion dam, in addition to the natural flow of the stream, until such time as relator's appropriation is procured at its headgate from other sources. The writ was served on the respondents on August 15, 1940. On August 23, 1940, the court, on its own motion, vacated and set aside the peremptory writ of mandamus. On August 24, 1940, relator moved to vacate the order of August 23, 1940. The motion was overruled on the day it was filed and an appeal taken to this court.

It is the contention of the respondents that the court did not have authority to enter the peremptory writ of mandamus on August 14, 1940, without notice to the respondents. It is provided by section 20-2159, Comp. St. 1929, as follows: "When the right to require the performance of the act is clear, and it is apparent that no valid excuse can be given for not performing it, a peremptory mandamus may be allowed in the first instance. In all other cases, the alternative writ must be first issued." This statute was discussed in *Horton v. State,* 60 Neb. 701, 84 N. W. 87, as follows: "This statute undoubtedly provides for the issuance of the peremptory writ without notice where the court or judge can clearly see that the refusal of the respondent to perform some duty resulting from his office, trust or station, can admit of no possible justification. Cases may arise in which the refusal of a public officer to discharge an official duty is so obviously inexcusable and the necessity for prompt action so imperative that notice must be dispensed with in order to prevent a failure of justice. In this class of cases the respondent loses nothing by the judgment and no right secured to him by either the state or federal Constitution is infringed."

We are convinced that the allegations of the affidavit and petition are not such that the trial court could assume them to be indisputable. As was said in *State v. Harrington,* 78 Neb. 395, 110 N. W. 1016: "It is only where there

is no room for controversy as to the right, and where from the nature of the facts set forth in the affidavit the court can take judicial knowledge that a valid excuse is impossible, that a writ may issue without notice." We think the allegations of the affidavit and petition admit of controversy. In the first place, relator's appropriation can be taken only from the natural flow of the stream during the irrigation season. It is altogether possible that the waters behind the public power company's diversion dam were accumulated during the nonirrigation season, in which relator would have no right by virtue of his appropriation. It is likewise possible that a usable quantity of water might not reach relator's headgate, even if the water were released in accordance with the writ. Other persons, not parties to the suit, might well have interests superior to those of relator, which respondents are obligated to protect. In such cases, where it is impossible for the district court to have knowledge that no valid excuse could be given for not performing the alleged duty, no power exists to issue a peremptory writ without the respondent having been notified of the pending proceedings.

Notice of intention to apply for a peremptory writ of mandamus is not sufficient notice. An action to procure such a writ is not begun until a motion and affidavit, or a petition verified positively, have been filed. The notice required must be given thereafter of the pendency of the application and of the time and place where it will be heard. *State v. Harrington,* 78 Neb. 395, 110 N. W. 1016. The issuance of a peremptory writ in a case requiring notice is of no force and effect. The trial court apparently recognized its error in issuing a peremptory writ, and on its own motion set the order aside. The trial court not only had the power to do this, but it was its duty to do so.

The judgment of the trial court is affirmed.

AFFIRMED.

MARTHA WATENPAUGH CURRIE, APPELLEE, V. L. L. CORYELL & SON ET AL., APPELLANTS.
297 N. W. 612

FILED APRIL 18, 1941. No. 31037.

Record examined and judgment of the trial court reversed and action dismissed.

APPEAL from the district court for Thayer county: ROBERT M. PROUDFIT, JUDGE. *Reversed and dismissed.*

Walter C. Weiss, Richard B. Travis and *Tunison & Joyner,* for appellants.

Baldwin & Pike, contra.

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

SIMMONS, C. J.

This is an action for damages to real property caused by a fire alleged to have been started by negligence of defendant Hebel, an employee of defendant L. L. Coryell & Son. Verdict was for plaintiff. Defendants appeal, assigning as error the refusal of the trial court to sustain their motion for an instructed verdict.

Watenpaugh v. L. L. Coryell & Son, 135 Neb. 607, 283 N. W. 204, was an action for damages to personal property resulting from the same fire. The allegations of negligence in both cases are the same. The testimony as to the fire and conditions in the building varies in some particulars but does not change in any way the ultimate facts stated or conclusions reached in the *Watenpaugh* case. We have reexamined the authorities cited in the *Watenpaugh* case and those relied upon by the plaintiff. The conclusion is that the *Watenpaugh* case was correctly decided and is controlling in the instant case.

REVERSED AND DISMISSED.

METROPOLITAN CASUALTY INSURANCE COMPANY OF NEW YORK, APPELLANT, V. FIRST NATIONAL BANK OF OMAHA ET AL., APPELLEES.

297 N. W. 593

FILED APRIL 18, 1941. No. 30987.

1. **Subrogation.** A party cannot acquire by subrogation any rights not possessed by the party whose rights are subrogated.
2. **Bills and Notes.** An indorser of a check is not liable to the drawer for a loss occasioned by a forged prior indorsement, where the circumstances are such as to estop the drawer from setting up the forgery.
3. ———. As between the drawer of a check who delivered it to an impostor and the person who cashed it upon the impostor's indorsement, the loss, under the facts outlined in the opinion, *held* to fall on the drawer.

APPEAL from the district court for Douglas county: JOHN W. YEAGER, JUDGE. *Affirmed.*

Brome, Smith & Fiedler, for appellant.

Finlayson, Burke & McKie, Crossman & Barton and *Edward A. Nelson, contra.*

Heard before SIMMONS, C. J., ROSE, EBERLY, CARTER and MESSMORE, JJ., and MEYER, District Judge.

ROSE, J.

This is an action by the Metropolitan Casualty Insurance Company of New York to recoup a loss occasioned by the rascality of an impostor who surreptitiously procured a bank check payable to another person, pretended to be the payee, forged the name of the payee as first indorser, and received from an innocent merchant the proceeds of the check. The First National Bank of Omaha and Orchard & Wilhelm Company, defendants, are charged in the petition with liability for the loss as subsequent indorsers of the check guaranteeing the genuineness of the first indorsement which was a forgery.

Defendants denied liability as indorsers and pleaded neg-

ligence of the drawer of the check as an estoppel defeating plaintiff's claim for the loss.

The district court dismissed the action and plaintiff appealed.

The following facts are summarized from a stipulation by the parties: On an application bearing the genuine signature of Herbert E. Ketcham, the Lincoln National Life Insurance Company of Fort Wayne, Indiana, issued to him a 2,000-dollar life insurance policy, naming his wife, Eva Boucher Ketcham, beneficiary. After her death, Herbert W. Boucher, using the mails and the name of Herbert E. Ketcham without the latter's knowledge or consent, surreptitiously procured from the insurer a change of beneficiary from Eva Boucher Ketcham to the estate of the insured Herbert E. Ketcham and a loan of $441.04 on the policy. The insurer drew and directed by mail to Herbert E. Ketcham a check payable to him on the Lincoln National Bank and Trust Company of Fort Wayne, Indiana, for the amount of the loan, but the check was intercepted by Boucher who had signed the name of Ketcham on the application for change of beneficiary and on the application for the loan on the policy and on the note for the loan. With the check, Boucher went in person to the store of Orchard & Wilhelm Company, Omaha, represented himself to be Ketcham, the payee, offered the check in payment of an open account of $30.90 charged on the books of the merchant to Ketcham, asked for the balance in currency, indorsed the name of Ketcham on the check and received the difference between the account of $30.90 and $441.04 or $410.14. The forged indorsement was followed thereunder by the indorsement of Orchard & Wilhelm Company and the check deposited to its credit in the First National Bank of Omaha. The latter also indorsed the check and it was subsequently paid by the bank upon which it was drawn.

The Metropolitan Casualty Insurance Company of New York had indemnified or bonded the Lincoln National Life Insurance Company of Fort Wayne, Indiana, against forgery, and in discharge of that obligation, after discovery

of the fraud, paid the latter $441.04, the loss occasioned by the forged indorsement on the check, asserted by subrogation the rights of indemnitee and, as plaintiff, brought this action against the First National Bank of Omaha and Orchard & Wilhelm Company, defendants, on their alleged liability as subsequent indorsers of the check and as guarantors of the genuineness of the first indorsement which was a forgery.

The question presented on appeal is: Did plaintiff, the indemnitor, make a case for recovery of the loss from the subsequent indorsers of the check? By payment of the loss, plaintiff, under the contract of indemnity, became subrogated to any right of indemnitee to recover the loss from the subsequent indorsers, but did not acquire by subrogation any greater right. *American Surety Co. v. School District,* 117 Neb. 6, 219 N. W. 583. The test, therefore, is whether the insurer, the drawer of the check, would be entitled to a recovery on the stipulated facts in absence of the indemnity. Plaintiff relies on the statute which provides:

"Where a signature is forged or made without authority of the person whose signature it purports to be, it is wholly inoperative, and no right to retain the instrument, or to give a discharge therefor, or to enforce payment thereof against any party thereto, can be acquired through or under such signature, unless the party against whom it is sought to enforce such right is precluded from setting up the forgery or want of authority." Comp. St. 1929, sec. 62-123.

In connection with this statute counsel for plaintiff call attention to the following rulings in a former case:

"An indorser of a negotiable instrument guaranties the genuineness of prior indorsements.

"Accordingly, where a check is drawn payable to the order of a named payee, one who takes the check on the forged indorsement of the payee and himself indorses it, is liable to the bank on which the check is drawn if that bank pays it in ignorance of the forgery, in the absence of

circumstances estopping the drawer from setting up the forgery." *First Nat. Bank of Hastings v. Farmers & Merchants Bank,* 56 Neb. 149, 76 N. W. 430.

Indorsers do not in every instance guarantee the genuineness of prior indorsements of the same instrument. To apply herein the statute as invoked would permit plaintiff to exact of defendants greater vigilance to prevent fraud than that exercised by plaintiff itself. It changed the beneficiary in a policy on an application signed by an impostor and not by the insured. It granted a loan on a policy under an application of which the insured knew nothing. It had in its possession at the time genuine signatures of insured which, if compared with spurious signatures accepted by it as genuine, might have prevented the fraud. In trusting the check to the mails, a registered letter and a demand for a receipt bearing the genuine signature of insured would quite likely have avoided the loss. Through negligence of the insurer the check fell into the hands of an impostor who found it easy, under the circumstances, to deceive Orchard & Wilhelm Company into cashing it. The conduct of insurer and the surrounding circumstances as shown by the evidence are sufficient to estop it from asserting the forgery of the first indorsement as against defendants. The same result would be reached by adopting the following doctrine:

"The weight of authority, however, seems to be decidedly in favor of the doctrine that where a check or draft is drawn or indorsed and delivered to a party to be cashed by him under the name in which it is made out or indorsed, that his signature by way of indorsement in that name is valid as between an innocent holder and the party delivering it to him. This is commonly put on the ground that the payer of the draft or the purchaser of it is simply carrying out innocently the intention of the maker or indorser." *Hoffman v. American Exchange Nat. Bank,* 2 Neb. (Unof.) 217, 96 N. W. 112.

The courts generally have adopted this doctrine in determining who must bear the loss as between a drawer who delivers a check to an impostor and one who cashes it upon

the impostor's indorsement. See cases cited in annotations in 22 A. L. R. 1228; 52 A. L. R. 1326; 112 A. L. R. 1435. The district court took this view in finding the facts and in applying the rules of law and equity thereto.

AFFIRMED.

DRAINAGE DISTRICT NO. 1 OF LINCOLN COUNTY, APPELLEE, V. SUBURBAN IRRIGATION DISTRICT, APPELLANT: GEORGE M. CARY ET AL., APPELLEES: KEITH NEVILLE ET AL., INTERVENERS, APPELLANTS.

297 N. W. 645

FILED APRIL 18, 1941. No. 31001.

1. **Corporations.** "The powers of a corporation organized under legislative statutes are such, and such only, as the statutes confer. The charter of a corporation is the measure of its powers, and the enumeration of these powers implies the exclusion of all others." *State v. Atchison & N. R. Co.*, 24 Neb. 143, 38 N. W. 43.
2. **Drains.** A drainage district organized under the provisions now carried as article 4, ch. 31, Comp. St. 1929, is a public and not a private corporation.
3. **Corporations.** "Corporations manifest their assent to and make contracts by deed or vote of the company, or by the agreement of their authorized agents, and not by the unauthorized declarations or promises of its individual members." *Clarke v. Omaha & S. W. R. Co.*, 5 Neb. 314.
4. **Drains.** "It was the intent of the legislature in the enactment of the provisions of article 4, ch. 31, Comp. St. 1929, to impose a duty on drainage districts organized thereunder to maintain and keep in repair the drainage systems constructed under the powers given them by such act, to the end that landowners whose land was assessed for the construction of such system on the basis of expected benefits from such construction may be protected in the enjoyment of such benefits." *Mooney v. Drainage District*, 126 Neb. 219, 252 N. W. 910.
5. ———. The performance of the powers delegated to drainage districts by article 4, ch. 31, Comp. St. 1929, especially those pertaining and relating to the continuance of the corporate entity authorized thereby and the care and preservation of its drainage ditches and other works and improvements, involves

the protection of public and private interests by a public corporation organized for that purpose, and this legislation, in view of its inherent nature and purpose, must be construed as a statute mandatory.

6. ———. "A drainage district organized under the laws of this state has a special right under the statute to have its drainage channel kept free from obstruction or interference on the part of third parties, and any damming of the channel to the detriment of the drainage district may be enjoined in a proper action." *Flader v. Central Realty & Investment Co.*, 114 Neb. 161, 206 N. W. 965.

7. ———. Under the terms of article 4, ch. 31, Comp. St. 1929, the board of supervisors are constituted public officers, and a right of appeal from their decision is provided. They are the corporate authorities vested with the powers of carrying on its business as prescribed by statute, and charged with the responsibility of providing for and securing the lawful exercise of its powers.

8. ———. Supervisors, as created by such legislation, have authority to bind the corporation only when they act collectively as a board, and are not *ex officio* agents of the corporation.

9. ———. This legislation confers no rights or powers upon drainage districts, whose creation it authorizes, to engage in irrigation, or to authorize or consent to the diversion, for the purpose of irrigation, of any waters carried in any drainage ditch which such district may construct and maintain. Neither is it empowered to authorize an obstruction thereof or therein.

10. **Waters.** "There is a well-defined distinction between artificial streams and natural streams in artificial channels. Thus, riparian rights do not ordinarily attach to artificial streams in artificial channels." 27 R. C. L. 1203, sec. 121.

11. **Record** examined, and *held* to sustain the ultimate disposition of the case as made by the district court.

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

Hoagland, Carr & Hoagland, for appellants.

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

Heard before SIMMONS, C. J., EBERLY, PAINE, MESSMORE and YEAGER, JJ., and LANDIS and MUNDAY, District Judges.

EBERLY, J.

This is a suit in equity by Drainage District No. 1 of Lincoln county, Nebraska, a corporation, to enjoin the defendant, the Suburban Irrigation District, from constructing or maintaining a "check" in the south ditch of plaintiff drainage district, and to compel defendant, by mandatory injunction, to remove a check or dam which it had placed in the north ditch of plaintiff drainage district. The petition alleges, in substance, that defendant in 1936 constructed a check in the north drainage ditch of plaintiff on section 29-14-31 for the purpose of diverting water from the drainage ditch into the irrigation district's canal; that such dam interfered with the drainage works and is causing the banks of the drainage ditch to slough away and cause other irreparable injury and damage; that the defendant has no right or lawful authority whatsoever to construct, or maintain, a check, or any works, in the ditches and works of the plaintiff herein for obtaining water for its canal. This petition also alleges that defendant was constructing another check in the south drain belonging to the drainage district and located on section 25-14-32, and is threatening to continue the construction of a check in said ditch which will interfere with the free flow of the water in the drainage works of plaintiff in said lateral and will cause the banks of the ditch to slough off and fall away and will fill up and interfere with the free flow of the water in said ditch, etc.; that defendant is proceeding to construct said check on section 25 without any authority from plaintiff herein and without any legal right so to do. The prayer of this petition, in substance, was for a temporary injunction restraining defendant from continuing to construct a check in plaintiff's water ditch, and on final hearing that such injunction be made permanent, and that a mandatory injunction be issued to compel the removal of the check in the north ditch, and to enjoin defendant from ever putting any other similar obstruction in drainage ditches of the plaintiff.

The defendant, by its answer, joins issue with plaintiff,

and by a series of special denials and affirmative allegations, in effect, pleaded: (1) An estoppel of plaintiff to ask injunctive relief for removal of the check on section 29, for the reason that the check had been placed therein under an oral agreement; (2) an irrevocable license because of money expended and because the defendant had obtained a water appropriation out of plaintiff's ditch from the state of Nebraska; (3) that plaintiff was not entitled to equitable relief because it had not built and maintained adequate flumes to carry the water of the irrigation district across its drainage ditches in sections 29 and 25; (4) that defendant was only constructing a proper flume in section 25 and should not be enjoined from so doing; (5) in effect, alleges riparian ownership of the water in the drainage ditches, and that, because of consent of the bordering landowners, the defendant had the right to take the water out of the drainage ditches and retard the flow therein to correct excessive drainage by plaintiff's ditches; (6) that the reason the drainage district allowed the check in section 29 to be placed in its ditch was because it furnished inadequate flumes for defendant's water, and that thereby the drainage ditch was compensating the defendant for its negligence; (7) that the checks maintained in the drainage ditch would be good for the lands, would restore their natural water-table, and increase the fertility thereof; (8) that defendant offers to hold the plaintiff and the landowners harmless and take out the checks except in growing season.

The defendant's cross-petition, in effect, restates and enlarges upon the statements contained in its answer, and prays for affirmative relief.

The issues presented by the interveners are substantially based on the theory of facts presented by defendant's pleading.

To defendant's pleading plaintiff filed as its reply a general denial; likewise it joined issues with the several interveners.

After hearing on the merits, the district court, in its

decree, found generally for plaintiff upon the allegations of its petition; found generally against defendant on its answer and cross-petition; and the court also found generally against each intervener on their petitions of intervention.

The trial court also found specifically that the check constructed at a point located on section 29-14-31 was constructed with the knowledge and consent of the board of supervisors of Drainage District No. 1, and that by the terms and conditions of the consent so given by the board of supervisors of Drainage District No. 1, the Suburban Irrigation District was required to remove said check at any time the same caused any injury to the drainage district ditch; and the court further found that said check as so constructed is interfering with the drainage works and purposes for which said ditch was constructed, and is unlawfully and illegally obstructing the drainage ditch of the plaintiff. The court further determined "that said defendant has no right or lawful authority to in any manner use said flume as a check in said drainage ditch of said drainage district, upon said section 25-14-32." Injunctions thereupon issued as prayed.

From the order of the trial court overruling their motions for new trial, defendant and the interveners severally appeal, and the issues thus determined now come on for hearing *de novo*.

It appears that Drainage District No. 1, plaintiff, organized under the provisions of article 4, ch. 31, Comp. St. 1929, embraces an irregular tract of land, varying in width from a fourth of a mile to one and three-fourths miles, approximately, and extending from the west boundary of the S.E.¼ of the N.E.¼ of section 22, township 14 north, range 33 W. to the east boundary of the S.W.¼ of section 26, township 14 north, range 31 W. It maintains two drainage ditches; one referred to as the North ditch, also known as drain No. 2, extending easterly from section 19, township 14 north, range 32 W. to the center of the N.E.¼ of section 26, township 14 north, range 31 W., the

other referred to as the South ditch, and also known as drain No. 1, commencing in section 28, township 14 north, range 32 W., extending in a general easterly direction, joins the north ditch at the N.E.¼ of section 26, township 14 north, range 31 W., aforesaid, and together both continue on to their outlet in the North Platte river. The Suburban Irrigation District maintains an irrigation ditch which has its intake in the North Platte river in section 7, township 14 north, range 32 W., divides into two separate channels in section 24, township 14 north, range 32 W., and both thereafter are conducted in a varying southeasterly direction, and have their separate outlets in the South Platte river. The course of these irrigation ditches cross the drainage district ditches in sections 29 and 25 (hereinbefore referred to) respectively. This crossing or intersection of the drainage and irrigation ditches has been the source of this litigation.

As the inception or source out of which this litigation has arisen, it appears that on August 10, 1934, a committee appeared before the board of supervisors of Drainage District No. 1, on the subject of building a "check" in the drainage district canal. This committee was presumed by the drainage district officers to be officially connected with the Suburban Irrigation District. The following minutes of the meeting is all of the official records of the drainage district that refer to this transaction:

"Hershey, Nebraska. August 10, 1934. The Board of Supervisors of Drainage District No. 1 met on the above date, Present: W. H. Jenkins, Chairman, Geo. V. Brownfield, Secretary, G. M. Cary, R. A. Frame, and J. R. White, Supervisors. * * * A committee consisting of Frank Strolberg, Gus Hultman, Wm. Rohlfing and Elliot Olson, approached the Board on the subject of building a check in the Drainage District Canal No. 2 at about the section line between Section 29 and Section 30, Township 14, Range 31. Permission was granted to them to build such check, provided that, first, the Suburban Irrigation District would enter into a contract to assume liability for any

damage caused by checking said canal; and, second, on appearance of any such damage, that the boards of the check be immediately pulled and the water turned back into said canal and allowed to follow its course without further attempt to divert for irrigation."

The evidence in the record also discloses that after the resolution was adopted the board of supervisors had a contract prepared which was handed to the committee appearing before it, but this contract was never returned to the board of supervisors. It also appears that the resolution thus adopted was transmitted to the Suburban Irrigation District, and it also was never returned. The evidence seems without contradiction that no application was ever made to this board of supervisors for permission to put in a "check" on section 25 and no authority for that purpose was ever granted. But it seems that immediately after the action thus taken, notwithstanding its terms were not complied with, the check or dam was built in ditch No. 2 in section 29 aforesaid, with the approval and cooperation of the Suburban Irrigation District, which contributed a substantial sum of money to be applied to the cost of construction thereof.

It is obvious that the defendant and the interveners have and possess no rights in the matters here in suit, save such as lawfully arise out of, or are derived from, the action taken by the corporate authorities of the drainage district, including estoppels if any created and established thereby. The determination of the claims made by them necessarily involves a consideration of the corporate powers vested in this drainage district, the limitations thereof and the action taken and had by these corporate authorities in the exercise of the statutory powers possessed by it.

"But, of course, the powers of a district of the kind under consideration are measured by the terms of the statute (of their creation), and the authorities agree that it can exercise no authority which has not been clearly granted it by the legislature." 17 Am. Jur. 789, sec. 18.

We are committed to the general rule stated thus: "The

powers of a corporation organized under legislative statutes are such, and such only, as the statutes confer. The charter of a corporation is the measure of its powers, and the enumeration of these powers implies the exclusion of all others." *State v. Atchison & N. R. Co.*, 24 Neb. 143, 38 N. W. 43. See, also, *Durland v. Elkhorn Life & Accident Ins. Co.*, 112 Neb. 105, 198 N. W. 564; *Allison v. Fidelity Mutual Fire Ins. Co.*, 81 Neb. 494, 116 N. W. 274.

As we understand the record, Drainage District No. 1, plaintiff herein, was organized in 1921 or 1922 under that portion of our drainage law originally enacted in 1905, as chapter 161 of the session laws of that year, "for the reclamation and protection of swamps, overflowed or submerged lands," as amended by chapter 147, Laws 1909, and which, together with subsequent amendments, is now carried as article 4, ch. 31, Comp. St. 1929.

This jurisdiction is committed to the view that a drainage district organized under the provisions of the foregoing legislation is a public and not a private corporation. *Drainage District No. 1 v. Richardson County*, 86 Neb. 355, 125 N. W. 796; *O'Neill v. Leamer*, 93 Neb. 786, 142 N. W. 112.

"Corporations manifest their assent to and make contracts by deed or vote of the company, or by the agreement of their authorized agents, and not by the unauthorized declarations or promises of its individual members." *Clarke v. Omaha & S. W. R. Co.*, 5 Neb. 314.

"These rules seem to be founded on the principle that the formation of a legal body by incorporation, confers the character and properties of individuality upon a collective and changing body of men; and that, therefore, the corporation is an entity, and in respect to its appointments, contracts and business affairs, it must act in its corporate capacity as an entity." *Clarke v. Omaha & S. W. R. Co., supra.*

And, as to the nature of the powers vested in the board of supervisors, we have determined:

"It was the intent of the legislature in the enactment of

the provisions of article 4, ch. 31, Comp. St. 1929, to impose a duty on drainage districts organized thereunder to maintain and keep in repair the drainage systems constructed under the powers given them by such act, to the end that landowners whose land was assessed for the construction of such system on the basis of expected benefits from such construction may be protected in the enjoyment of such benefits." *Mooney v. Drainage District,* 126 Neb. 219, 252 N. W. 910.

Also, that in this connection, the performance of the powers delegated to drainage districts by article 4, ch. 31, Comp. St. 1929, especially those pertaining and relating to the continuance of the corporate entity authorized thereby and the care and preservation of its drainage ditches and other works and improvements, involves the protection of public and private interests by a public corporation organized for that purpose, and that this legislation, in view of its inherent nature and purpose, must be construed as a statute mandatory. *Doane v. City of Omaha,* 58 Neb. 815, 80 N. W. 54; *Greb v. Hansen,* 123 Neb. 426, 243 N. W. 278; *Mooney v. Drainage District,* 126 Neb. 219, 252 N. W. 910.

In addition, in *Flader v. Central Realty & Investment Co.,* 114 Neb. 161, 206 N. W. 965, an action for injunction to prevent the construction of a dam, where it appears that the drainage district complaining was organized under the provisions of article 5, ch. 17, Comp. St. 1922 (article 5, ch. 31, Comp. St. 1929, which contains many provisions similar to those in article 4, ch. 31), we announced the rule:

"A drainage district organized under the laws of this state has a special right under the statute to have its drainage channel kept free from obstruction or interference on the part of third parties, and any damming of the channel to the detriment of the drainage district may be enjoined in a proper action."

Under the terms of this legislation the board of supervisors are constituted public officers, and a right of appeal

from their decision is provided. They are the corporate authorities vested with the powers of carrying on its business as prescribed by statute, and charged with the responsibility of providing for and securing the lawful exercise of its powers. *White v. Papillion Drainage District,* 96 Neb. 241, 147 N. W. 218.

In this regard, it will be noted, however, that supervisors have authority to bind the corporation only when they act collectively as a board, and are not *ex officio* agents of the corporation. *Smith v. Bankers Nat. Life. Ins. Co.,* 130 Neb. 552, 265 N. W. 546.

A careful consideration of article 4, ch. 31, Comp. St. 1929, discloses that it expressly confers no rights or powers upon drainage districts, whose creation it authorizes, to engage in irrigation, or to authorize or consent to the diversion, for the purpose of irrigation, of any waters carried in any drainage ditch which the district may construct and maintain. Neither is it empowered to authorize an obstruction thereof or therein. The only special provision conferring special rights in the use of drainage ditches appears to be section 31-457, Comp. St. 1929.

Section 31-464, Comp. St. 1929, provides for the care of drainage ditches by overseers appointed by the board of supervisors, "whose duty it shall be to keep the ditches, drains, dikes, and other works erected or constructed by the reclamation of the lands in the drainage district in good repair, and remove all obstructions from all ditches, drains, or watercourses within their respective districts."

Section 31-465, Comp. St. 1929, provides penalties for any person who "shall wilfully obstruct or injure any ditch, drain, or watercourse, or damage or destroy any dike or other work constructed under the provisions of this article."

Not only is there an entire omission in article 4, ch. 31, Comp. St. 1929, to confer the power on the drainage district to engage in irrigation or authorize the diversion of the water carried in its ditches and drains for irrigation purposes, or authorize the creation of dams or other obstructions in the channels thereof, but express words and

provisions of the enactment, some of which are referred to above, are wholly inconsistent with existence or exercise of such powers.

Nor do the claims of riparian rights aid the defendant and the interveners. We have held that land, to be riparian, must have a stream flowing over it or along its borders; and such proprietors have the right to the ordinary or natural flow of such stream. *Crawford Co. v. Hathaway,* 67 Neb. 325, 93 N. W. 781.

In the instant case, the drainage ditches here involved are strictly artificial creations. Neither in source nor channel do they partake of the elements of a natural stream.

"There is a well-defined distinction between artificial streams and natural streams in artificial channels. Thus, riparian rights do not ordinarily attach to artificial streams in artificial channels." 27 R. C. L. 1203, sec. 121. See *Sampson v. Hoddinott,* 1 C. B. n. s. 590, 26 L. J. C. P. n. s. 148; *Fox River Flour & Paper Co. v. Kelley,* 70 Wis. 287, 35 N. W. 744.

"As the water in a ditch is private property, the landowner through whose land the ditch runs, or into which a ditch discharges, can claim no riparian rights therein against the ditchowner, for riparian rights exist only in natural streams, whose waters are *publici juris.*" 1 Wiel, Water Rights in the Western States (3d ed.) 51, sec. 57.

An examination of the record, *de novo,* we find, amply supports the disposition of this case as made by the trial court. Proof establishes the fact that damages to the drainage canal by reason of the operation of the dam or check have "appeared." Under the reservation made by the board of supervisors in their resolution of August 10, 1934, it was then the duty of the Suburban Irrigation District to remove the parts of the flume that operated as a check or dam, situated on section 29 aforesaid, and "turn the water back into said (drainage) canal and allow it to follow its course without further attempt to divert for irrigation."

There is no valid basis for the claimed right to install a check in the drainage district ditch in section 25, disclosed by the evidence.

In addition, the rights claimed by defendant and the interveners are inconsistent with and repugnant to the terms of article 4, ch. 31, Comp. St. 1929, and were not within the lawful power of the public corporation, acting through its board of supervisors, to grant. The defendant and interveners were at all times chargeable with notice of the limitation of the lawful powers of these officers and of the public corporation represented by them.

It follows that the decree entered by the district court as to relief granted is correct, and the judgment is

AFFIRMED.

TENA E. GLISSMANN, APPELLEE, V. EDMOND H. ORCHARD ET AL., APPELLANTS: SERENA E. GRABOW ET AL., APPELLEES.
297 N. W. 612

FILED APRIL 18, 1941. No. 30934.

Equity. He who comes into equity must come with clean hands, and while a court of equity endeavors to promote and enforce justice, good faith, uprightness, fairness, and conscientiousness on the part of the parties who occupy a defensive position in judicial controversies, it no less stringently demands the same from the litigant parties who come before it as plaintiffs or actors in such controversies.

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

Edmond H. Orchard, for appellants.

Gray & Brumbaugh, Raymond E. McGrath and *Samuel L. Winters, contra.*

Heard before SIMMONS, C. J., EBERLY, PAINE, MESSMORE and YEAGER, JJ., and LANDIS and MUNDAY, District Judges.

PAINE, J.

This was an action in equity, brought by Tena E. Glissmann against Edmond H. Orchard and wife, defendants, for a declaratory judgment to settle the amount of her indebtedness under a lease and option agreement, which had

heretofore been construed by the court to be an equitable real estate mortgage. Plaintiff also asked for an accounting with the defendants Edmond H. Orchard and wife to determine the exact amount which they had invested in the property, which amount plaintiff should pay in order to settle with the defendants in full.

The plaintiff alleges generally that on March 28, 1929, the lease and option agreement, involving the Valley View Golf Course west of Omaha, near Ninety-eighth and Center streets, consisting of 70 acres, with improvements thereon, was entered into by and between Serena E. Grabow and John J. Grabow and the Orchards; that the district court had previously determined that said agreement was an equitable real estate mortgage in favor of the defendants Orchard and against the plaintiff; that in another action in the district court, between the same parties as in the case at bar, a decree had been entered, finding that so long as payments continued to be made promptly when due, according to the terms of the agreement, they will be entitled to the possession of the Valley View Golf Course, on which land they have expended large sums of money in improving the same since the agreement was entered into with Orchard; that upon payment by her of the sums due Orchard she is entitled to a deed of conveyance of all of said real estate from the Orchards, and to the cancelation of all claims the Orchards have by virtue of the agreement.

It is further alleged in the plaintiff's petition that in signing said agreement Serena E. Grabow and John J. Grabow were acting as the agents of the plaintiff. The petition charges that the defendants Orchard, at the time of signing said agreement, by fraud and misrepresentation and with intent to deceive, represented that the total amount they had invested in said property, including payment of taxes thereon, was the sum of $26,000. The plaintiff did not learn until a year before bringing this suit that the total payments that the defendants Orchard had invested in said property amount to the full sum of $18,085.40, and not the sum of $26,000, as represented by them.

Plaintiff further charges that during all of these years she has overpaid the defendants Orchard $505.19 a year in interest, which represents the difference between the annual interest on $26,000, which they charged her at 6 1/3 per cent. interest, and the true interest on $18,085.40, making the total overpayments in interest amount to the sum of $5,051.90, and that she is entitled to have her indebtedness reduced by the amount of these overpayments of interest, which, deducted from the amount actually paid by the Orchards, leaves a balance of $13,033.50, and therefore plaintiff asks for an accounting.

Upon the motion of defendants Orchard, it was ordered by the court that Henry C. Glissmann, Serena E. Grabow, John J. Grabow, Harold W. Glissmann and Hans Glissmann be made additional parties defendant.

On April 1, 1939, an answer and amended cross-petition was filed by Edmond H. Orchard and Harriet, his wife, in which it is admitted that Serena E. and John J. Grabow have held a lease and option from the Orchards upon the premises described in the lease and option, copy of which is attached as exhibit A; admitted that the district court entered a decree in the case of Tena Glissmann versus the Grabows and Orchards, and they deny every other allegation contained in the petition. Defendants Orchard allege that from the decrees so entered no appeal has been taken within the time allowed by the statute, and that the statute of limitations has run, and the time for appeal has expired.

By way of cross-petition, defendants allege that the lease and option held by Serena E. Grabow and husband John, and in which the plaintiff, Tena E. Glissmann, claims to have an interest, has expired, together with extension under the moratorium law; that the plaintiff and others have terminated said option by failing to comply with its terms; that no proceedings are now pending for possession of the property; that whatever interest the plaintiff and others may have in said property is junior and inferior to the rights and interests of the Orchards; wherefore, Edmond H. Orchard and wife, Harriet, pray that the action of the

plaintiff on charge of fraud and misrepresentation be dismissed, that title to the premises described be forever quieted in them, and that Tena E. Glissmann, Henry C. Glissmann, Harold W. Glissmann, Hans C. Glissmann, Serena E. Grabow and John J. Grabow, and each of them, be forever barred and foreclosed of all right, title and interest in said premises, and, further, that the court give direction to said Orchards as to the restoration of the remainder of the $1,500 equity which Serena E. Grabow has in a certain five acres described in the lease and option agreement, and that a writ of assistance be given to the said Orchards to put them in possession of the premises.

Serena E. Grabow and John J. Grabow, by way of answer and cross-petition filed May 19, 1938, admit that a lease and option were entered into between the defendants Edmond H. Orchard and his wife, Harriet, as parties of the first part, and Serena E. Grabow and husband, John, as parties of the second part; admit that the decree was entered as alleged in the petition, and deny all other allegations not herein admitted; admit that, in making the original bid of $23,725 at sheriff's sale, Serena E. Grabow made such bid as agent of, and for the accommodation of, the plaintiff, and upon the assurance of plaintiff that the sum so bid would be furnished by said plaintiff when needed to comply with the terms of the bid; that when plaintiff failed to produce the sum so bid, Serena E. Grabow, in order to avoid being punished for contempt of court, entered into the lease and option with Orchards, and was compelled to pledge her personal estate, as therein indicated, and as found by the court in its decree of June 6, 1930, at great financial loss to said Serena E. Grabow, and further allege that, when plaintiff failed to exercise the option so procured for her benefit, the district court on February 12, 1934, by declaratory judgment held, among other things, that the defendant Serena E. Grabow became the holder of an equitable real estate mortgage. Serena E. Grabow specifically denies that the terms of rental fixed in the lease were based upon any fixed sum of money paid by

the Orchards in consideration of the assignment to them of the bid made by Serena E. Grabow at the sheriff's sale, and that the rights of the plaintiff should be quieted in the defendants Orchard, and the Orchards be directed to surrender and deliver up to Serena E. Grabow all property held by them as collateral under said option and lease, and that said option and lease be declared forfeited by reason of default upon the part of the plaintiff to comply with the terms and conditions thereof, and that the defendant Serena E. Grabow recover the collateral remaining in the hands of the said Orchards.

On October 31, 1939, a decree was rendered in the district court, setting forth that a trial was had, beginning on June 26, 1939. The court finds that the lease and option agreement between Serena E. Grabow and Edmond H. Orchard and wife was executed by Serena E. Grabow as agent for Tena E. Glissmann, that the district court in a prior action had determined that the amount which Tena E. Glissmann was to repay to the defendants Orchard under said lease and option, construed as an equitable mortgage, was the precise sum advanced by the Orchards to clear said premises from encumbrance.

The court further finds that Edmond H. Orchard, at the time of signing said lease and option agreement, by fraud and misrepresentation, with intent to deceive the plaintiff, falsely represented that the total sum invested by said Orchard was the sum of $26,000, and that the total amount actually invested by the defendant Orchard was only $18,299.82, and that Edmond H. Orchard offered no proof to show that he had invested any other sums than $18,299.82. The court denies the prayer of the plaintiff for a credit of $5,051.90 as interest overpaid.

The court further finds that the Orchards have accepted the rental payment of $1,650 per annum, and thus renewed the operation of said lease and option during each year in which said rental was paid. The court finds that Tena E. Glissmann, plaintiff, is not in default with reference to said lease and option.

The court further directs that Orchard return to Serena E. Grabow any property given him by way of collateral security in connection with said lease and option agreement. It is further ordered that, when plaintiff Tena E. Glissmann pays to the defendant Edmond H. Orchard the sum of $18,299.82, said Orchards are directed to execute a warranty deed to said premises to the plaintiff, and it is further ordered that the cross-petitions of Serena E. Grabow and husband and Edmond H. Orchard and wife be and they are dismissed, and that the costs shall be paid by Edmond H. Orchard and wife.

Thereupon Edmond H. Orchard and wife filed motion for a new trial on the ground that the decree was not sustained by sufficient evidence, is contrary to law, and allege that the court erred in many rulings during the trial, and that the decree is not within the pleadings and evidence submitted.

Other phases of the litigation between some of the parties involved herein have been before this court in the following cases: *Bauermeister v. McDonald,* 124 Neb. 142, 247 N. W. 424; *Glissmann v. McDonald,* 128 Neb. 693, 260 N. W. 182; *Glissmann v. Happy Hollow Club,* 132 Neb. 223, 271 N. W. 431; *Glissmann v. Bauermeister,* p. 354, *post,* 297 N. W. 617.

The evidence discloses how Mrs. Serena E. Grabow came to be a party to the contract with Orchards. She was the sister of Henry C. Glissmann and a daughter of Hans C. Glissmann. There was a mortgage on Valley View Golf Course property, which had been foreclosed, and the property was being sold. The night before the sheriff's sale Henry C. Glissmann and his wife, Tena E. Glissmann, came out to Serena E. Grabow's home, five miles west of Louisville, and urged them to make a bid at the sale the next day. Mrs. Grabow refused to do it, and they said that her husband John could not do it because he was under foreclosure too, and they said Mr. Robertson, the attorney, thought Serena E. Grabow could do it, and her brother Henry agreed to finance the bid, and they took her to Omaha

that night. The next morning they took her to the attorney's office, and he told her that her brother Henry was going to lose the Valley View Golf Course, and she finally went over to the east entrance of the courthouse with their attorney, Mr. Robertson. She said that Judge Foster made it very plain that there was to be no false bid, that anybody who bid was responsible for the bid, and that Mr. Orchard bid $23,700, and then Attorney Robertson stepped up and bid $23,725 in her name, and there was no other bid, and she went back to the attorney's office, where her brother Henry and his wife, Tena, were waiting for them, and the attorney prepared an assignment of the bid to Tena E. Glissmann, which she signed and left with the attorney, and she understood that Henry had the money to carry out the bid, but after lunch the same day they returned to the attorney's office and she was first told that Henry did not have the money to carry out the bid.

Mrs. Grabow testified that she had never attended a sheriff's sale before, and this was the first bid ever made by her. She was then urged to go up and see Mr. Orchard, a teacher at the Technical High School, to see if he would leave in $15,000 of his money to help out on the bid, and they went and talked, but he would not agree to that, and then they drove home to their farm at Louisville.

Letters were written to them that the judge was very anxious to have the bid confirmed. Attempts were made to get a bond issue through Rufus E. Lee, and her brother Henry attempted to furnish security, but failed, and wanted her to help him out and put up her interest in her father's estate, but the bond deal fell through.

In a conference at the sheriff's office between William C. Nollman, Mr. Orchard and Mrs. Grabow, Mr. Nollman told Mrs. Grabow at that time that she was liable for contempt of court, and also subject to a jail sentence, on the bid she had been induced to make, and that the land might have to be resold at her expense, and then conversations were held toward getting Orchard to accept the assignment of the bid which had been made in the name of Serena E.

Grabow. Later Mr. Orchard and Mr. Nollman brought papers already prepared out to the Grabow farm west of Louisville, and Serena E. Grabow and Edmond H. Orchard signed a preliminary agreement in the presence of William C. Nollman, in which it was stated that she had that day assigned her bid to Orchard in the foreclosure suit of the Bank of Benson against Henry C. Glissmann. Orchard agreed to give her the first option to purchase the property, which option was to be entered into at any time within two months, in which she would pay the amount of her bid and additional sums amounting in all to approximately $25,000, on condition that Serena E. Grabow would put up security for the payment of the interest and carrying out the contract. Finally the option was to be executed and held until Mrs. Grabow delivered such security.

Mrs. Grabow's interest in the estate of her father, Hans C. Glissmann, was estimated by her at that time to be worth $6,500, and in a conversation with Henry C. Glissmann she was told that Orchard demanded $7,000 worth of securities to give the option, and Henry offered to put up five acres in lieu of her interest in her father's estate, but Orchard would not accept it under those conditions. Tena E. Glissmann objected to putting in her five acres, and bitter conversation followed. Henry wrote out the top part of an agreement on his typewriter, using the instrument relating to the proposed bond issue as a model, and then sewed this with a sewing-machine to the bottom part of the old bond contract that had been signed by the same parties.

This nondescript paper so made was marked exhibit No. 33, and received in evidence without objection. The top part, being the first paragraph, reads as follows: "That whereas it is to the mutual advantage of the contracting parties hereto, that the first party, pledge her share in the estate of the late Hans C. Glissmann, as security in connection with other securities offered so that the parties hereto can procure and complete, a certain deal in which E. H. Orchard, of Omaha Neb, is to take a deed to the 70

acres included in what is known as the Valley View Golf Links, located at about 98th and Center St, Douglas County Neb, and to lease the same back to Serena E. Grabow, and give a 5 yr option to buy same, at a price mentioned in contract entered into with E. H. Orchard, the option to be assigned to Tena E. Glissmann, wife of Henry C. Glissmann, now therefore:—"

The lower part of this agreement, on a different kind of paper and sewed with a sewing-machine to the upper part, provided that, in consideration of Serena E. Grabow pledging her share in her father's estate, Henry C. Glissmann would sell, assign and set over to her and her heirs all right, title and interest of Henry C. Glissmann in his father's estate, and grant her and her heirs the right to receive, receipt for, and acknowledge all papers in connection with the share of Henry C. Glissmann in the estate of his father, and in consideration of his assignment to her of all his interest in the estate of his father she agrees to execute any instruments necessary to pledge her share in the estate of her father. Then appear the signatures of Serena E. Grabow, party of the first part, and Henry C. Glissmann, party of the second part, with no witness, nor acknowledgment of the signatures, but at the bottom of the paper appears this statement:

"The above assignment to Serena E. Grabow on the part of Henry C. Glissmann is hereby approved and I hereby acknowledge and confirm such assignment, this 24 day of January, 1929.

"Witness to signature. (Signed) Tena E. Glissmann.

"(Signed) J. J. Grabow."

Serena E. Grabow testified that she had never received any property from Henry C. Glissmann, or from the trustees holding his interest in his father's estate, to protect her in the collateral she gave to Orchard, which was all of her interest in her father's estate, although Henry C. Glissmann and his wife, Tena, have at all times resided on this Valley View Golf Course. Whenever there was a default in the payments of rent, Orchard wrote letters to

Serena E. Grabow that she must keep up her payments on the option agreement, to protect which she had deposited all of her interest in her father's estate, and she was compelled to beg Henry and his wife to make these payments promptly. Letters and evidence show that Serena E. Grabow and her husband were in a desperate shape financially to meet their own obligations, because she had put up all of her interest in her father's estate to Orchard on his contract for the sole benefit of her brother Henry and his wife, the plaintiff herein.

Edmond H. Orchard testified that he was still holding the share of Serena E. Grabow in the estate of her father, which she had pledged back in March of 1929.

"Fraud is never to be presumed. It must be proved. A creditor of a vendor seeking to invalidate a sale upon the grounds of fraud must prove facts from which a legitimate inference of fraudulent intent can be drawn. Evidence simply justifying a suspicion is not sufficient. *Jaege v. Kelley,* 52 N. Y. 273, followed." *Bank of Commerce of Grand Island v. Schlotfeldt,* 40 Neb. 212, 58 N. W. 727. See, also, *Meyer v. Schmidt,* 135 Neb. 850, 284 N. W. 337; 12 R. C. L. 237, sec. 8.

We fail to find any evidence whatever of fraud on the part of Orchard.

He who comes into equity must come with clean hands, and "while a court of equity endeavors to promote and enforce justice, good faith, uprightness, fairness, and conscientiousness on the part of the parties who occupy a defensive position in judicial controversies, it no less stringently demands the same from the litigant parties who come before it as plaintiffs or actors in such controversies." 1 Pomeroy, Equity Jurisprudence (3d ed.) sec. 398.

In our opinion, the plaintiff and her husband are bound to settle with Orchard on the terms of the amount stated in the option contract. The plaintiff would be barred ordinarily by her laches, except for the fact that payments, which have dragged along over the years, have been accepted by Orchard.

The court finds that the indebtedness on the lease and option of Orchard is in the amount stated therein, of $26,000, and that, in order to retain said premises under the theory that said lease and option are an equitable mortgage, Orchards should be paid $26,000, as provided therein. The date of redemption, fixed in the decree of the district court, having expired nine months from October 31, 1939, said redemption date is fixed at three months from the date of the mandate herein. Costs are taxed to plaintiff.

AFFIRMED AS MODIFIED.

HAROLD W. GLISSMANN, APPELLEE, V. F. H. BAUERMEISTER ET AL., APPELLEES: EDMOND H. ORCHARD ET AL., APPELLANTS.

297 N. W. 617

FILED APRIL 18, 1941. No. 30935.

1. **Equity.** "Equity seeks the real and substantial rights of the parties, and applies the remedy in such manner as to relieve those having the controlling equities." *Weckerly v. Taylor*, 77 Neb. 886, 110 N. W. 738.
2. ———. "It is an old and well-established principle that equity looks to the substance of things rather than the form, and will endeavor to carry out the real intent and purpose of the parties to a contract." *Empson v. Deuel County State Bank*, 134 Neb. 597, 279 N. W. 293.
3. **Assignments: EQUITY.** "If the plaintiff, or his assignor, has been guilty of any misconduct in connection with the transaction out of which the claim in suit arose, so that the enforcement of such claim would be harsh, unconscionable, and oppressive, a court of equity will either decline to grant any relief whatever or grant it on such terms as may be just and equitable." *Lewis v. Holdrege*, 56 Neb. 379, 76 N. W. 890.

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

Edmond H. Orchard, for appellants.

Gray & Brumbaugh, Raymond E. McGrath and *Samuel L. Winters, contra.*

Heard before SIMMONS, C. J., EBERLY, PAINE, MESSMORE and YEAGER, JJ., and LANDIS and MUNDAY, District Judges.

PAINE, J.

Plaintiff brought an action in equity against Serena E. Grabow and several other defendants to obtain certain money held by the Happy Hollow Club and trustees thereof, payment of which to plaintiff was refused because Serena E. Grabow had served notice that her interests in said fund were prior and superior to the interests of plaintiff, and plaintiff asked for $2,000 damages from Serena E. Grabow, and his attorney's fee, for her alleged wrongful interference with his collection of said fund and credits. Serena E. Grabow interpleaded and asked that she be awarded the funds and credits claimed by plaintiff, and other funds and credits alleged to be due her from defendants Orchard. Trial was had and court denied plaintiff damages, denied Serena E. Grabow the prayer of her cross-petition and counterclaim, and ordered all sums in the possession of Happy Hollow Club and its trustees which were due to his father under the will of his grandfather paid to plaintiff.

Harold W. Glissmann filed a petition alleging that Hans C. Glissmann owned a certain tract of land which he sold on a contract to the Happy Hollow Club on July 1, 1922; that upon the death of Hans C. Glissmann he willed his interest in said contract to his children, among whom was his son, Henry C. Glissmann, who on October 15, 1928, assigned all of his right, title and interest in his share of the contract to his wife, Tena E. Glissmann. She assigned this interest on November 3, 1930, to her son, the plaintiff herein, Harold W. Glissmann.

Plaintiff alleges that on March 8, 1927, the Bank of Benson obtained a judgment against Henry C. Glissmann, which it sold to George H. Boland, who attempted to levy on the interest of Henry C. Glissmann in the real estate contracted to be sold to the Happy Hollow Club. After considerable litigation, Boland on June 15, 1938, assigned the judgment he had obtained to this plaintiff, which he now

holds in addition to the interest which he secured from his mother, Tena E. Glissmann.

Plaintiff alleges that the Happy Hollow Club has $1,800 which it is ready and willing to pay over on said contract, being the share now assigned to and owned by the plaintiff; that these payments have not been made to the plaintiff because Serena E. Grabow, aunt of plaintiff and one of the devisees under her father's will, served notice upon the Happy Hollow Club and the trustee not to pay such sum, for the reason that she claims an interest therein by virtue of an agreement which she claims to have entered into with Henry C. Glissmann in January, 1929, which provided that she should pledge her share in the estate of their father as security for him, and in which agreement Henry C. Glissmann pledged his share in said estate to her, giving her full right and authority to sign all necessary papers in accordance therewith.

Plaintiff admits that such an agreement was entered into, but alleges that it was abandoned by all parties, and that Serena E. Grabow has since said time collected all but a few dollars due her on her share in said estate, and that she has no right, interest or title now due in the share assigned to the plaintiff, and charges that said Serena E. Grabow filed her claim knowing that it had no foundation in fact, and that she was not entitled to anything under the abandoned agreement, but that, for the sole purpose of harassing this plaintiff, she put him to the expense of commencing a lawsuit, employing an attorney, and damaged him to the extent of $2,000; that, while she has some money coming under the Happy Hollow Club contract, she is otherwise insolvent, and plaintiff cannot be reimbursed for his expense and damage unless the court orders such damages paid out of the money due her from the Happy Hollow Club. Plaintiff prays that the rights of all parties be determined, and that a decree be entered finding that plaintiff is entitled to the sums in controversy, and that Serena E. Grabow has no right, title or interest therein, and fixing the amount of damage sustained by the plaintiff,

together with his attorney's fee, and directing that the same be paid out of any moneys due Serena E. Grabow under the Happy Hollow Club contract.

F. H. Bauermeister and Henry J. Moeller file answers asking the court to direct to whom money held by each shall be paid.

The Happy Hollow Club in its answer admits the purchase from Hans C. Glissmann of certain real estate under a contract providing for instalments, and alleges that both the plaintiff and Serena E. Grabow claim the right to the payments, and that this answering defendant cannot safely pay such moneys until the rights have been determined by the court.

Serena E. Grabow, by way of answer, cross-petition and counterclaim, admits the family relationships alleged by the plaintiff, and alleges that Henry C. Glissmann assigned his interest in his father's estate to his wife, Tena E. Glissmann, on October 15, 1928, but charges that said conveyance was made without valuable consideration to discourage creditors from attaching his interest to collect debts against him, and that after assigning said interest to his wife he continued to exercise all the rights of ownership, with the written consent and approval of his wife, and that on February 15, 1929, for a valuable consideration, he assigned and transferred all his interest to this answering defendant, said assignment being filed in the office of the register of deeds in Douglas county on October 18, 1929. She further charges that the plaintiff, residing at home with his parents, was fully advised of the true nature and character of the transaction, and is not a good faith purchaser through an alleged assignment of the interests of his father and mother, and denies that the plaintiff, on November 3, 1930, or at any other time, became a good faith purchaser, for a valuable consideration, of the interest in the estate of Hans C. Glissmann conveyed to plaintiff's father by will.

Answering defendant admits that George H. Boland purchased the judgment obtained by the Bank of Benson

against Henry C. Glissmann and Tena E. Glissmann, and denies that plaintiff furnished any part of the consideration for the settlement of the judgment assigned to Boland, and that such purported assignment to plaintiff was made after defendant had served notice on Happy Hollow Club of her rights therein, and was made for the express purpose of defrauding this defendant of her rights in said property given to her under agreement dated January 24, 1929, and executed by Henry C. Glissmann on or about February 15, 1929, in pursuance of which this defendant did on or about March 28, 1929, pledge her share in the estate of her father for the faithful performance of a five-year lease entered into with Edmond H. Orchard for the Valley View Golf Links, which lease was entered into for the benefit of Henry C. Glissmann and Tena E. Glissmann, who have at all times held possession of said real estate and enjoyed the benefits of said lease and of said option to purchase.

Answering defendant further alleges that, because of this assignment, defendant has at all times since March 28, 1929, been deprived of the use and benefit of her interest in the estate of her father. She further alleges in her cross-petition that said Valley View Golf Links was the homestead of Henry C. Glissmann, and was subject to a judgment in favor of the Bank of Benson, and at the solicitation of her brother she bid in said property for $23,725, and her brother Henry failing to furnish money for said bid, she entered into the option agreement with Edmond H. Orchard, putting up collateral to secure the same, and therefore prays that the action of the plaintiff be dismissed, and that defendants Orchard be ordered and directed to release to her her interest in the estate of Hans C. Glissmann and certain other property.

The Happy Hollow Club filed a separate answer, setting up the sums it has retained because of this litigation. John J. Grabow and Edmond H. Orchard were made parties defendant, and answers were filed by Daniel G. Cary and Edmond H. Orchard, and a reply by Harold W. Glissmann.

On October 31, 1939, a decree was entered by the district

court, finding against the plaintiff on his prayer for damages against Serena E. Grabow, but finding for the plaintiff in regard to all sums of money held by Happy Hollow Club and its trustees and others, and directing that all of such sums be paid to the plaintiff. Motions for new trial were filed by the Orchards, Serena E. Grabow and John J. Grabow, which were overruled by the court, and appeals taken.

This case is a companion case to *Glissmann v. Orchard, ante,* p. 344, 297 N. W. 612, and was tried at the same time, on the same evidence, and but one bill of exceptions is prepared for both cases. To save duplication, reference is hereby made to the opinion found in that case, which shall also govern in this opinion as to all points disposed of therein.

As to the many allegations against his aunt, Serena E. Grabow, raised by plaintiff in his long petition, it is quite significant that the bill of exceptions does not disclose that Harold W. Glissmann, the plaintiff, took the witness-stand to support any of these allegations of his petition by his evidence, the only direct support thereof being found in the testimony of his father and mother.

As Henry C. Glissmann's homestead property was in process of foreclosure, and with outstanding judgments of $30,000 to $40,000 against him, according to his own testimony, he turned to his sister, Mrs. Grabow, to save his homestead property, the Valley View golf grounds. He induced her to make a bid at the sheriff's sale, but failed to raise the money to protect her bid, and she was finally induced to go through with it upon the promise of her brother Henry, supported by pledging to her his interest in his father's estate.

On that promise she entered into an agreement for him, which is exhibit No. 5 in the bill of exceptions, and was entered into on March 28, 1929, between Edmond H. Orchard and wife and Serena E. Grabow and husband. It consists of four pages of single-space typewriting, and is too long to set out at length in this opinion. It recites that

Serena E. Grabow has assigned her bid of $23,725, made on October 23, 1928, at sheriff's sale to Edmond H. Orchard, which sale has now been confirmed. It then recites that Serena E. Grabow has an equity of $775 in a contract on a five-acre tract, and has assigned that contract, together with all her interest in the proceeds coming to her from the estate of her father, Hans C. Glissmann, of the value of $5,500, all of which is to be held by Orchard as security for the faithful performance of the conditions of the contract. It is then set out that Orchard leases to Serena E. Grabow the property covered by the sheriff's deed for five years, commencing January 1, 1929, and terminating December 31, 1933, for which she agrees to pay as annual rent $1,650, and also to pay all taxes and assessments levied against the property. She agrees to keep the buildings insured against fire and tornado, and to use and maintain the premises solely for golf and country club purposes, and keep the same in good condition, and it is further provided: "Said first parties further give and grant to the second parties an option to purchase the said properties heretofore described, with all the buildings thereon, at any time during the term of this lease and while the same and the tenancy of the second parties thereunder remain in full force and effect, at and for the purchase price of $26,000.00 dollars; and in case of the exercise of this option by second parties and payment of the purchase price thereon within the time herein provided, thereupon first parties will convey said property to second parties by good and sufficient warranty deed * * *. It being further understood in this connection that in case of purchase by second parties, said second parties shall have the right of using to apply on the purchase price all moneys which have been received by first parties under the Glissmann estate assignment heretofore referred to and which have not been used and applied as hereinafter provided."

Under this contract, in the companion case we have just held that Henry C. Glissmann can redeem his homestead property by complying with the terms of this contract.

To now allow his son to secure the payments due on his father's share which were pledged to his aunt would violate all equitable principles.

By exhibit No. 33, entered into by the two parties, Serena E. Grabow and Henry C. Glissmann, he pledged to her all his rights and share in the estate of his father if she would enter into the contract with Orchard, which she has been compelled to carry out by Orchard, to her great loss.

At the bottom of exhibit No. 33 appears the following:

"The above assignment to Serena E. Grabow on the part of Henry C. Glissmann is hereby approved and I hereby acknowledge and confirm such assignment, this 24 day of January, 1929.

"(Signed) Tena E. Glissmann.

"Witness to signature. (Signed) J. J. Grabow."

See, also, exhibit No. 37, executed by same parties in January, 1939, to the same effect. This exhibit, received without objection, contains the following statement: "That now, Henry C. Glissmann, in consideration of the making of said contract and other valuable considerations, hereby covenants and binds himself, his heirs and assigns that he will diligently protect and preserve his former original share in said estate with the view that it be not diminished, in particular in any suit at law or outstanding contract or right created against such by any party, and that should such share be diminished, said Henry C. Glissmann hereby specifically covenants with Serena E. Grabow, her heirs and assigns, that he will reimburse said Serena E. Grabow in the dollars and cents whereby such share is lessened."

This exhibit No. 37 was prepared to have Serena E. Grabow put up her share in the estate to secure a bond issue, which fell through, but Henry C. Glissmann got all the benefit of keeping his homestead property under the Orchard contract as he would have secured if the bond issue had gone through as planned, and this exhibit is but one piece of evidence among many which proves the promises made to his sister to help him out.

"Equity seeks the real and substantial rights of the par-

ties, and applies the remedy in such manner as to relieve those having the controlling equities." *National Mortgage Loan Co. v. Hurst,* 120 Neb. 37, 231 N. W. 519; *Weckerly v. Taylor,* 77 Neb. 886, 110 N. W. 738.

"It is an old and well-established principle that equity looks to the substance of things rather than the form, and will endeavor to carry out the real intent and purpose of the parties to a contract." *Empson v. Deuel County State Bank,* 134 Neb. 597, 279 N. W. 293.

"If the plaintiff, or his assignor, has been guilty of any misconduct in connection with the transaction out of which the claim in suit arose, so that the enforcement of such claim would be harsh, unconscionable, and oppressive, a court of equity will either decline to grant any relief whatever or grant it on such terms as may be just and equitable." *Lewis v. Holdrege,* 56 Neb. 379, 76 N. W. 890.

The decree of the district court is hereby reversed and the action dismissed.

REVERSED AND DISMISSED.

On motion to clarify original opinion, the following supplemental opinion was filed July 3, 1941.

PAINE, J.

The opinion in this case was released on April 18, 1941, and is found *ante,* p. 354, 297 N. W. 617. The 40 days for filing motion for rehearing expired on May 28, 1941, and no litigant filed such a motion. However, on May 21, 1941, the appellants filed a motion to clarify the court's opinion, supported by the affidavit of Emmet S. Brumbaugh, and this motion was orally argued to the court on June 2, 1941.

In *Bell v. Dingwell,* 91 Neb. 699, 136 N. W. 1128, this court restated: "'It is a well-settled principle of equity jurisprudence that where a court of equity has obtained jurisdiction of a cause for any purpose it will retain it for all, and will proceed to a final determination of the case, adjudicate all matters in issue, and thus avoid unnecessary litigation.' *Buchanan v. Griggs,* 20 Neb. 165."

This court had jurisdiction of the parties, and reversed the decree of the district court and dismissed the plaintiff's petition. However, our opinion, in addition thereto, should have disposed of all of the issues between the parties which were set out in the pleadings and supported by the evidence, and in following the approved practice of courts of equity this court has decided to enter this supplemental opinion, and thereby more completely adjust the rights of the parties litigant, to the end that future litigation in regard to the same issues may be avoided.

Therefore, in addition to the entry of the judgment heretofore rendered, and supplemental thereto, judgment is hereby entered in favor of Serena E. Grabow on her counterclaim and cross-petition against the plaintiff and defendants Henry C. Glissmann and Tena E. Glissmann for all moneys due from defendant Happy Hollow Club, Inc., or from defendant Daniel C. Cary, and representing the one-eighth interest of Henry C. Glissmann in the estate of Hans C. Glissmann, whether said moneys are in the hands of F. H. Bauermeister, former trustee, Henry J. Moeller, present trustee, or are still in the hands of Happy Hollow Club, Inc., or Daniel C. Cary; and the district court is further directed to enter judgment in favor of Serena E. Grabow and against defendants Henry C. Glissmann and Tena E. Glissmann for such sums as that court finds have been received by Henry C. Glissmann, Tena E. Glissmann and Harold W. Glissmann from and after March 28, 1929, together with interest thereon from date so received, and which said sums represent payments on the aforesaid share of Henry C. Glissmann in the estate of Hans C. Glissmann.

JOHN M. ALEXANDER ET AL., APPELLEES, V. MELVIN C. TURNER ET AL., APPELLANTS.
297 N. W. 589

FILED APRIL 18, 1941. No. 31041.

1. **Joint Adventures.** A joint adventure has been defined as an undertaking by two or more persons to carry out a single business enterprise for profit.
2. ———. A contract for a joint adventure, containing no stipulation as to its termination, does not continue for the life of the partners, or either of them, nor for any longer time than their mutual consent, and may be dissolved by either party at his own will at any time.
3. ———. When two persons engage in a joint adventure, each has a right to demand and expect the utmost good faith in all that relates to their common interests, for they stand in a fiduciary relation to each other.
4. ———. One party to a joint adventure may sue the other for a breach of contract, and equity will order an accounting between the parties.
5. **Evidence.** In the trial of a civil action, after the plaintiff has introduced evidence tending to establish his case, if defendant fails to testify to matters peculiarly within his knowledge, and necessary to his defense, a presumption exists that his testimony, if produced, would militate against his interest.
6. **Contracts.** In the construction of a contract, not only the express terms, but what is necessarily implied from those terms, should be considered.

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

Beghtol, Foe & Rankin and *Perry, Van Pelt & Marti,* for appellants.

Tunison & Joyner, contra.

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

PAINE, J.

This is an action in equity for the dissolution of a joint adventure, created by a written agreement, and for the is-

suance of certain corporate shares of stock. Court found for plaintiffs. Defendants appeal.

It appears that the Fidelity Investment Company owns the Metropolitan Apartments in Lincoln, which is the only property that this corporation owns. Plaintiff John M. Alexander purchased and had transferred to defendant Melvin C. Turner 219 shares of common stock and 379 shares of preferred stock of the Fidelity Investment Company. This was done in accordance with a written agreement between the parties, dated September 30, 1935, consisting of two typewritten pages, which provides, in brief, that Alexander contemplates purchasing the above shares of stock from the owner, W. E. Sharp, and said Alexander will cause the said shares of stock to be assigned by Sharp to defendant Turner, who will take charge of and manage said Metropolitan Apartments for 5 per cent. of the gross receipts, and will pay out of the income the taxes, upkeep, and repairs, together with interest on the outstanding mortgage of $57,000 owned by the Woodmen Accident Insurance Company, which loan matures in 1940, bearing interest at 4 per cent.

It is stated in said agreement that the above shares of stock represent a majority of the stock in said corporation, and Turner reserves the right to purchase any of said outstanding stock for himself with all profits to be made thereon; that Alexander shall only be entitled to receive his share of the interest in the stock he has purchased of W. E. Sharp. But, by a written amendment of November 5, 1935, the parties changed this last provision in paragraph No. 5 to provide that the two parties would own all stocks that could be purchased in the Fidelity Investment Company in equal shares.

Paragraph No. 7 provided that "when, as, and if" Turner should sell or trade any of said stock, Alexander should receive 50 per cent. of the net profit. It was further agreed that, so long as said stock was held, all net dividends or profits should be divided equally between Alexander and Turner. It appears that Alexander purchased the shares

of stock from Sharp, according to their contract, and that Turner on October 2, 1935, deposited the certificate in escrow in the First National Bank, as provided in their agreement.

It is charged by plaintiffs that on December 21, 1938, Turner wrongfully and unlawfully sought to dispose of the shares of stock for his own use and benefit, and in violation of the rights of the plaintiffs, by executing an instrument assigning said stock to Paul H. Schroeder as trustee for the Fidelity Investment Company. By reason of this assignment, in violation of their contract, plaintiff Alexander asked to have the contract terminated, and to declare the partnership, or joint adventure, between the plaintiff and defendant dissolved, and that the Fidelity Investment Company be ordered to cancel and reissue said certificates of stock, issuing to plaintiff Alexander new certificates for one-half of the amount, to wit, 109½ shares of common stock and 189½ shares of preferred stock.

The First National Bank stated in its answer that it is ready and willing to deliver said certificates of stock in accordance with the escrow agreement, but is unable to determine whether or not the plaintiff or any other person is entitled to said shares of stock.

In the answer filed by Melvin C. Turner, Paul H. Schroeder, and the Fidelity Investment Company, it is admitted that Turner signed and delivered to Paul H. Schroeder the assignment of said shares of stock, as charged, but they insist that said assignment was made subject to all rights of plaintiff under the original contract for a joint adventure.

It is charged in defendants' answer that the plaintiff has been attempting to buy up outstanding stock in said corporation to gain control thereof, so that plaintiff can operate the same with sole benefit and profit, in violation of the rights of the other stockholders in said corporation. Defendants pray that the amended petition be dismissed.

The three defendants in their answer claim that this stock should be held as a unit, or block, to prevent either the plaintiff or the defendants from gaining absolute con-

trol of the corporation, but there appears to be no evidence offered by the defendants to support this contention, but it is clearly stated in the amendment which they made to the contract that the intention of the parties was that in the final settlement each party should have an equal share in the ownership of stock.

The trial court entered its decree, finding that the plaintiff was the owner of an undivided one-half of 219 shares of common stock and an undivided one-half of the 379 shares of preferred stock in the Fidelity Investment Company, free and clear of any interest therein, or lien thereon, in favor of the defendants, or any of them, and directing that the said certificates now on deposit in escrow with the First National Bank of Lincoln be delivered by said bank to the Fidelity Investment Company for cancelation, and that said Fidelity Investment Company shall reissue to the plaintiff, Alexander, certificates for one-half of the shares of stock, free and clear of any interest therein, or lien thereon, in favor of the defendant Paul H. Schroeder or the Fidelity Investment Company, and that the joint adventure contract, dated September 30, 1935, between the plaintiff Alexander and the defendant Turner be, and the same is hereby, dissolved.

In the motion for a new trial, it was stated that the findings of the court are contrary to the facts, are not sustained by sufficient evidence, and are contrary to law.

In construing this contract, it appears to be conceded that the relationship created is one known as joint adventures, in which two parties combine their property, money, efforts, skill, or knowledge in a common undertaking. *Wilson v. Maryland*, 152 Minn. 506, 189 N. W. 437.

A joint adventure has been defined as an enterprise undertaken by two or more persons to carry out a single business enterprise for profit. 30 Am. Jur. 677, sec. 3.

In general, a joint adventure is subject to the same rules as a partnership, although the two relationships are not identical, for a joint adventure always relates to a single transaction, although the business of conducting it to a termination may be continued for several years.

The defendants insist that "It is not the function of a court of equity to make a contract for the parties, or to supply any of the material stipulations thereof." *Mercer v. Payne & Sons Co.*, 115 Neb. 420, 213 N. W. 813. See 13 C. J. 524, 525.

Defendants also cite us to our holding that "In construing a paragraph of a contract which is in dispute, the court must endeavor to place itself in the position of the parties, and ascertain their intention, as well as the object and purpose to be accomplished by the doubtful provision, and interpret it in the light of the actual facts and circumstances surrounding them at the time it was made." *Lyman-Richey Sand & Gravel Co. v. State*, 123 Neb. 674, 243 N. W. 891.

The defendants insist that in a joint venture, if no date is fixed for its termination, the agreement shall remain in force until its purpose is accomplished, citing *Goss v. Lanin*, 170 Ia. 57, 152 N. W. 43; insisting that to set aside this contract would be unjust and inequitable, for the contract could only be terminated under its terms "when the stock could be sold in a lump sum."

The contract in this case was drawn by Alexander in his office, and doubtless did not contain all of the provisions that would have been inserted if it had been drawn by an attorney, for the contract does not fix any time for the termination thereof.

In a similar case, in the United States supreme court, in *Karrick v. Hannaman*, 168 U. S. 328, 18 S. Ct. 135, 42 L. Ed. 484, it was said: "It is universally conceded that a contract of partnership, containing no stipulation as to the time during which it shall continue in force, does not endure for the life of the partners, or of either of them, nor for any longer time than their mutual consent, but may be dissolved by either partner at his own will, at any time," and this statement of the law would control a case of joint adventure, and the same has been said by the Iowa supreme court in *Fitzhugh v. Thode*, 221 Ia. 533, 265 N. W. 893, where it was held that a contract for the purchase and sale

of realty containing no provision for its termination was terminable at will.

When two persons engage in a common enterprise, each has a right to demand and expect the utmost good faith in all that relates to their common interest, for they stand in a fiduciary relation to each other, and are bound by the same standards of good conduct and square dealing as are required between partners. Such joint adventure continues until the enterprise has been completely wound up and terminated. 33 C. J. 851.

The rights of the parties, with respect to the management and control, were fixed by the written agreement which they entered into on September 30, 1935.

If one of the parties has the property in his control, and is regarded as a trustee, he will not be permitted to enjoy any unfair advantage because of his possession of the property.

One party to a joint adventure may sue the other for a breach of the contract, and equity will order an accounting between the parties. 21 Standard Ency. of Procedure, 108; *Dorwart v. Ball*, 71 Neb. 173, 98 N. W. 652.

In this case the bill of exceptions consists of certain exhibits offered by the plaintiff, and the oral testimony of Alexander, the plaintiff. The defendants offered no oral evidence or exhibits.

"In the trial of a civil action, after the plaintiff has introduced evidence tending to prove his case, if the defendant fails to testify to matters peculiarly within his knowledge necessary to his defense, a presumption exists that his testimony, if produced, would militate against his interest, which presumption may be considered by the court or jury trying the case, in determining the facts proved." *Talich v. Marvel*, 115 Neb. 255, 212 N. W. 540.

In the construction of a contract, not only the express terms, but what is necessarily implied from those terms, should be considered. *Hamilton v. Wead*, 122 Neb. 854, 241 N. W. 556.

Plaintiff Alexander insists that this contract be dis-

solved. When Melvin C. Turner assigned all of the shares of stock which Alexander had purchased of Sharp and placed in Turner's name to Paul H. Schroeder as trustee, this was clearly a violation of the contract which Turner had with Alexander, and would be governed by the rule announced in *Clay v. Palmer*, 104 Neb. 476, 177 N. W. 840, that where a partner has, in violation of his duty, wrongfully disposed of property in which the partnership has an interest, or wrongfully surrenders partnership rights to third parties, a court of equity may dissolve the partnership and compel an accounting.

An examination of the evidence of John M. Alexander, being the only witness who testified in the case, and of the exhibits introduced by him, and an analysis of the several citations of law, brings the court to the conclusion that the trial judge was right in his decree, and we find nothing prejudicial therein to the rights of any of the defendants, and the decree is hereby

AFFIRMED.

CHARLES GUMMERE, APPELLANT, V. GEORGE L. MUDD, APPELLEE.

297 N. W. 622

FILED APRIL 18, 1941. No. 30911.

1. **Automobiles.** "Gross negligence has been defined as an entire failure to exercise care, or the exercise of so slight a degree of care as to justify the belief that there was an indifference to the safety of others." *Larson v. Storm*, 137 Neb. 420, 289 N. W. 792.
2. ———. "When evidence is resolved most favorably toward the existence of gross negligence, and thus a fixed state of facts had, the question of whether or not such facts will support a finding of the existence of gross negligence is a question of law." *Gosnell v. Montgomery*, 133 Neb. 871, 277 N. W. 429.

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

E. H. Evans and *Urban Simon*, for appellant.

O. B. Clark and *Robert Crosby, contra.*

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

CHAPPELL, District Judge.

Plaintiff sued his host for damages because of personal injuries suffered in an automobile accident. He appeals because at the conclusion of his evidence, upon motion of defendant, the trial court dismissed his case upon the theory that, as a matter of law, all the facts thus established did not amount to gross negligence within the meaning of the guest statute, section 39-1129, Comp. St. Supp. 1931.

His petition alleges that when defendant reached state highway No. 16, a well improved and important highway in excellent condition of repair, defendant accelerated the speed of his car to a high, unreasonable and unsafe rate of speed and, thereafter, near Arnold, Nebraska, suddenly and without just cause applied the brakes violently, suddenly and effectively, proximately causing the car, solely by reason of the grossly negligent manner in which defendant applied the brakes at the rate of speed at which it was then being driven, to skid, leave the highway, turn over several times, and injure the plaintiff.

Evidence adduced for plaintiff discloses that he and W. J. Bell were guests of defendant, who was driving his almost new Chevrolet coupé from his ranch to Arnold, Nebraska, for the purpose of visiting a friend in the hospital. They had been defendant's overnight house guests. It was approaching 11 a. m., and they were in a hurry because defendant's guests wished to return to the ranch and leave for their home right after the noonday meal. The car was in perfect condition and equipped with hydraulic brakes. Up to the time of the accident it was working perfectly, running smoothly, and under reasonable control. The highway was good, smooth, solid, dry, graveled, a little rolling, but in perfect condition. It was from 30 to 36 feet wide, plenty wide, with clear visibility for approximately 1,000 feet ahead. It was a nice, bright, sunny day, and there

was no traffic to interfere. Two cars had previously passed them going in the same direction. The accident happened while driving around a slight curve from the left, which could be taken at high speed safely without danger. Defendant at the time was driving carefully, leaning over the steering wheel, very intent upon the road, and paying attention to his driving. No complaint of his driving was made by plaintiff because he had not seen any reason to complain. He was not scared. It did not look dangerous to him. Defendant was driving pretty fast, that is all, and put his foot on the brake. Plaintiff could feel it. The car swerved left, then back to the right; the front wheel went into some gravel on the north side of the highway; the car turned over to the right at least twice, and plaintiff was injured.

In a statement made by plaintiff a short time after the accident, in his evidence at a previous trial of Bell's case, and in this trial, but on cross-examination only, plaintiff said that defendant was driving 50 to 55 miles an hour. On redirect examination he testified that he had experimented with another car since the accident and concluded that he should have said 70 to 75 miles an hour. The other guest, Mr. Bell, testified that he felt defendant apply the brakes about 200 feet from the accident which, independently of any other matter, caused the accident; that in the 8 or 9 miles of travel on the highway, defendant had driven from 60 to 80 miles an hour, and that several miles before the accident he had said to defendant: "My God, we must be going to a fire," but no reply was given.

Shortly after the accident plaintiff said to defendant: "George, we had a blowout," and defendant replied: "That is what caused the wreck. The tire blew out. The car swerved. I tried to stop it and it went over." Plaintiff made similar statements to others, and there is evidence that defendant, at or about the same time, also said that in his opinion the left hind tire went down; that he heard a noise indicating that there was a blowout of the left hind tire before he put on the brakes. There actually was a

hole in the tire. Plaintiff says that he saw it after the accident and while the wheels of the car were still in the air before it was righted on the highway. There is other evidence that both plaintiff and defendant honestly believed at the time of the accident that there had been a blowout.

It is conceded that the court will regard as conclusively established every fact which plaintiff's evidence proves, together with reasonable inferences therefrom, and that if different minds might reasonably draw different conclusions therefrom, the question of alleged gross negligence of defendant would be factual for the jury to decide, but this court has recently said, and the trial judge in this case was the writer of the opinion: "When evidence is resolved most favorably toward the existence of gross negligence, and thus a fixed state of facts had, the question of whether or not such facts will support a finding of the existence of gross negligence is a question of law." *Gosnell v. Montgomery,* 133 Neb. 871, 277 N. W. 429. See, also, *Thurston v. Carrigan,* 127 Neb. 625, 256 N. W. 39; *Lemon v. Hoffmark,* 132 Neb. 421, 272 N. W. 214.

"Gross negligence, within the meaning of section 39-1129, Comp. St. Supp. 1931, means negligence in a very high degree, or the absence of even slight care in the performance of a duty." *Morris v. Erskine,* 124 Neb. 754, 248 N. W. 96. This definition has been consistently adhered to in many cases. It is followed more comprehensibly in the recent case of *Larson v. Storm,* 137 Neb. 420, 289 N. W. 792, wherein the court said: "Gross negligence has been defined as an entire failure to exercise care, or the exercise of so slight a degree of care as to justify the belief that there was an indifference to the safety of others."

Authorities relied upon by plaintiff for reversal all disclose the ever present imminence of danger visible to, known by, or made known to the driver, together with a persistence in negligence apparently heedless of the consequences thereof; evidence of negligence far in excess of any appearing in the case at bar and from which different minds might reasonably draw different conclusions as to

the factual question of gross negligence. This court concludes from plaintiff's petition and the evidence attempting to support it that the accident would not have happened except for the braking of the car by defendant which he did in an emergency honestly and sincerely believed by both plaintiff and defendant to exist at the time. *Kelly v. Gagnon,* 121 Neb. 113, 236 N. W. 160; *Belik v. Warsocki,* 126 Neb. 560, 253 N. W. 689. There is a rule of law in this state that a rate of speed which would amount to gross negligence in one case might, amid different surroundings and dissimilar circumstances, fall far short thereof. *Sheehy v. Abboud,* 126 Neb. 554, 253 N. W. 683; *Thurston v. Carrigan, supra.* Therefore, even if speed be regarded as a contributing cause and, thereby, negligence of defendant established, still under the circumstances it fails to rise to the condition of gross negligence as that term is employed in the guest statute. This court has decided questions of like import recently in *Heesacker v. Bosted,* 131 Neb. 42, 267 N. W. 177, and *Gosnell v. Montgomery, supra,* and they are controlling.

It is the opinion of the court that the motion of defendant to dismiss plaintiff's case at the conclusion of his evidence was not erroneously sustained, and the judgment is

AFFIRMED.

ELIZABETH MCKULSKY STUEHM ET AL., APPELLEES, V. LILLIAN DANFORD MIKULSKI, APPELLANT.

297 N. W. 595

FILED APRIL 18, 1941. No. 30798.

1. **Joint Tenancy.** The creation as well as the continued existence of an estate in joint tenancy under the common law, which is allowed to exist in this jurisdiction, requires a unity of possession, a unity of interest, a unity of time and a unity of title in all holding an interest in such estate.
2. **Husband and Wife.** One already owning an estate in fee title in real estate may not, without the intervention of a trustee, convey directly to himself and another and thereby create in him-

self and such other such an estate in joint tenancy with right of survivorship as was recognized as existable at common law, and such as is now recognized as existable in this jurisdiction.

3. **Statutes.** Section 76-109, Comp. St. 1929, commonly known as "the intent statute," relates only to rules of construction, and does not enlarge or limit, or in any way modify, any rule of substantive law that existed at the time of its passage or that thereafter has been created.

4. **Deeds:** UNDUE INFLUENCE. Undue influence resulting in a given act arises usually from deceit or fraud, and its existence is established when it is clearly shown that the opportunity to exercise it existed, that an attempt to exercise it was designedly made, and that its effect upon its victim was such as to cause such act to be the result of such influence and not to flow from the exercise of his free deliberate will.

5. ———. Evidence examined and *held* to necessitate a finding of the existence of undue influence.

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

O'Sullivan & Southard and *Joseph E. Strawn*, for appellant.

Ritchie, Swenson & Welpton and *Bernard E. Vinardi, contra.*

Edwin Vail, Frank D. Williams, R. O. Williams, Lewis R. Ricketts, Perry W. Morton and *H. J. Whitmore, amici curiæ.*

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

TEWELL, District Judge.

Nine children of George Mikulski, Sr., deceased, brought this action in equity in the district court for Sarpy county against Lillian Danford Mikulski, widow of said George Mikulski, Sr., to set aside a deed executed by said George Mikulski, Sr., to himself and said defendant. This deed, dated March 7, 1938, and recorded the second day thereafter, purports to convey the south half of the southeast quarter of section 6 and the north half of the northeast quarter of section 7, all in township 13 north, range 13 east of the 6th P. M., in Sarpy county, Nebraska, to George

Mikulski, Sr., and the defendant, Lillian Danford Mikulski, husband and wife, "as joint tenants, and not as tenants in common." Among the reasons assigned for cancelation of this deed by the plaintiffs in their petition are that such deed was procured by undue influence exercised by the defendant upon said George Mikulski, Sr., and that such deed, even if not procured by undue influence, failed to convey any title to the grantees therein on account of its form and substance. The trial court found and decreed that the deed was not procured by undue influence, and that its legal effect was to convey to each of the two grantees an undivided one-half interest in fee as tenants in common with no right of survivorship. The defendant has perfected an appeal to this court and the plaintiffs have perfected a cross-appeal.

Several members of the bar have filed briefs *amici curiæ* solely upon the question of what estate, if any, the deed involved would create in the grantees. The form of this deed, when executed without consideration and without reference to, and not for the purpose of carrying out, any contract that specified the characteristics of the estate intended to be created, raises a question new to this jurisdiction. Its decision is appropriate.

Long prior to the execution of this deed and at the time of its execution, George Mikulski, Sr., was the sole owner of the fee title to the land involved. The sole grantors in the deed as well as the sole grantees were the fee owner and his wife. Both the conveying clause and the habendum clause recite that the land is conveyed to the grantees as joint tenants and not as tenants in common. Furthermore, the deed recites, in effect, that it is the intent of the parties that in the event of the death of one grantee the other shall become invested with the fee simple title. That the parties to the deed intended to create a joint tenancy with right of survivorship as such estate was known at common law cannot logically be questioned. Is a deed of such a character capable of conveying an estate in joint tenancy with right of survivorship as such estate existed at common law is the question involved.

A solution of this question involves a consideration of the exact nature of such an estate. An attempt to define such an estate by the words of one sentence would be of little aid to an understanding of its nature. To detail some of the factors that must exist while such an estate exists will be of more aid. The law books seem to define such an estate as hereafter stated. Such an estate must be created in two or more persons at the same time by the same conveyance, and the holders of such an estate must be given an equal and like interest therein and be given equal and like right to possession of the corpus of the estate. That there must be a unity of possession, a unity of interest, a unity of time and a unity of title in the holders of such an estate in order for it to exist is one statement that is often used in law books to express its nature. Any act which divests the interest of a portion of the holders of their estate during their lifetime, such as a conveyance by such portion, or a sale of the interest of such portion under execution, operates as, what in the law is called, a severance of the estate of such portion. The four unities heretofore listed must not only come into being with the creation of such an estate, but must also continue to exist while the estate exists, and the destruction of any one of them as to all holders will destroy the estate, even though all holders still live. For cases dealing generally with the nature of a joint tenancy, see 33 C. J. 904; *Fleming v. Fleming*, 194 Ia. 71, 174 N. W. 946; *Staples v. Berry*, 110 Me. 32, 85 Atl. 303; 2 Blackstone, 180; 1 Tiffany, Real Property (2d ed.) 625.

In line with statements made in the above discussion of the nature of an estate in joint tenancy as known at common law with right of survivorship, it has been held that one of the owners of such an estate may acquire the interest of the others by adverse possession (*Smith v. Hogg*, 195 Ky. 265, 242 S. W. 354); that upon the death of one of two cotenants holding such an estate, the survivor takes the entire fee free from the debts of the deceased cotenant (*Wood v. Logue*, 167 Ia. 436, 149 N. W. 613, Ann. Cas. 1917B, 116). We do not intend that any statement

made in the above discussion of the nature of such an estate shall be a holding that any one statement therein contained is the law of this state. Such discussion is merely for the purpose of considering the nature of the estate under discussion, as such estate was known at common law.

It will be remembered that this court has held that estates in joint tenancy as they existed at common law have not been abrogated by statute in this state. *Sanderson v. Everson*, 93 Neb. 606, 141 N. W. 1025. Under the common law, one could not convey real estate to himself. No statute of this state has changed such rule. In the absence of legislative enactment, we are not ready to say, even in order to appear "modernistic," that one holding a fee title as an individual in real estate may effectively, and without the intervention of others, convey such real estate to himself as an individual with restrictions upon his right of alienation, or so as to change the nature of his estate. In order for an estate in joint tenancy as known at common law with right of survivorship to have been created by the deed involved in this case, George Mikulski, Sr., either had to convey to himself, and also in so doing to change the nature of his estate, or such estate must have come into being without the required unity of time or title. The defendant urges that the common-law rule that prevented one holding real estate in fee from conveying to himself and another and creating a joint tenancy is archaic, and that the reason for its existence has ceased to exist. To preserve the nature of various estates that the law allows to exist could not be archaic. To support this contention the defendant cites the following cases: *Currier v. Teske*, 84 Neb. 60, 120 N. W. 1015, and cases therein cited on the point under discussion. In each of these cases the question of the validity of a deed of land in fee direct from a husband to his wife without the intervention of a trustee was involved. Such a deed may convey a valid fee title, although it could not at common law, for the reason that the wife was restricted in her power of contract, and was re-

garded as one and the same person as her husband. The married woman's act enlarged the rights of the wife and use of the trustee was no longer necessary. These cases do not support the defendant's contention. The defendant cites the case of *Neneman v. Rickley,* 110 Neb. 446, 194 N. W. 447. In that case a right of survivorship was held to have been created by specific contract, but a joint tenancy as known at common law was not created. The property was subject to the debts of the deceased cotenant. The case is not in point. In this case, to preserve the four unities necessary in an estate in joint tenancy must defeat intent. To preserve those unities is the duty of the court. Courts should not create new kinds of estates, heretofore unknown. If any one of these four unities is to be declared unnecessary in certain cases, the enumeration of such "certain cases" and the scope and breadth of such enumeration must be by legislative act. Too many and varied are the acts of one common-law joint tenant that, under the law, may constitute a severance, and destroy the joint tenancy during the lifetime of all joint tenants, on account of the destruction of one or more of these four unities, to make it allowable for a court to say, without legislative enactment, that a joint tenancy as known at common law may exist, in certain cases, in the absence of one or more of these four unities. In this case it is well to remember that there is nothing in the deed involved, nor in any act out of which it arose, from which it may be said that the parties intended that the joint tenancy should be other than joint tenancy as known at common law with all the attributes and incidents inherent therein.

The defendant urges that to declare that the deed involved did not create a joint tenancy would defeat many hundreds of such deeds now of record in the various counties of Nebraska, and says in her brief that an investigation has disclosed that 55 such deeds have been placed on record in Dodge county since the decision in *Neneman v. Rickley, supra.* As heretofore pointed out, that case did not hold that the facts involved created a joint tenancy.

The question presented by the form of the deed involved is now before this court for the first time. No doctrine of *stare decisis* is involved. The rule herein announced will cause far more certainty in real estate titles containing conveyances that purport to creat a joint tenancy, than would a rule that allowed a court to say that in "certain cases" a joint tenancy may exist in the absence of one of the four required unities. Under such a rule an examiner of such titles would wonder whether the facts presented to him was one of those "certain cases," and send his client to court to find out.

We hold that the deed in controversy was not capable of creating a joint tenancy as known at common law with right of survivorship in George Mikulski, Sr., and the defendant. In that view we are supported by the following authorities: *Deslauriers v. Senesac,* 331 Ill. 437, 163 N. E. 327; *Breitenbach v. Schoen,* 183 Wis. 589, 198 N. W. 622; *Pegg v. Pegg,* 165 Mich. 228, 130 N. W. 617. As supporting an opposite view the defendant cites among others the following cases: *Colson v. Baker,* 42 Misc. 407, 87 N. Y. Supp. 238; *Saxon v. Saxon,* 46 Misc. 202, 93 N. Y. Supp. 191; *Lawton v. Lawton,* 48 R. I. 134, 136 Atl. 241; *Ames v. Chandler,* 265 Mass. 428, 164 N. E. 616; *Dutton v. Buckley,* 116 Or. 661, 242 Pac. 626; *Coon v. Campbell,* 138 Misc. 567, 240 N. Y. Supp. 772; and *Boehringer v. Schmid,* 254 N. Y. 355, 173 N. E. 220. In some of these cases a statute had changed the common-law rule, and others are not in point or their logic untenable.

The defendant urges that section 76-109, Comp. St. 1929, is controlling. This section, commonly referred to as "the intent statute," reads as follows: "In the construction of every instrument creating or conveying, or authorizing or requiring the creation or conveyance of any real estate, or interest therein, it shall be the duty of the courts of justice to carry into effect the true interest (intent) of the parties, so far as such intent can be collected, from the whole instrument, and so far as such intent is consistent with the rules of law." This statute has been a prolific

parent of errors, and at the same time has perhaps greatly encouraged and hastened the use of proper rules of construction of written instruments of conveyance that courts should have, and belatedly would have, adopted without its existence. This statute seems first to have appeared in Nebraska as one of the acts of the second territorial legislature in 1856 and to have been an exact copy of a section of the property code of New York in 1828, and upon casual search does not appear ever to have been amended. An interesting and helpful article upon this section by Dean Foster of University of Nebraska College of Law will be found in volume 8, Nebraska Law Bulletin, p. 148. If it were repealed today, it is very difficult, if not impossible, to conceive how either rules of construction or of substantive law would be in any manner changed. It does not stop with the word "parties" contained therein, nor does it purport to amend or in any manner modify any rule of substantive law existing or created in the future, as it has been many times erroneously assumed to have done. Its causing this false assumption is the secret of its powers as a parent of errors. Examples of such errors are found in the following cases: *Albin v. Parmele*, 70 Neb. 740, 98 N. W. 29; *Moran v. Moran*, 101 Neb. 386, 390, 163 N. W. 315, 1071. Following the word "parties" in this statute occur the words "so far as such intent can be collected from the whole instrument." This clause admonishes the courts to consider the entire instrument, and not allow, for example, a direct and unqualified conveyance in the clause of conveyance and habendum clause to nullify superadded words that would, if given effect, create a legal limitation upon the clause of conveyance. This clause is still a rule of construction. The last, too often unnoticed, clause is *"and so far as such intent is consistent with the rules of law."* (Italics ours.) It has long been recognized that public policy demands that certain limits, such as the rule against perpetuities, the rule against certain restraints on alienation, be placed upon freedom in the conveyance of real estate, however clear the intent of the one making such

conveyance may be. To enforce any of these legal restraints, the intent of the one making the conveyance must necessarily be defeated. To enforce the rule in Shelley's Case, which, perhaps, the legislature should abolish, must defeat intent.

Regardless of any previous expressions of this court concerning this intent statute that may be considered at variance with the interpretation thereof as herein given, we adopt the interpretation above stated as the correct meaning of such statute so far as such interpretation extends.

By their cross-appeal the plaintiffs raise the question whether the deed involved conveyed any interest in the property because of the exercise of undue influence in its procurement. To answer this question involves a consideration of all the evidence. George Mikulski, Sr., was married to Mary Schram in February, 1905, and to this union were born the nine children, who are the plaintiffs. On August 14, 1934, this first wife, who is hereinafter referred to as Mary Schram, died intestate. On June 1, 1935, the defendant, then named Lillian Danford, and theretofore unknown by any of the plaintiffs or their father, was employed as a housekeeper by said father. At the time of such employment George Mikulski, Sr., was living upon the farm involved, with four of his sons, all of whom were unmarried, and three of whom were minors. Prior to such employment and after the death of Mary Schram, the said father and his sons had employed a lady as a housekeeper a portion of the time, and for a portion of such time had "batched." By about the middle of July, 1935, or about six weeks after the defendant first met George Mikulski, Sr., he and the defendant were engaged to be married. They were married on August 23, 1935. In September, 1935, George Mikulski, Sr., and his second wife were negotiating for a sale of all land involved with a view to moving to California. An action in equity was thereupon brought by a portion of the plaintiffs against George Mikulski, Sr., and the defendant for the purpose of establishing a trust in their favor for what they alleged was their share of money advanced

to George Mikulski, Sr., by their mother, Mary Schram, from money inherited by her from the estate of one of her parents. Such money is shown to have been upwards of $13,000 in amount. About $9,000 of it was used by George Mikulski, Sr., to pay mortgages upon the farm involved. About the time such action for the establishment of such trust was begun, a proceeding was started in the county court of Sarpy county to secure the appointment of John Mikulski, one of the adult plaintiffs herein, as guardian for his three minor brothers, the youngest of whom was then about 14 years of age. Such an appointment as guardian was made on October 26, 1935. In the proceedings to probate the estate of Mary Schram, of which George Mikulski, Sr., was administrator, pleadings were filed by a portion of the plaintiffs to secure an accounting by the administrator. About April 15, 1936, a settlement, expressed by written agreement, was reached between George Mikulski, Sr., and all his children, by which $5,750 was paid to the children in full settlement of the action to establish a trust and of said proceedings for an accounting as administrator, and by which all interest of the children in the estate of their mother was assigned to their father. About May 14, 1936, George Mikulski, Sr., executed a will by which he gave each of his children $1, provided for the payment of his debts, and gave all the rest and residue of his estate to the defendant. In October, 1937, George Mikulski, Sr., became ill, a portion of the cause of which was diagnosed as cancer of the stomach. The defendant was then informed of the existence of such cancer. On March 7, 1938, when George Mikulski, Sr., was quite ill, the deed in controversy was executed. On March 17, 1938, he was taken to a hospital, and on April 3, 1938, was taken back to his home. On May 6, 1938, George Mikulski, Sr., died.

The facts above stated form only the skeleton of the tragedy reflected in the record. The bill of exceptions consists of 1,153 pages, each of which has been carefully read. To outline the evidence with greater detail than is herein done would serve no useful purpose. In addition to the

skeleton of the facts above stated we mention a few of the salient conclusions that may be fairly deducted from the evidence. The deed in controversy recited a consideration of $1 and the record does not disclose any agreement by the defendant to pay anything for such deed. At the time of the defendant's marriage to George Mikulski, Sr., she was about 47 years of age, he about 67 years of age. Prior to the defendant's coming to the Mikulski home as housekeeper on June 2, 1935, no ill feeling had ever existed between George Mikulski, Sr., and any one or more of his children. Some of the older children had graduated from high school. The youngest child, then about 14 years of age, had been sent to high school as a freshman the preceding winter, and application was made in June, 1935, to send him to high school the following winter. All of the four daughters were married and living in homes of their own. Four of the sons were not married and were living with their father. The oldest of these four, George, Jr., had farmed the land involved under lease from his father for the year 1935. Within about six weeks after the defendant's arrival as a stranger she was engaged to be married to her employer, and shortly after such engagement began to refuse to wash the shirts and underclothing of the boys, to refuse to make their beds, and to object to a neighbor boy eating at the Mikulski home. This boy had played and eaten at the Mikulski home quite often for years. In all of this she was upheld by her employer. During August, 1935, a portion, at least, of the boys decided that Miss Danford should be discharged, and they told her to pack her belongings and they would take her to town. She replied "Oh Yeah," and went into her room. They supposed she was preparing to leave. Instead she left the house through a window and a short time later entered the farm yard in a car driven by George Mikulski, Sr. That same day complaint was made to the county attorney by the defendant and her employer in an effort to obtain the arrest of the boys. A few days after this incident most of the plaintiffs gathered at the Mikulski home in an effort to

talk matters over with their father. The defendant attended the conference, although asked by the children to let them talk with their father alone. During this conference the father informed the children that they had nothing coming from their mother's estate, and that all money had been spent. The conference ended by George Mikulski, Sr., leaving the room with the defendant at her request. A few days after this conference the marriage of the defendant and the father occurred. No objection to this marriage is shown to have been voiced by the children or any of them. The boys continued to reside at their father's home for a few weeks. Through some source the father was made to believe that the boys, or some of them, arranged to have a poisonous water moccasin placed in the house. Some cream merely foamed, and could not be made to produce butter, when churned. Through some source the father was made to believe that poison had been placed in this cream, and that Frank, the youngest boy, had been seen about the premises just prior to this incident. The boys left their father's home in early September, 1935, the youngest going to live with his sister in Kansas City, as no arrangements to send him to school had been mentioned by the father.

At the time of the execution of the deed involved on March 7, 1938, the father gave instructions for drawing a will, and also for drawing a lease to the farm. Such a will was drawn and executed about March 8, or 9, 1938. It was of the same general nature as was the will of May 14, 1936, above mentioned, with the exception that it provided for $100 to be paid to one Father O'Hearn for masses. About this time George Mikulski, Sr., gave directions for the preparation of written directions to an undertaker as to his funeral and place of burial. He directed burial in a cemetery other than, but near, the cemetery wherein his first wife and his father and mother were buried. He had several times expressed a wish not to be buried in the same cemetery as was Mary Schram.

The record clearly supports a finding to the effect that the defendant knew of the execution of each and all of the

instruments above mentioned, and was active in making arrangements for the preparation of the two wills mentioned above and of the deed in controversy. She was present at the execution of most of them. It is worthy of note that none of the children ever had heard of the poisonous snake incident or of the cream incident above mentioned until the trial of a contest of the validity of the second will above mentioned after the death of their father. One of the attorneys for George Mikulski, Sr., in the negotiations to bring about the written settlement whereby the children assigned their interest in their mother's estate, which has been mentioned above, and who testified as a witness for the defendant in this case, admitted, in effect, in his testimony, that the attorneys involved had much more difficulty in obtaining concessions from George Mikulski, Sr., in negotiations for such settlement when the defendant was present than when she was absent. In a trial in the county court the defendant admitted she had never done anything in an effort to bring about more amiable relations between the children and their father, and when asked as to whether she would have allowed the minor boys to move back to her home, said "Why should I?"

That undue influence upon a grantor in a deed is a subtle thing, that it is usually exercised in secret, and that it is not usually susceptible of direct proof, and that it may be shown by circumstantial evidence alone are statements, the truth of which need not be substantiated by citation of authorities. It is useless to attempt to classify the various influences, even by groups, that may constitute undue influence. Its existence, arising usually from deceit or fraud, is established when it is clearly shown that the opportunity to exercise it existed, that an attempt to exercise it was designedly made, and that its effect upon its victim was such as to cause his act to be the result of such influence, and not to flow from the exercise of his free and deliberate will. *Gidley v. Gidley*, 130 Neb. 419, 265 N. W. 245. Hundreds of circumstances other than those mentioned above are shown in the evidence. That the affections of

George Mikulski, Sr., for his children were completely alienated between the coming of Miss Danford as a stranger on June 2, 1935, and before any legal proceedings were begun by any of the children in September, 1935, is worthy of note. Many stories, quite apparently false, derogatory of some one or more of the children, had been told to George Mikulski, Sr., by the defendant, if one is to judge from declarations shown to have been made by him prior to his death. We conclude from the record that the deed involved herein should be canceled on account of having been obtained through undue influence.

For reasons above stated, the decree of the trial court is reversed and the cause remanded, with instructions to enter a decree canceling and holding for naught the deed involved in this suit. Costs in this court are taxed to the defendant, Lillian Danford Mikulski.

REVERSED.

SIMMONS, C. J., dissenting.

The majority reach the conclusion that the deed in question, having been obtained through the use of undue influence, should be canceled and held for naught. In that conclusion I concur.

The majority opinion, however, before reaching the above conclusion, holds that the deed did not create a joint tenancy estate with right of survivorship. To that conclusion I dissent.

I shall disregard the question of undue influence and limit this discussion to that part of the majority opinion dealing with the creation of estates in joint tenancy. I submit that, if the deed is void because of undue influence, that disposes of the case, for if it is void, it is void, no matter what its effect may have been, if valid. Accordingly, that part of the majority opinion dealing with the question of how estates in joint tenancy may be created is dictum, and does not constitute a controlling precedent.

This type of deed and method of conveyance direct from one person to himself and another are in common use in the state. The presentation of this question to the court

has created doubt in the minds of the profession as to the validity and effect of titles held under such conveyance. The majority deem it advisable to determine the question, and accordingly the presentation of the views of a minority of the court becomes proper. However, if the court is to decide, as it purports to do, that the deed in question does not create a joint tenancy estate, then the profession is entitled to an expression of the opinion of the judges as to what estate is created by the deed. Certain it is that the majority hold the instrument created some sort of an estate in the grantee wife, or grantees, husband and wife, for, were it otherwise, there would be no necessity for holding that the deed should be canceled and held for naught. The present expression of opinion can have no effect but to add to the confusion and doubt already existing. If this instrument does not create a joint tenancy estate, what does it create? Are the grantees tenants in common or does the grantee wife take the entire estate? Having entered this field, the question should be answered as to what the effect of this instrument is, and the question is not answered by saying what it is not.

The granting clause of the deed in question describes the grantees "as joint tenants, and not as tenants in common." Following a description of the property is this sentence: "It being the intention of all parties hereto, that in the event of the death of either of said grantees, the entire fee simple title to the real estate described herein shall vest in the surviving grantee." The habendum clause again refers to the grantees "as joint tenants, and not as tenants in common." The warranty of title goes to the grantees and "the heirs and assigns of the survivor of them."

The majority opinion throughout assumes that the parties intended to create, and holds that they did not create, a joint tenancy "as such estate was known at common law." I find nothing in the instrument that justifies that assumption. It would be more reasonable to assume that the parties intended to create a joint tenancy estate as defined by the decisions of this court under our statutes and by the use of methods which this court has approved.

The majority opinion holds that the owner of an estate in fee may not convey directly to himself and another so as to create in himself and such other an estate in joint tenancy, but that such estate may be so created with the intervention of a trustee. In other words, that it is entirely proper and legal to do indirectly that which the "rules of law" prohibit doing directly. This court, however, has said that, "The law will not permit that to be done indirectly which cannot be done directly." *Fall v. Fall,* 75 Neb. 120, 132, 113 N. W. 175, 180.

The majority opinion apparently attempts to limit the announced rule to such a deed, "when executed without consideration and without reference to, and not for the purpose of carrying out, any contract that specified the characteristics of the estate intended to be created." This limitation is for the apparent purpose of avoiding the controlling effect of the decision of this court in *Neneman v. Rickley,* 110 Neb. 446, 194 N. W. 447.

What was the holding in the *Neneman* case? What was the instrument there construed and held valid and enforceable? "The antenuptial agreement and conveyance" (so described by this court) provided:

"3. That each of these parties hereby grants, bargains, sells and conveys to the other an undivided one-half (½) interest in all the property, real or personal, which he or she now owns for the purpose and with the intent of vesting in both parties the joint ownership of all property at this date owned in severalty by either of them.

"4. In case of the death of one of these parties, all of said property shall, subject to the claims of creditors, vest absolutely in the survivor." This court said: "The third paragraph constitutes and is a valid conveyance of an undivided one-half of the property of each to the other." And that, "In the absence of fraud, or mistake, such a conveyance is valid." By what process did the survivor become entitled to the whole estate? This court said: "Both the present estate and the right of the survivor to take passed upon the execution of the contract. The contract

required nothing further to be done by either party. It was executed with all the formalities of a deed of conveyance, and was such in fact. It was not an executory but an executed contract, and required no trustee to carry it into effect."

There is no distinction to be made between a conveyance between a husband and wife and parties not husband and wife, as in the *Neneman* case. A conveyance from a husband to a wife is valid without the intervention of a trustee. *Currier v. Teske*, 84 Neb. 60, 120 N. W. 1015. In reaching that conclusion this court disregarded the "verbal husks of the old rule" and acted "in accordance with the modern tendency to disregard the fictions and technical niceties and distinctions of the common law."

Neither is a distinction to be made because the Neneman instrument was antenuptial and the present conveyance was postnuptial. For this court has said that postnuptial contracts are valid and may operate as a conveyance of real estate in Nebraska. *Jorgensen v. Crandell*, 134 Neb. 33, 277 N. W. 785.

The majority opinion disposes of the *Neneman* case by stating that there a "right of survivorship was held to have been created by specific contract, but a joint tenancy as known at common law was not created," and that, "The property was subject to the debts of the deceased cotenant." That decision cannot be so cast aside.

This court held in the *Neneman* case that the "specific contract," so referred to in the majority opinion, was in fact a deed of conveyance when executed, and that no trustee was necessary to carry it into effect. The distinction made by the majority between the *Neneman* case and the instant case that one was based on contract and the other on a deed is therefore eliminated.

But one difference remains. In the *Neneman* case the property was to be held by the survivor "subject to the claims of creditors;" in the instant case it was not to be so held. To that extent, then, the "deed of conveyance" in the *Neneman* case may not have been a strict common-law

joint tenancy. See 33 C. J. 903, and 14 Am. Jur. 79, sec. 6. But what did this court say about that? "It is next said that the contract did not create a joint tenancy, which would vest the estate in the survivor. Whether it created a joint tenancy or not is immaterial. We see no reason why, upon the death of one party, the property may not vest absolutely in the survivor, subject to the claims of creditors, as the contract provides. This was evidently the intent of the parties, which section 5594, Comp. St. 1922 (now sec. 76-109, Comp. St. 1929), makes it the duty of the court to carry into effect."

Is it not "the duty of the court to carry into effect" the intent in the instant case as it was the duty of the court to carry the intent into effect in the *Neneman* case? I think so.

Is the fact that the property in the instant case is not "subject to the debts of the deceased cotenant" a reason why the property may not vest absolutely in the survivor as the deed provides and the parties intended? I do not think so. "The distinct characteristic of a joint tenancy is that, upon the death of one of the joint tenants, there being no severance, his interest descends to the survivor or survivors, and at length to the last survivor. Therefore, whenever a joint tenancy exists, whether at common law or under the statutes, on the death of one of the joint tenants and in the absence of statute otherwise, the survivors take the whole estate, free from any charges on the property made by the deceased cotenant." 33 C. J. 903. See 14 Am. Jur. 79, sec. 6.

Does this holding of the majority mean that, if, in the instant case, the property had been conveyed by Mr. Mikulski to himself and wife pursuant to a contract and subject to the debts of the parties, the conveyance would have been valid and would have created an estate with right of survivorship? Apparently so! But if a specific contract and liability for debts are the controlling elements, then what becomes of the "four unities" which the majority hold are necessary in order to create an estate in joint tenancy?

Must not those four unities exist where an estate is created with right of survivorship by specific contract subject to debts as well as where an estate with right of survivorship is created by deed not subject to debts? A specific contract to make the conveyance is not one of the four unities. Whether or not the property is to be subject to debts of the deceased cotenant is not one of the four unities. It is a result of the conveyance that can only arise when and if the conveyance is valid to create the estate with right of survivorship.

I concur with the majority that it is entirely legal and proper to create an estate by contract with right of survivorship and subject to debts of the deceased cotenant without the intervention of a trustee, but I do not concur that it is entirely illegal and improper, without the intervention of a trustee, to create such an estate by deed with right of survivorship, free from the debts of the deceased cotenant.

The majority opinion holds that "rules of law," to wit, the "four unities," prevent that being done. Those four unities did not prevent it from being done in the *Neneman* case. They are not mentioned in the *Neneman* opinion. However, an examination of the brief of the appellant in that case discloses that he urged upon this court that "no joint tenancy is created vesting the estate in the survivor" and cited the "four unities" rule in support of that proposition. So this court in the *Neneman* case had before it, and rejected, the identical proposition which it now accepts.

In *In re Estate of Johnson*, 116 Neb. 686, 218 N. W. 739, a husband made deposits in a bank and certificates of deposit were issued payable to himself and wife, in varying language, indicating a joint ownership with right of survivorship. This court held that "an interest in the nature of a joint tenancy with the attendant right of survivorship" was created. If a person can so create "an interest in the nature of a joint tenancy" in personality which will pass title to his wife, why can he not do so in realty? Obviously the "four unities" were not observed in the *Johnson* case.

In the *Johnson* case this court quoted with approval the following language: "In such case it is not necessary to establish the existence of a technical joint tenancy to create the right of survivorship; in other words, the incident of survivorship which exists by implication in a joint tenancy is expressly provided for by such a form of deposit. *New Jersey Title Guarantee & Trust Co. v. Archibald,* 91 N. J. Eq. 82." In the instant case, why is it necessary to establish a "technical joint tenancy," the incident of survivorship being expressly provided for in the deed? Both the reasoning and the conclusion in the *Johnson* case are opposed to the reasoning and conclusion of the majority in the instant case. The *Johnson* case is in accord with the reasoning and conclusions in the cases from this and other jurisdictions which this court now refuses to follow. Is not the *Johnson* case, in effect, overruled and such transactions invalidated?

It does not seem necessary to cite authorities from other jurisdictions to sustain this conveyance as one which creates an estate with right of survivorship in the grantees. The opinion in the *Neneman* case was written by a distinguished member of this court, now deceased. The contract which this court there enforced was apparently drafted by an able lawyer and former Chief Justice of this court. It has been repeatedly cited with approval by this court. Many of the profession in this state have accepted it as approving this form of conveyance. That decision should not be disturbed.

The majority opinion further states: "In the absence of legislative enactment, we are not ready to say, * * * that one holding a fee title as an individual in real estate may effectively, and without the intervention of others, convey such real estate to himself as an individual with restrictions upon his right of alienation, or so as to change the nature of his estate." I submit that that is exactly what this court did hold seventeen years ago in the *Neneman* case. For in that case we had a "deed of conveyance" wherein two people holding fee titles, without the interven-

tion of a trustee, conveyed each to the other and created a right of survivorship in the whole, and thereby restricted their rights of alienation and changed the nature of their estate.

This state does not require that property be transferred according to the rituals of the common law. Those methods and forms of the common law have been discarded in Nebraska. Is there an "absence of legislative enactment" that authorizes the creation of such an estate by deed? The majority opinion ignores the simple and complete statutory basis whereby estates in land may be created, aliened, mortgaged or assigned by deed. And likewise the majority ignore the statutory provision (Comp. St. 1929, sec. 76-103) that the term "deed," as used in the statute, "shall be construed to embrace every instrument in writing by which any real estate or interest therein is created, aliened, mortgaged or assigned, or by which the title to any real estate may be affected in law or equity, except last wills and leases for one year or for a less time." Our law does not provide that only estate such as were recognized at common law may be created in Nebraska. Our statute, in broad terms, clearly authorizes the creation of estates and interests in real estate by deed. The statute determines the necessary incidents of the conveyance. No legislative limitation forbids the creation of such an estate by the methods used here. The parties in this case created this estate by deed as the statute authorized them to do.

The majority opinion states that "We hold that the deed in controversy was not capable of creating a joint tenancy as known at common law with right of survivorship * * *. In that view we are supported by the following authorities," citing three cases: *Deslauriers v. Senesac*, 331 Ill. 437, 163 N. E. 327; *Breitenbach v. Schoen*, 183 Wis. 589, 198 N. W. 622; *Pegg v. Pegg*, 165 Mich. 228, 130 N. W. 617. Let us examine the opinion of other courts of these three decisions.

(1) *Deslauriers v. Senesac, supra.*

In *United States v. Jacobs*, 306 U. S. 363, 59 S. Ct. 551, the difference between tenancies by the entirety and joint

tenancies was urged upon the court as a basis for subjecting but one-half of the interest in real property held in joint tenancy to a death duty. The supreme court of the United States held: "The constitutionality of an exercise of the taxing power of Congress is not to be determined by such shadowy and intricate distinctions of common-law property concepts and ancient fictions." The *Deslauriers* case, with its "four unities" of the common law, is cited in the note.

In *Edmonds v. Commissioner of Internal Revenue,* 90 Fed. (2d) 14 (Ninth Circuit, Cal.), the equitable owners of trust property joined with the trust company in a declaration of trust declaring that it was their intention that said property should be held by them as joint tenants with right of survivorship. The court held:

"In California, to create a joint tenancy there must be" the four unities. The court then said: "Petitioner argues that a person cannot convey title to himself, * * * that if a person conveys property to himself and another as joint tenants, what he has done is to convey an undivided half interest; that since the grantor and grantee acquire their respective interests at different times, and that of the grantor, when acquired, was not the same as that which the grantee acquired, there is neither unity of title, nor unity of time, and therefore no joint tenancy. This technical view is followed in *Breitenbach v. Schoen,* 183 Wis. 589, 198 N. W. 622 (the second case relied upon in the majority opinion) and in *Deslauriers v. Senesac,* 331 Ill. 437, 163 N. E. 327. * * *

"However, the weight of authority is opposed to that view. (Cases cited.) We believe the technical view should give way to the intention of the parties, and hold that a joint tenancy may be created by conveyance from one to himself and another, as joint tenants."

In *Irvine v. Helvering,* 99 Fed. (2d) 265 (Eighth Circuit, Minn.), a husband owned stocks individually; these he transferred to himself and wife as joint tenants. The question was whether a one-half interest in this property went

to his estate or whether it all went to the wife as the surviving joint tenant. The four unities rule was urged upon the court, the contention being that the husband's interest was acquired when the stock was originally purchased, and the wife's interest was acquired by the subsequent transfer, that the tenancy lacked the unity of time and title and was not a joint tenancy but a tenancy in common. Here again *Breitenbach v. Schoen, supra,* and *Deslauriers v. Senesac, supra,* were cited to support the contention that a joint tenancy was not created. The court discussed the Minnesota case of *Peterson v. Lake City Bank & Trust Co.,* 181 Minn. 128, 231 N. W. 794, wherein it was said: "From the viewpoint of a layman the right of survivorship is the principal characteristic of a joint tenancy * * *. That was the goal which they mutually sought;" and *Forney v. Farmers Mutual Fire Ins. Co.,* 181 Minn. 8, 231 N. W. 401, wherein it was said: "We need not decide whether Mr. and Mrs. Forney were technically joint tenants under the language of the deed. It is plain that the element of survivorship was present and that it was the intention of the parties that the survivor was to own the land in fee." The court further cited *Edmonds v. Commissioner of Internal Revenue, supra,* and held that, "While the exact question is, perhaps, still open in Minnesota, we believe that the supreme court of that state would follow the weight of authority, rather than adopt the technical view contended for by the respondent. We are of the opinion that the joint tenancies here in question were valid."

The *Deslauriers v. Senesac* case was cited in *Papke v. Pearson,* 203 Minn. 130, 280 N. W. 183, but it was held that it was not necessary to decide the question as to whether a party could create a joint tenancy by direct conveyance.

The question was discussed in *Eisenhardt v. Lowell,* 105 Colo. 417, 98 Pac. (2d) 1001, and citation was made to the note in 62 A. L. R. 514, following the report of the *Deslauriers* case on page 511. The contention was made that a joint tenancy cannot be created by conveyance of the

property from the owner to himself and another. The court said: "Failing to perceive any particular necessity for circuitous conveyance through a dummy from the owner to the intended joint tenants, we are inclined to favor the latter view (that a joint estate may be thus created where the intent to create is clear), although, since it is unnecessary to a determination of the question here presented we do not expressly so hold."

Likewise the annotation in 62 A. L. R. 514, was referred to in *Johnson v. Landefeld,* 138 Fla. 511, 189 So. 666, wherein the court, evenly divided, held that "A man * * * may by appropriate deed convey to his wife and to himself as tenants by entireties so that such property will not pass to a son under a subsequent will of the grantor husband."

I have herein reviewed all of the decisions that, according to the Shepard Northeastern Citator, have in any way made reference to the *Deslauriers* case. It is obvious that it has not received the approval of the appellate courts that have had occasion to review it.

(2) *Breitenbach v. Schoen, supra.*

This case states that a tenancy in common and not a joint tenancy in personalty was created where the owner of stock had assigned directly to herself and son "or survivor." However, the court further held that the attempted gift was never completed by delivery and that the son was not the owner of the stock. The decision turned not on the question of the nature of the estate created, but upon the question of delivery, and the determination of the first question was not necessary to a decision of the second. It would appear that the determination, in the opinion, of the nature of the estate created was dictum.

The *Breitenbach* case was cited favorably in the *Deslauriers* case. It was next cited in *Fries v. Kracklauer,* 198 Wis. 547, 224 N. W. 717. The question there presented was whether or not a deed had created a joint tenancy or a tenancy in common. The court cited the *Breitenbach* case as the sole authority for this proposition: "The legislative

public policy is declared by sec. 230.44, Stats., to the effect that grants and devises of land made to two or more, unless within certain exceptions not material here, shall be construed to create estates in common and not in joint tenancy, unless expressly declared to be the latter. To the same effect are the judicial decisions." The *Breitenbach* case was again cited on the question of a completed gift in *Marshall & Ilsley Bank v. Voigt*, 214 Wis. 27, 252 N. W. 355. It was again considered by the supreme court of Wisconsin in *Estate of Staver*, 218 Wis. 114, 260 N. W. 655. In that case certificates of deposit had been issued to "Joseph Staver or Frank J. Staver" and kept in the possession of Joseph who by his will devised them to Frank J. The question was whether they passed to Frank J. under the will, and subject to debts, or to him as survivor free from debts. The court held that delivery of the certificates to Joseph was sufficient, and that a further delivery to Frank J. was unnecessary to entitle him thereto by right of survivorship. The court referred to the *Breitenbach* case and said: "The right of the son to take by survivorship was denied by this court on the ground that there had been no delivery to him of the certificates. This case is clearly inconsistent with the rule announced in the instant case and will be considered overruled, as to that part of the decision in conflict herewith."

The *Breitenbach* case is again cited in *Estate of Skilling*, 218 Wis. 574, 260 N. W. 660. There a savings account was carried in the name of Edward Skilling or John M. Skilling. Edward Skilling created the account. The question was whether it belonged to Edward's estate or to John M. as survivor. The court said: "*Breitenbach v. Schoen, supra*, is overruled." The "four unities" rule does not seem to have been observed by the Wisconsin court in the latter decisions.

Other than the two references noted in discussing the *Deslauriers* case, Shepard's Northwestern Citator makes no further reference to the case.

(3) *Pegg v. Pegg, supra.*

In that case David Pegg, the husband, by warranty deed in the usual form, conveyed to Mary Pegg, the wife, an undivided one-half interest in certain real estate. Between the granting and habendum clauses was inserted the following: "The object and purpose of this deed is to convey to said second party such an interest in said land that the parties hereto will have an estate in entirety, and that the same shall survive and vest in the survivor as a full and complete estate." It will be noted: First, that the deed was in form a general warranty deed; second, that the husband did not convey to himself and another, but only to another person; third, that the grantor conveyed and retained an undivided one-half interest. The widow contended that the retained one-half upon his death did not descend to his heirs, because she and her husband owned the premises as tenants by the entirety, made so under the deed, and that she is the owner of the whole. The court held that an estate by entirety was not created.

The *Pegg* case was cited in *Wright v. Knapp,* 183 Mich. 656, 150 N. W. 315. In that case, the husband conveyed to himself and wife "jointly, the survivor to have full ownership of the same." It was held that an attempt was made to create an estate in entirety which failed, and that the deed did not create an estate in entirety, nor in joint tenancy, but did create an estate in common. The *Pegg* case was followed in *Michigan State Bank v. Kern,* 189 Mich. 467, 155 N. W. 502, with the statement that "It has recently been held by this court that such a deed (from husband to self and wife) creates a tenancy in common, and not one by the entirety." It was again cited in *Weaver v. Michello,* 193 Mich. 572, 160 N. W. 612, on the question as to whether the formalities necessary to create a tenancy by the entireties had been observed. It was again followed in *Union Guardian Trust Co. v. Vogt,* 263 Mich. 330, 248 N. W. 639, on the question as to how an estate by entireties may be created.

However, the *Pegg* case has been considered by other courts. In *Lang v. Wilmer,* 131 Md. 215, 101 Atl. 706,

where the case appears to have been decided on a question of limitations, the court discussed, among others, the *Pegg* case and said: "It is apparent that the controlling feature of *Pegg v. Pegg* was that the grant to the wife was only of an undivided one-half interest in the property, which made the wife a tenant in common, and which the court held could not be enlarged by the subsequent clause of the deed. * * * In the case at bar the conveyance was not in terms of an undivided one-half interest in the property, but a grant of the entire estate to husband and wife * * * and there is no conflict between the granting and habendum clauses of the deed."

The *Pegg* case was referred to in *Weinbeck v. Dahms,* 134 Md. 464, 107 Atl. 12, as to the general rule of interpretation of instruments. It is again cited generally in *Bennett v. Hutchens,* 133 Tenn. 65, 179 S. W. 629, as to the creation of an estate in entireties. It is cited in *Breitenbach v. Schoen, supra.*

In *Brown v. Jackson,* 35 N. M. 604, 4 Pac. (2d) 1081, the court pointed out that the *Pegg* case was "open to the criticism that the court permitted a technical objection to override the grantor's express intention," and specifically refused to follow the *Pegg* case, where community property was conveyed by the husband and wife to the wife and daughter, and held, following the New York cases, that the four unities were observed when the new estate was created by the deed, and specifically gave effect to the intent of the parties.

The final reference to the *Pegg* case is in *Hicks v. Sprankle,* 149 Tenn. 310, 257 S. W. 1044, on the proposition that a "limitation expressed in the habendum cannot destroy the fee conveyed by the granting clause."

It is noted that the *Pegg* case deals with the creation of an estate by the entireties. I shall not attempt to point out the distinctions and similarities of estates in the entirety and in joint tenancy. I call attention, however, to a case from the same court, *Bassett v. Budlong,* 77 Mich. 338, 43 N. W. 984, wherein a husband conveyed land to his wife

by quitclaim, with the reservation following the habendum clause that she should not, during his lifetime, convey the land without his consent, and that in case of her death prior to his the estate should "revert back" to him. The court said: "Every deed or contract in writing is supposed to express the intention of the parties executing it, and when the object or purpose of such deed or contract is called in question in a court of justice the first inquiry is, what is the intention of the parties, as expressed in the written instrument? * * * It is the duty of the court to so construe the instrument as to carry out the intent of the parties making it, if no legal obstacle lies in the way. * * * When we consider the intimate relation of the parties to the instrument,—that of husband and wife,—the effect of the arrangement entered into was that the title to the real estate should, in the event of the death of either, go to the survivor. Doubtless a simpler way to accomplish the object would have been for them to have united in a deed to a third party, and for him to have conveyed to them jointly, and then, under the statute, the survivor would have succeeded to the whole title and estate." It was held that the effect of the instrument was to leave the title to the survivor.

So far as the effect of the conveyance is concerned, is that not what happened in the instant case, although the form of the conveyance was not the same?

In the *Pegg* case, the *Bassett* case is cited for a "suggestion" following a discussion of the four unities.

The *Bassett* case is repeatedly cited on the proposition that the intent of the parties is the fundamental inquiry, and upon the effect of a habendum clause which limits the granting clause, and in support of the proposition that technical rules of construction are not favored.

I submit that these three cases, one which has not been favorably received by other courts, one which has been specifically overruled by the court that wrote it, and one clearly distinguishable from the case at bar, create an insecure foundation upon which to rest a decision denying

effect to the clearly expressed intent of the parties to a conveyance, and upon which to rest a rule affecting the title to property of the importance of the one under consideration.

It may be of value to here note the comment of an English writer upon the four unities rule. Henry W. Challis, "of the Inner Temple, Barrister-at-Law," in his Real Property, *295, says: "The identity of the interest and title of joint tenants is commonly analyzed into the 'fourfold unity' of interest, title, time, and possession. 2 Bl. Com. 180-184. This analysis has perhaps attracted attention rather by reason of its captivating appearance of symmetry and exactness, than by reason of its practical utility. It means only, that each joint tenant stands, in all respects, in exactly the same position as each of the others; and that anything which creates a distinction either severs the joint tenancy or prevents it from arising. Blackstone seems not to have adverted to the fact that the 'unity of time' is not, under the learning of uses and devises, an indispensable requisite."

The majority opinion discusses at length the intent statute, section 76-109, Comp. St. 1929. As to that discussion, I make three suggestions: First, that the discussion, also, is dictum; second, that the statute does not require that instruments be construed so as to restrict the grant to conveyances such as existed at the common law, but to the intent of the parties, "so far as such intent is consistent with the rules of law."

What are the "rules of law" referred to in the intent statute upon which the majority opinion relies for its authority to ignore the clearly declared intent of the parties? The phrase is easily defined. In its broad aspects it means the law of the land. It includes the federal and state Constitutions, applicable federal statutes, the Nebraska statutes, and the decisions of appellate courts construing such Constitutions and statutes and interpreting and applying the law. The clause should not be construed to limit its scope to the rules of the common law.

The whole of the common law is not now and never

has been in force in this state. By statute, only "so much of the common law of England as is applicable and not inconsistent with the Constitution of the United States, with the organic law of this state, or with any law passed or to be passed by the legislature of this state, is adopted and declared to be law within the state of Nebraska." Comp. St. 1929, sec. 49-101. Is there a rule of law in this state inherited from the common law that is so static that it prevents this instrument from being enforced so as to carry out the obvious and admitted intention of the parties? The legislature did not define the rules of law to which it referred in the intent statute. It left that matter to the sound judgment of the court. The law grows. Growth requires an orderly change. Of necessity, the law must be adjusted and changed to meet changed conditions.

The legislature has defined the method of creating and transferring estates in Nebraska. It has not shackled our people nor our courts with the common law of England, but has left that law to be made "applicable" to Nebraska and to permit the law of this state to develop with our needs and necessities. This court has, in the *Neneman* case, declared the rule of law as to the estate that may be created by deed under circumstances such as exist here, has refused to apply the "four unities" rule to such a conveyance, has permitted a party to convey real estate directly to himself and another and by that means to create an estate with right of survivorship. The estate intended to be created, as declared in this instrument, is consistent with the rules of law as announced in the *Neneman* case. Should the clearly expressed intent of the parties be thwarted after they have followed the "rules of law" as announced by this court? I do not think so. We should not now turn backward and recede from that position.

Public policy does not require that the intent of the parties to this conveyance be thwarted and the deed be construed to create an estate other than that intended by the parties. In fact, joint tenancy estates with right of survivorship have been approved by this court. See *Sanderson*

v. Everson, 93 Neb. 606, 141 N. W. 1025. The majority opinion follows that approval.

The majority opinion states: "Courts should not create new kinds of estates, heretofore unknown." Certainly it is not the contention that an estate in joint tenancy with right of survivorship is a new kind of estate heretofore unknown. Neither can it be contended that the court is being asked to create an estate known or unknown. This court is being asked to hold valid an estate created by deed and according to the clearly declared intent of the parties.

Third, the majority opinion states that our "intent" statute was copied from the New York Code of 1828. It continues in practically the same language in the New York Code today. Book 49, McKinney's Consolidated Laws of New York, 458, sec. 240. In view of the fact that our intent statute came from New York, we might with profit consider the holdings of the courts of that state as to this problem. I venture, therefore, to discuss some of the New York cases of recent date, the "logic" of which the majority opinion holds is "untenable."

Colson v. Baker, 42 Misc. 407, 87 N. Y. Supp. 238. "The question to be determined on this motion is whether a person seized in fee of an estate can, by a direct grant, deed the property to another and himself in joint tenancy, instead of tenancy in common, without the intervention of a third party." It was claimed "that in this day of directness resort must be had to the indirect and useless method of conveyance through a third party for an owner in fee to carve out a joint tenancy for himself and another in his estate." The "four unities" were relied upon. The court said: "In all references to the 'four unities' requisite to create a joint tenancy, I find nothing that prevents their existence or creation by the act of the grantor for himself and another as well as by his act for two other persons." The court cited 1 Thomas, Coke on Littleton, 732: "If a man make a feoffment in fee to the use of himself and of such wife as he should afterwards marry for the term of their lives and after he taketh a wife, they are

joint tenants and yet they come to their estates at several times," and points out that neither Coke nor Blackstone considered it "an exception to the general rule." "It being conceded that the intent to create a joint tenancy * * * could have been accomplished by a conveyance through a dummy, a third party, I see no reason for insisting upon such circuitousness." The survivor was held entitled to the entire estate.

Saxon v. Saxon, 46 Misc. 202, 93 N. Y. Supp. 191. The plaintiff owned the land and made deed to himself and wife. In the clause, descriptive of the parties, the language was "for their joint lives, and upon the death of either the survivor to become absolute owner." It was contended an estate by entireties was created. The court construing the quoted language as though it were in the habendum said: "They do not create an estate by the entireties, but only a joint tenancy; and the plaintiff was able to convey an estate in joint tenancy, or any other estate, to his wife."

Coon v. Campbell, 138 Misc. 567, 240 N. Y. Supp. 772, a husband deeded to himself and wife "as tenants by the entirety." The referee in writing the opinion reviewed a number of New York decisions and said: "It seems to me that the drift of present legislation is towards the elimination of the archaic. That the present day decisions of the courts are in accord with this spirit, to use and interpret language in accordance with the understanding of the average man with the view to clarify rather than to obscure. * * * The instant case is typical of the application of archaic law to present time conditions. Here was the husband * * * confronted with the certainty of survivorship of either himself or his wife and desirous of bestowing the estate upon either his wife or retaining it himself, and directly and simply he expressed such a purpose, and now the widow * * * waits for the courts to slowly unroll the record * * * and to determine * * * whether the language shall be construed as though uttered in the twentieth century or the eighteenth."

Matter of Klatzl, 216 N. Y. 83, 110 N. E. 181, the syllabus

approved by the court is: "The creation of a tenancy by the entirety is permitted by law and a husband may by conveyance to himself and his wife create such a tenancy, thereby reserving to himself the same rights he would have had under a deed from a third person." This holding was reiterated in *Boehringer v. Schmid,* 254 N. Y. 355, 173 N. E. 220.

This court has said: "A technicality should be temperately resorted to at all times, but not to defeat plain justice. Like every known rule of law, it may be liberally applied to oppose, not aid, a manifest wrong." *Northwest Ready Roofing Co. v. Antes,* 117 Neb. 121, 219 N. W. 848.

Before adopting this technical requirement of the common law, as the applicable law in this state, consideration should be given to its effect upon the business transactions of the state as well as its effect upon titles to real estate. This court has held that personal property may be held in joint tenancy. *In re Estate of Johnson, supra.* (The overruled case relied upon by the majority deals with personal property.) It must be recognized that financial institutions have quite generally issued securities to people as joint tenants with right of survivorship. The right and practice to so hold property by declaration of the parties is clearly recognized in *Smith v. Douglas County* (a Nebraska case) 254 Fed. 244. Under the opinion of the majority, if people in this state desire to change their personal property holdings from a separate estate to one of joint tenancy, is it necessary that they first convey it to a trustee and have it reconveyed? Must records of the conveyance through a trustee be made and kept in order that proof of compliance with this technical requirement may be available? This opinion would seem to require that that be done.

What will be the effect of this opinion upon the title to all the real property in Nebraska which has been conveyed by the owner direct to himself and another as joint tenants with right of survivorship? Clearly, the title to such lands is in question. If the court adheres to this technical rule of the common law, then it is certain that no examiner will

hold that a joint tenancy exists, but what lawyer can tell clients what kind of a title they have? Clearly, all such titles will be in confusion, until this court, in some future litigation, undertakes to determine what title actually is conveyed by such an instrument.

All of this uncertainty and confusion may be avoided if this court would follow its prior decisions and the clearly defined rules of the majority of the modern decisions of the courts of the country.

ROSE, J., concurs in this dissent.

CARTER, J., concurring.

The doctrine of estates, together with the characteristics and manner of creation of estates, has come down to us from the common law of England. A joint tenancy is an estate with many distinguishing features which originated in the common law. Naturally, we have adopted the common law as to joint tenancies by virtue of the act of our legislature in adopting all of the common law that is applicable. We cannot escape this conclusion by merely saying that it is within the sound judgment of this court to say what is and what is not applicable. The invocation of such a rule would introduce speculation and uncertainty into the field of titles and estates, a result to be unqualifiedly condemned. Property law has had a separate development, and of all the law, it has been the slowest to change and the most stubborn in resisting innovations. The reason for this is so patent as not to require exposition here. I agree that the law should not be made static and that opportunities should be available to meet changing conditions. But innovations should not be indulged in to create confusion and uncertainty, the best evidence of which is contained in the very dissent which charges the majority opinion with so doing.

In a joint tenancy the tenants thereof must have one and the same interest, arising by the same conveyance, commencing at the same time, and held by one and the same undivided possession. A common-law joint tenancy, upon the death of one joint tenant, vests the whole title in the

survivor free from the debts of the deceased joint tenant. In such an estate the four unities of time, title, interest and possession must be maintained throughout its tenure because an act which destroys one or more of the unities results in a severance incompatible with the existence of a joint tenancy. An estate in joint tenancy as known in the common law is lawful in this state, and there being no legislation restricting its nature, characteristics and attributes, the term "joint tenancy," when used as descriptive of an estate conveyed, means a joint tenancy as known in the common law.

An estate in the nature of a joint tenancy can be created by contract. The right of survivorship can be supplied by the agreement of the parties. But it is not, strictly speaking, a joint tenancy and it does not have all the attributes of such an estate. There can be a sale, gift or pledge of the interest of one cotenant in such an estate created by specific contract without the destruction of the estate. The interests of the joint owners in such an estate are subject to debts. Such is not the case in a common-law joint tenancy. The case of *Neneman v. Rickley*, 110 Neb. 446, 194 N. W. 447, the primary basis of the dissenting opinion, is such an estate created by contract. The contract in that case did not create a joint tenancy and the opinion so states. The interests of the parties were subject to the debts of the deceased joint tenant which is also shown by the opinion. A close reading of that decision discloses that it was not a joint tenancy, but did create a tenancy in common with some but not all of the attributes of a joint tenancy.

If we are to say that a joint tenancy with all its peculiar characteristics and attributes can exist without the unities of time and title, on what basis can we say that any of the common-law unities are essential? If the common-law definition of the term "joint tenancy" is not the basis of determining its nature and manner of its creation, then how are they to be determined? Certainly, the components of such an important estate cannot be left to the decisions of the courts on the facts of each particular case. Such a

rule would disrupt real estate transactions and impair the merchantability of every estate, where tenancies in common or joint tenancies might be involved. In an estate created by contract we can interpret the language used and gather the intent of the testator or grantor from the instrument creating it. But when the words "joint tenancy" alone are used as descriptive of the estate conveyed, we must look to the common law, the place of its creation, for the answer. And if the common-law definition be archaic and obsolete, our legislature has the power to change it, in which event we could look to the language of the statute in determining the nature and characteristics of the statutory joint tenancy thus created. By this method definiteness and certainty would be maintained and the confusion and want of uniformity that would otherwise follow would be avoided.

Essential requirements were lacking in the case before us to create a joint tenancy and the situation cannot be remedied by a declaration in the deed that it is intended to convey a joint tenancy. A noted text-writer states the rule applicable in the case before us as follows: "A conveyance by a husband and wife of property owned by the wife to themselves cannot create an estate in joint tenancy, but is effective to convey the husband an undivided half interest in the property, even though the deed declares that it is intended to convey a joint tenancy, and not a tenancy in common." 2 Tiffany, Real Property (3d ed.) sec. 421. While it was not necessary to a decision to determine the nature of the estate conveyed by the deed in the case before us, the writer has no hesitancy in answering the question posed by the dissent by stating that the deed before us, except for the undue influence found to exist, conveyed a half interest in the land to the wife.

It is essential that titles and estates in land be definite and certain. It is not a field in which the court should undertake to establish that it is liberal and modernistic in keeping pace with changing conditions. The creation of hybrid estates unknown to the common law is to be deplored. It can only bring about uncertainty, confusion and

want of stability in estates and their attributes. Carried to an absurd conclusion, there would eventually be as many different kinds of estates as there are tracts of land. The plain duty of this court is in the opposite direction. Many states have made changes by legislative action and this is entirely proper. Other states have made such changes by judicial fiat which have resulted in all the varied and conflicting decisions cited in the dissent. I submit that it is the obligation of this court to adhere to the landmarks of the common law on this subject until we are directed by competent authority to deviate therefrom.

HILDA LEPLEY, ADMINISTRATRIX, APPELLANT, V. NELLIE VON DORN ET AL., APPELLEES.
297 N. W. 642

FILED APRIL 25, 1941. No. 31022.

Landlord and Tenant. In an action for damages against an apartment house owner for personal injuries resulting from a fall at a bathroom entrance, *held,* under the facts recited in the opinion, that the proximate cause of the accident was the act of the injured party and that recovery cannot be had.

APPEAL from the district court for Douglas county: JOHN W. YEAGER, JUDGE. *Affirmed.*

Brown, Fitch & West, for appellant.

Kennedy, Holland, De Lacy & Svoboda, contra.

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

SIMMONS, C. J.

This is an action for personal injuries resulting from a fall when leaving a bathroom, common to several tenants. The trial court directed a verdict for defendants. Plaintiff appeals.

Defendants are the owners of an apartment house. One part is so constructed that the entrances to three apartments and a bath, common to the three apartments, are from a

hallway, lighted only by artificial light when all doors are closed. The light in the hallway was situated in the ceiling, some three or four feet from the bathroom door, and is described as a 15 to 25 watt lamp, inclosed by an opaque glass ornament. This light was kept burning continuously. The floor, woodwork, and walls were dark in color. The elevation of the floor of the bathroom was some six and one-half inches higher than that of the hall. The riser and outer edge of the sill of the bathroom door were immediately under the bathroom door when closed. The door of the bathroom opened inward. The bathroom floor and sill were of white material and the bathroom was painted white. It was lighted by a 50 watt bulb, so placed that it was necessary to fully enter the bathroom to turn it on and to be in the bathroom to turn it off. A sign was on the inside of the bathroom door requesting the tenants to turn off the light when not in use.

Some ten days before the accident in question, one Earl Nelson became a tenant of the defendants in one of the three apartments opening from this hallway. He used the common bathroom. His mother, Mrs. Johnson, visited him, for the first time in the apartment, on the day of the accident from which this action arises. After dinner, she expressed a desire to use the bathroom. The son walked down the hall with her, entered the bathroom, turned on the light, told his mother to "step up," which she did and entered the bathroom. The son stepped out, the door was closed and the son returned to his apartment. A few moments later she called the son. She was found, by another tenant and the son, sitting on the floor in front of the bathroom door, one leg under her. The bathroom light was out and the door was partly open. The other tenant reached her first and she told that tenant that "when she came out of the bathroom she forgot that she stepped up when she went in and she said coming out into the hall it was a little dark and she didn't see the step and she fell." Mrs. Johnson was severely injured in the fall and some days later died from pulmonary embolism.

Plaintiff administratrix seeks to recover damages on the theory that it was defendants' duty to keep the premises sufficiently lighted to enable people using the same to see and comprehend dangers by the use of ordinary care and that defendants were negligent in not having the hallway sufficiently lighted and in failing to give a warning of danger. Plaintiff's contention is that one coming out of the dark bathroom, into a dimly lighted hallway, could not tell from the appearance of the bathroom and hall floors that a step was there.

The construction of a bathroom with an elevated floor is common in homes, hotels, apartment houses, and public places. Lighting arrangements such as were in the hall and bathroom are in common use. Mr. Nelson made no complaint about them at the time he rented the premises and the evidence indicates that he accepted and used the premises without objection. Obviously he was conscious of no danger from either the construction of the premises or the light, for he gave his mother no warning of danger or need of care. No inherent danger is shown either in the construction of the bathroom floor or the lighting of the hallway.

It is obvious that no affirmative act of the defendants caused Mrs. Johnson to fall. What was the proximate cause of the accident?

This situation is presented. A woman, her eyes adjusted to the bright light of the bathroom, turned out that light and opened the door into the hall where the light was less brilliant than it had been in the bathroom. Knowing that the step was there, but forgetting about it, she stepped from the dark bathroom into the hall and fell, to her injury. Whether she slipped on the sill, lost her balance as a result of the lower elevation of the hall floor, or just what happened is left to speculation and conjecture. Obviously Mrs. Johnson, at the moment before she stepped into the hallway, had three courses open to her,—she could wait until her eyes became adjusted to the light before proceeding; she could have turned on the bathroom light, which,

when the door was open, clearly lighted the hall, and determined the nature of the hallway; and she could proceed, forgetful of the step, into what the plaintiff contends was a dark hall and a dangerous situation. She apparently took the last course. The conclusion is inescapable that Mrs. Johnson's own act was the proximate cause of the accident.

In a somewhat similar situation in *Wentink v. Traphagen*, 138 Neb. 41, 291 N. W. 884, we reviewed the holdings of this court dealing with the subject of actionable negligence, proximate cause, and contributory negligence. The holdings there made are applicable here.

The court in *Viles v. Thunborg*, 164 Wash. 190, 2 Pac. (2d) 666, reviews several decisions of a comparable nature. We quote the last part of that opinion: "If, as she says, the hallway was dark or poorly lighted, then it was incumbent upon her to proceed with greater caution and wait, after she had opened the door, until she had fixed in her mind's eye the floor level of the hallway before attempting to descend the step. Her failure to do this was the proximate cause of the injury, and bars any recovery." See, also, *Wessner v. Blue Ridge Transportation Co.*, 338 Pa. St. 161, 12 Atl. (2d) 559; *Main v. Lehman*, 294 Mo. 579, 243 S. W. 91.

The judgment of the trial court is

AFFIRMED.

JOHN P. HELLEBERG, APPELLANT, V. CITY OF KEARNEY, APPELLEE.

297 N. W. 672

FILED APRIL 25, 1941. No. 31009.

1. **Municipal Corporations.** A contract for the preparation of preliminary sketches, plans and specifications for a city hall, for supervising construction, for the architect's compensation, and including the subsequent provision, "Should the bond election fail or grant not be allowed then this contract becomes void," *held* void in its entirety upon failure of the city electors to vote

bonds in aid of the project at the first election for that purpose.

2. Appeal. Where a jury is waived in an action at law, the findings of the district court have on appeal the effect of a jury's verdict and will not be set aside unless clearly wrong.
3. Municipal Corporations: ESTOPPEL. No member of a city council or the mayor or the city attorney, each acting separately as an individual, can bind the city by a contractual obligation creatable only by official action of the city council, nor can any one of them ratify or reinstate a void city contract or estop the city from denying the validity thereof.

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

Dryden, Dryden & Jensen, for appellant.

George A. Munro, contra.

Heard before SIMMONS, C. J., ROSE, PAINE, MESSMORE and YEAGER, JJ., and CHAPPELL, District Judge.

ROSE, J.

This is an action to recover $1,800 in damages for breach of a contract executed August 28, 1935, under which John P. Helleberg, plaintiff, was employed as an architect by the city of Kearney, defendant, to prepare preliminary sketches, plans and specifications for a city hall and to supervise construction thereof.

Plaintiff alleged in his petition that he performed and that the city accepted the preliminary services required by the contract and that the city failed to pay the agreed compensation therefor.

By answer defendant admitted the execution of the contract and the preparation by plaintiff of preliminary sketches, plans and specifications pursuant thereto, but alleged the contract became void by its own terms through failure of the electors of Kearney to adopt at the city election April 7, 1936, a proposition to issue municipal bonds in aid of the project. Liability for plaintiff's claim was denied.

Upon a trial of the cause the district court found the issues in favor of defendant and entered a nonsuit. Plaintiff appealed.

The sum of plaintiff's argument in support of contentions that the dismissal was erroneous and the claim for compensation valid is that the contract was ambiguous and was kept in force by interpretation, understanding and conduct of the parties until bonds were voted and until the federal Public Works Administration made a grant of funds pursuant to an application by the city. The provision of the contract under which plaintiff demands compensation or damages of $1,800 reads thus:

"If work is postponed or abandoned after the preliminary sketches are made, the owner agrees to pay the architect one and one quarter per cent. (1¼%) of the architect's estimated cost, or three per cent. (3%) when plans and specifications are entirely complete."

This is printed matter in a printed form with blank spaces for dates, names and additional provisions and is immediately followed by conditions inserted by the use of a typewriter and a pen in these words:

"Should the bond election fail or grant not be allowed then this contract becomes void."

It is contended by counsel for plaintiff that this latter provision is ambiguous and by interpretation and conduct of the parties, or by ratification or estoppel, did not operate to annul the contract, because the city voted bonds and the Public Works Administration eventually made the necessary grant of funds for the construction of a city hall.

Pending negotiations for the employment of an architect, plaintiff told the city council that there would be no charge for the preliminary plans prepared by him if the election failed. The same understanding was recited in minutes of the city council. Plaintiff testified that he himself inserted in the contract the provision: "Should the bond election fail or grant not be allowed then this contract becomes void." Plaintiff prepared plans and specifications for a city hall to be constructed at an estimated cost of $130,000. To aid in financing that project the city council submitted to the electors of Kearney, April 7, 1936, a proposition to issue municipal bonds and "the bond election

failed." At a meeting of the council December 7, 1936, the contract employing plaintiff was declared void and he was notified thereof by letter of the city clerk February 5, 1937. A second election April 6, 1937, to vote on a bond issue for a city hall and auditorium according to plans prepared by McClure & Walker, architects, was lost. Bonds were voted at a third election in September, 1938, to help finance a city building to cost $100,000 as planned by McClure & Walker. The Public Works Administration made a grant of funds for the same purpose and the project was eventually completed. The plans for the three projects and the propositions submitted to the voters were not the same. The proposition based on the plans prepared by plaintiff was never resubmitted to the voters. The plans on which the work of construction proceeded to completion were the plans of McClure & Walker. The city in the work of construction did not use the plans drawn by plaintiff. The facts outlined are established by the evidence. The district court so found and his findings on appeal have the effect of a jury's verdict, a jury having been waived.

Plaintiff insists, nevertheless, that he is not bound by the municipal resolution declaring his contract of employment void, since he did not have notice of such contemplated action of the council or timely notice of the resolution and pursued the duties of his employment until the bonds were voted.

The "bond election," contemplated by the parties to the contract of employment providing, "Should the bond election fail or grant not be allowed then this contract becomes void," means the first bond election subsequently held April 7, 1936. In the negotiations for the employment of an architect and in the making of the contract itself, no other election was mentioned, intimated or implied. The definite article "the" before "bond election" indicates one election, not an indefinite number of elections. Plaintiff himself selected and inserted in the contract the terms submitted for construction as ambiguous. They are not open to construction. The contract became void by its own terms upon

failure of the electors to vote bonds at the first election. Nothing was added to the nullity by the resolution of the city council.

Plaintiff insists further that he performed service under his contract of employment as architect after the failure of the city election April 7, 1936, at the request of members of the council or the city and the mayor and the city attorney; that consequently his contract of August 28, 1935, was kept in force for the purpose of his compensation in the event of postponement of the work of construction, and that the city is estopped to question the validity of his claim, which is based solely on breach of contract. He testified that, in response to such requests, he made investigations relating to the project; gave advice; made calculations; furnished estimates; was active in procuring a federal grant and for that purpose made trips to Omaha at his own expense and performed other services as architect in the interests of the city.

The construction of a city hall was the business of the city. It conducts business of this nature by proceedings of the council evidenced by public records. Plaintiff did not introduce in evidence any city records showing that the city council requested his services after the first city election or accepted the services to which he testified. The provision, "Should the bond election fail or grant not be allowed then this contract becomes void," applies to the entire contract, including compensation of the architect. No member of a city council or the mayor or the city attorney, each acting separately as an individual, can bind the city by a contractual obligation creatable only by official action of the city council, nor can any one of them ratify or reinstate a void city contract or estop the city from denying the validity thereof. *Scott v. City of Lincoln,* 104 Neb. 546, 178 N. W. 203.

In these views of the facts and the law, there is no error in the proceedings and judgment of the district court.

AFFIRMED.

A. H. READ, DOING BUSINESS AS A. H. READ COMPANY, APPELLANT, V. CITY OF SCOTTSBLUFF, APPELLEE: GILBERT I. GODSEY, INTERVENER, APPELLEE.

297 N. W. 669

FILED APRIL 25, 1941. No. 31093.

1. **Municipal Corporations.** Courts have uniformly recognized a distinction between acts that were legislative and those that were administrative, and the initiative and referendum provisions ordinarily apply only to legislative acts.
2. ———. Both legislative and administrative powers are vested in a mayor and city council. Administrative powers may be exercised by motion, resolution, or even by ordinance. The form or name of the action does not change the nature of the real step taken.
3. ———. Referendum laws are usually directed against the supposed evils of legislation alone.
4. ———. To allow referendum laws to be invoked to annul or delay executive or administrative action would tend to delay, and in some cases to annul, the prompt and efficient administration of city affairs.
5. ———. The action of the mayor and city council in accepting a bid and directing that a contract be entered into, if unmixed with the exercise of any legislative power whatever, is not subject to a referendum, in the absence of a specific law relating thereto.

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

Floyd E. Wright, for appellant.

Straight Townsend and *William Morrow, contra.*

Heard before SIMMONS, C. J., PAINE, MESSMORE and YEAGER, JJ., and CHAPPELL and POLK, District Judges.

PAINE, J.

This was an action in equity, asking the court to determine the rights of the parties under a contract and enter a declaratory judgment. The district court found generally for the defendant and intervener, and dismissed plaintiff's petition, and plaintiff appealed.

Plaintiff filed his petition on July 12, 1940, alleging that the defendant city, by ordinance No. 537, enacted April

27, 1939, created Paving District No. 24. The city engineer presented estimates and specifications for paving, which were accepted by the city, and notice given for bids. Plaintiff submitted bids for various types of pavement, and was low bidder on type No. 3 for three-inch bituminous concrete foundation, with one-inch sheet asphalt on top. On May 31, 1940, the mayor and city council accepted said bid and entered into a contract in the sum of $35,618.50, which contract was signed by the mayor and city clerk on June 8, 1940. Plaintiff thereupon gave bond, which was duly approved.

Plaintiff commenced work under the contract, and on July 9, 1940, at a regular meeting of the council, presented an estimate of the work performed under said contract, showing 2,000 cubic yards of dirt excavated at 35 cents a cubic yard, the claim being for $560, or 80 per cent. of the amount of the estimate, which claim was disallowed by the mayor and council. On July 1, 1940, there was filed with the city clerk a petition, signed by 714 persons, of which 593 were registered voters, which petition asked that plaintiff's contract be referred to the voters for rejection or approval.

Plaintiff contends that his contract is in full force and effect, and that the petition for a referendum is ineffective, for the following reasons: (1) That the initiative and referendum does not refer to contracts of the character involved herein, but only to contracts for the government of the city; (2) that the contract entered into became effective June 30, 1940, and that the referendum petition was filed too late to entitle the question to be submitted to the voters; (3) that the petition filed was void because at least ten persons signing same failed to make oath before a competent officer that they were duly qualified voters.

Plaintiff alleges that, unless the court adjudicates the rights of the parties under the contract, it is unsafe for plaintiff to continue under said contract, and therefore prays the court to render a declaratory judgment as to the rights and obligations of the parties.

For answer the city of Scottsbluff, defendant, admits the first 12 paragraphs of plaintiff's petition, and sets out certain defects, and prays that the court determine the rights of the parties and enter a declaratory judgment as to the validity of said contract.

On August 1, 1940, Gilbert I. Godsey, having received leave of court, intervened and filed an answer, in which the intervener denied that said contract is in full force and effect, denies that plaintiff is entitled to proceed with the paving, denies that plaintiff is entitled to be paid as provided in the contract, and alleges that by reason of the filing of the petition the question of the acceptance or rejection of the contract must be submitted to the voters, and that the operation of said contract must be suspended until the next general city election. On August 5, 1940, plaintiff filed reply to the answer of the intervener.

Said cause was tried August 5, 1940, in the district court and taken under advisement, and journal entry was filed on August 10, 1940, finding that on May 31, 1940, the mayor and city council accepted bid of plaintiff as alleged, and his bond was duly approved, and that the plaintiff had performed certain work set forth in paragraph No. 8 within 30 days after the acceptance of the bid; that a referendum petition was filed on July 1, 1940, and that 593 registered voters signing the same are more than 15 per cent. of the total registered voters of the city of Scottsbluff.

The court finds that the work done by the plaintiff described in his petition was done within 30 days after his bid was accepted. As conclusions of law, the court finds that the initiative and referendum as adopted by the city of Scottsbluff applies to such contract; that while 30 days from the date of the passage of the motion by the city council accepting the bid expired on June 30, which was Sunday, the referendum petition, which was filed July 1, 1940, was filed within the time as provided by law.

The court further finds that the work done by the plaintiff, described in paragraph 8 of his petition, was done when said contract was not in full force and effect, and

therefore plaintiff cannot recover for said work under the terms of the contract. The court therefore dismissed the petition at the costs of plaintiff.

In the motion for new trial, plaintiff sets out that the court erred in holding that the initiative and referendum applies to plaintiff's contract; that the court erred in holding that, while 30 days expired June 30, 1940, the last day being Sunday, the petition filed July 1, 1940, was filed within time as provided by law; that the court erred in holding that the work done by plaintiff was done when the contract was not in full force and effect, and therefore plaintiff could not recover for said work under the terms of his contract; and, lastly, that the judgment of the court is contrary to the evidence and contrary to law.

The facts are undisputed that the city of Scottsbluff created a paving district by ordinance. The abutting property owners did not agree upon or ask for any particular type of paving, therefore the mayor and council determined the type which should be used in this contract.

The first contention of the appellant is that this was not a legislative act, but just an administrative act, and therefore it was not subject to the referendum petition.

"It is the general rule that initiative and referendum provisions are applicable only to acts which are legislative in character, and are not applicable to those dealing with administrative or executive matters." 122 A. L. R. 769, Ann.

This court in *Schroeder v. Zehrung*, 108 Neb. 573, 188 N. W. 237, had before it a case in which a judgment of dismissal had been entered in a suit to enjoin the mayor and council of the city of Lincoln from entering into a contract with the Technical Advisory Corporation for certain work, including the preparation and submission to the council of a proposed ordinance relating to zoning. It was held that the resolution was simply to obtain data and information for the framing of an ordinance to be submitted, and that the resolution is an administrative act, rather than a legislative act, and that the referendum is applicable to

municipal legislation, that is, to an ordinance which is a declaration of municipal law upon any subject.

In an Oklahoma case the county commissioners ordered the clerk to advertise for bids for the construction of a bridge, and it was held that the power of referendum reserved to the legal voters of a county was applicable only to laws or legislative action as distinguished from administrative or executive action. *Brazell v. Zeigler,* 26 Okla. 826, 110 Pac. 1052.

In *Monahan v. Funk,* 137 Or. 580, 3 Pac. (2d) 778, a city ordinance provided for the purchase of property for garbage incinerating plant, and to acquire real property for such plant. This was held to be merely an administrative act, and not subject to referendum. It is said in that case: "The crucial test, for determining that which is legislative and that which is administrative, is whether the ordinance was one making a law or one executing a law already in existence."

"Notwithstanding the broad language of these and other statutes, the courts have uniformly recognized the distinction between acts that were legislative and those that were administrative, and have said that the initiative and referendum applied only to the former." *Murphy v. Gilman,* 204 Ia. 58, 214 N. W. 679.

"Both legislative and executive powers are possessed by municipal corporations. Often executive powers are vested in the council or legislative body and exercised by motion, resolution or ordinance. Executive action evidenced by ordinance or resolution does not subject such action to the power of the referendum, which is restricted to legislative action as distinguished from mere administrative action. The form or name does not change the essential nature of the real step taken. The mode of effecting the action is not important. If legislative the law contemplates the people may invoke the referendum. The referendum is usually held 'applicable to all ordinances and resolutions which constitute an exercise of legislative power.' That is, it was designed to be directed against 'supposed evils of

legislation alone.' 'To allow it to be invoked to annul or delay executive conduct would destroy the efficiency necessary to the successful administration of the business affairs of a city. In many cases it would entirely prevent the exercise of the executive power necessary to carry out the acts determined upon by the legislative department. In the absence of a very clear declaration to the contrary it must be presumed that the power of referendum was intended to apply solely to the legislative powers of the city.' An act purely executive in character, unmixed with the exercise of legislative power, is not subject to the referendum. But if the act done is essentially legislative the referendum may be invoked, irrespective of the naming of the act, whether denominated a motion, resolution or ordinance. Of course, accurately speaking, an ordinance is the proper designation for legislative action." 7 McQuillin, Municipal Corporations, Supp. 6621, sec. 351c.

In the opinion of the court, the action of the mayor and city council taken on May 31, 1940, accepting the bid of the plaintiff and entering into the contract, was an act which was purely administrative in character, unmixed with the exercise of any legislative power.

That being our conclusion, the act was not subject to referendum, and the other objections need not be discussed. The judgment is reversed and the cause remanded for further action in the premises.

REVERSED.

ANNIE C. PIERCE, APPELLANT, V. BURLINGTON TRANSPORTATION COMPANY ET AL., APPELLEES.
297 N. W. 656

FILED APRIL 25, 1941. No. 31030.

1. **Innkeepers.** The proprietor of a hotel is not an insurer against accident to persons invited upon the hotel premises, but he must exercise reasonable care to keep the premises reasonably safe for the purposes for which they are to be used.

2. ———. The fact that an invitee in a hotel falls in a lavatory and suffers injury raises no presumption of negligence on the part of the hotel proprietor, and the doctrine of *res ipsa loquitur* does not apply.
3. ———. Where a recovery is sought for personal injuries sustained as the result of a fall in a hotel lavatory, the burden is upon the plaintiff to prove negligence of the proprietor, and if a case sufficient to sustain a judgment is not made out, the trial court should direct a verdict for the defendant.
4. ———. The fact that there was a step which plaintiff was required to ascend and descend in going to and from a lavatory does not of itself evidence a want of due care on the part of a hotel proprietor.
5. ———. The mere statement of a plaintiff that she fell because the floor was slippery is not sufficient to sustain a judgment, unless there is evidence of negligence with reference thereto on the part of the person charged with the care and maintenance of the premises.

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

Hoagland, Carr & Hoagland, for appellant.

Shuman & Overcash, J. W. Weingarten, W. P. Loomis, E. H. Evans, Urban Simon and *Beatty, Maupin, Murphy & Davis, contra.*

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

CARTER, J.

This is an action brought by Annie C. Pierce against the defendants, Burlington Transportation Company, Jensen Hotel Company and Hendryx E. Davis, to recover damages for personal injuries sustained when she slipped and fell in a rest room in the hotel operated by the Jensen Hotel Company. A demurrer to the petition filed by Hendryx E. Davis was sustained and the cause dismissed as to him. At the close of plaintiff's evidence the remaining defendants moved for a directed verdict, which motion the trial court sustained. Plaintiff appeals from the order dismissing her action.

The record discloses that the Jensen Hotel Company was

the lessee of the Pawnee Hotel building in North Platte, Nebraska, from the Neville Company. The store space on the first floor was not included in the lease, such space being leased direct to the occupants. The Burlington Transportation Company was a lessee of space for its bus depot, which space was located immediately north of the east entrance to the hotel. The bus depot had one outside entrance and one door leading to the hotel lobby. The busses stop at the bus depot entrance on the east side of the hotel.

On the morning of July 7, 1938, the plaintiff was traveling on a bus belonging to the defendant Burlington Transportation Company from Chicago to Denver. Upon arrival in North Platte the bus was stopped at the bus depot for rest and refreshment, the driver announcing that the stop would be for forty minutes. The bus driver also announced that the men's rest room would be found on the first floor off the lobby and the ladies rest room on the mezzanine floor of the Pawnee Hotel.

It appears from the record that the rest rooms were controlled and maintained by the Jensen Hotel Company for the convenience of its guests and the public generally. It was customary on the part of hotel employees to direct any person making inquiry to one of these rest rooms, whether such person had any business with the hotel or not.

On the morning of the accident plaintiff entered the hotel lobby and, upon making inquiry, was directed to the ladies rest room on the mezzanine floor. Plaintiff entered the small anteroom from the mezzanine floor and from there passed into the rest room proper. The floor level of the rest room was some six or seven inches higher than the floor level of the anteroom, which made it necessary for plaintiff to step up as she passed into the rest room proper. The floors of both rooms were black and white checkered tile and the riser of the step was black. The inner room contained two toilets and two washbowls. The rooms were well lighted and the evidence affirmatively shows that the floors were clean, dry and unobstructed.

Plaintiff testifies that she used a toilet and then returned to use one of the washbowls. While so engaged she slipped and fell over the step and against the wall. As a result she suffered a broken leg and other injuries for which damages are sought.

Plaintiff's evidence is to the effect that the floor was slippery, although she admits that it was dry and clean and that she saw nothing on it. The evidence of other witnesses is to the effect that the floor was dry and clean. No complaint is made as to the lighting. Just how the accident happened is not shown. Plaintiff apparently slipped and fell over the step and against the wall without knowing just what happened. With this evidence before him the trial judge directed a verdict for defendants.

The premises upon which the plaintiff was invited to enter and where the accident happened was a hotel which must be kept reasonably safe for all persons invited to use its facilities. The proprietor of a hotel is not an insurer against accidents to guests or other invitees. Liability arises only from a failure to exercise reasonable care and prudence in keeping the premises safe. It is true that the tile floor was hard and smooth, the same as all floors of similar construction, but this of itself is not negligence. *Kline v. Abraham*, 178 N. Y. 377, 70 N. E. 923. It does not appear that plaintiff fell because of any foreign substance on the floor or because of a want of proper lights. The mere fact that there was a step which plaintiff would have to ascend and descend in going to and from the rest room does not evidence a want of due care on the part of the hotel proprietor. Such steps are usual and customary in hotels. *Main v. Lehman*, 294 Mo. 579, 243 S. W. 91. There is nothing inherently dangerous in having the floor of a toilet and lavatory raised six or seven inches above the floor of the anteroom. *Viles v. Thunborg*, 164 Wash. 190, 2 Pac. (2d) 666; *Albachten v. The Golden Rule*, 135 Minn. 381, 160 N. W. 1012. The fact that plaintiff fell on the floor without any evidence to show how the fall was occasioned raises no presumption of negligence on the part of

the proprietor, and the doctrine of *res ipsa loquitur*, which is only applicable when the thing shown speaks of the negligence of the defendant, not merely of the happening of the accident, does not apply. *Broadston v. Beddeo Clothing Co.*, 104 Neb. 604, 178 N. W. 190; *Garland v. Furst Store*, 93 N. J. Law, 127, 107 Atl. 38.

There is a failure to prove any negligence on the part of the defendant Jensen Hotel Company. Neither is there sufficient evidence to sustain a finding that the construction was dangerous or that a dangerous condition was the cause of the accident. Considering the evidence in the light most favorable to the plaintiff, as we must do in determining the correctness of a directed verdict, we are of the opinion that it fails to make a case against the Jensen Hotel Company, the operator of the Pawnee Hotel. We think that the holding is supported by the following decisions of this court: *Broadston v. Beddeo Clothing Co.*, 104 Neb. 604, 178 N. W. 190; *Thompson v. Young Men's Christian Ass'n*, 122 Neb. 843, 241 N. W. 565; *Sokolof v. First Nat. Bank*, 122 Neb. 892, 240 N. W. 547; *Brown v. Davenport Holding Co.*, 134 Neb. 455, 279 N. W. 161.

The Burlington Transportation Company contends that there was no negligence shown and, even if there was, that the facts are not sufficient to charge it with responsibility. The record is entirely devoid of evidence that this defendant owed any duty to the plaintiff with respect to the care of the rest room. The space occupied by the Burlington Transportation Company was rented direct from the Neville Company. The businesses of the Jensen Hotel Company and of the bus company were separate and distinct, the evidence affirmatively showing that no agreement, business relation or arrangement existed between them concerning the use of hotel facilities by the Burlington Transportation Company or its employees and passengers. The record also affirmatively shows without dispute that the bus company had no right to control, maintain or care for the rest room in question. Passengers of the bus company were free to enjoy hotel privileges as any others of the public who

might care to do so. Under such circumstances no liability arises as to the bus company. *Pickwick Stage Lines v. Edwards*, 64 Fed. (2d) 758 (C. C. A. 10th Cir.). Such being the case, the trial court properly sustained the motion for a directed verdict in favor of the Jensen Hotel Company and the Burlington Transportation Company.

Other errors assigned have been examined, and we find none prejudicial to the rights of the plaintiff. The judgment of the trial court is in all respects correct.

AFFIRMED.

R. C. JOHNSON, APPELLANT, V. LOUIS M. HANSEN: ANDREW O. JOHNSON, APPELLEE.
297 N. W. 643

FILED APRIL 25, 1941. No. 31026.

1. **Bills and Notes.** An instruction which, in referring to a promissory note introduced in evidence, states "is itself some evidence of what the promises and agreements of the parties were" is indefinite and erroneous in that the word "some" would mean: Consisting of greater or less proof, when, in fact, the note is *prima facie* evidence of the indebtedness.
2. ———. Where an answer alleges that defendant was an accommodation maker of a promissory note and that the note was without consideration to such maker, such allegations constitute affirmative defenses, and the burden of proof is on the defendant to prove either or both of such defenses by a preponderance of the evidence; and an instruction, using only the language, "by the greater weight of the evidence," and failing to incorporate therein the language, "burden of proof" and "preponderance of the evidence," and further failing to apprise the jury of the meaning of the term "consideration," or the sufficiency thereof, is prejudicially erroneous.

APPEAL from the district court for Franklin county: LEWIS H. BLACKLEDGE, JUDGE. *Reversed.*

Spence & Long, for appellant.

William H. Meier, contra.

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

MESSMORE, J.

Plaintiff sued defendants on a promissory note. Defendant Hansen defaulted and judgment was entered against him. Defendant Andrew O. Johnson defended on the ground that he was an accommodation maker and received no consideration for his signature on the note. The cause was submitted to a jury, and the verdict was in favor of defendant Johnson. From this verdict and judgment thereon the plaintiff appeals.

Plaintiff contends that instruction No. 1, given by the trial court, constitutes prejudicial error. The court, in endeavoring to cover the issues and the proof required in the instant case, instructed in part as follows: "The note has been introduced in evidence and is itself some evidence of what the promises and agreements of the parties were and upon that phase of it the plaintiff would be entitled to a verdict * * *." "Some evidence" would mean: Consisting of a greater or less portion; a certain indefinite or indeterminate part; more or less. The note is *prima facie* evidence of the indebtedness, not just more or less evidence of the fact, or an indeterminate part thereof. See 39 Words and Phrases (Perm. ed.) 480. The use of the word "some" might be interpreted by the jury to mean that other evidence was required, in addition to the note, to prove a *prima facie* case. The plaintiff having made a *prima facie* case, the defense being that the note is an accommodation note, then the only remaining evidence to be offered by the plaintiff is in rebuttal of the affirmative defense of accommodation maker.

Instruction No. 1 then continues: "Unless the defendant Andrew O. Johnson on his behalf has overcome the apparent effect thereof, by establishing by the greater weight of the evidence at this trial, the truth of the defense he claims which is in effect that he received no consideration for the signing of it and signed it with the agreement be-

tween himself and the bank to which the note was given, and upon the express promise of the bank through its cashier, Mr. Swan, that he, Andrew O. Johnson, should never be liable on the note nor be required to pay it."

Defendant Johnson's separate answer alleged the defense of accommodation maker. The burden of proof is then upon him to prove the defense by a preponderance of the evidence. *Neslund v. Kinnan,* 129 Neb. 279, 261 N. W. 358. The instruction omits the use of the language "burden of proof" and "preponderance of the evidence" and speaks of "the greater weight of the evidence," and, subsequently, in instruction No. 2, defines "the greater weight of the evidence."

We believe that the language of the instruction is unfortunate in that it fails to apprise the jury that the defendant has the burden of proof, and, inasmuch as the pertinent part of the pleadings is not a part of the instructions, the jury might not give the weight to the language, "burden of proof," that they might give if they understood the defendant's obligation in this respect.

The other instructions given by the court are with reference to the credibility of the witnesses and the duties of the jury in arriving at a verdict. Instruction No. 1, given by the court, fails to properly state the effect of the note as evidence, fails to properly inform the jury as to the burden of proof required of the defendant, and fails to apprise the jury of the meaning of the term "consideration," or the sufficiency thereof. The instruction as given constitutes prejudicial error.

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

REVERSED.

THELMA JOLLIFFE, APPELLANT, V. CITY OF NORTH PLATTE ET AL., APPELLEES.
297 N. W. 666

FILED APRIL 25, 1941. No. 31121.

1. **Workmen's Compensation:** APPEAL. Record examined and *held* that plaintiff failed to perfect her appeal as provided by section 48-174, Comp. St. Supp. 1939, and as held in *Hansen v. Paxton & Vierling Iron Works*, 135 Neb. 867, 284 N. W. 352, and in *Bell v. Denton*, 136 Neb. 23, 284 N. W. 751.
2. **Courts.** The interpretation of a syllabus is gathered from the arrangement of words and their relation to each other, regardless of punctuation marks.
3. **Workmen's Compensation:** APPEAL. A transcript of proceedings before a compensation court and a petition on appeal in the district court are filed with the clerk of the district court when such papers are placed in his custody and deposited by him in the place where his official papers and records are usually kept.
4. ———: ———. The record contains insufficient evidence of negligence on the part of the deputy clerk of the district court to disclose that plaintiff was prevented from having her appeal docketed as required by law.

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

Hoagland, Carr & Hoagland, for appellant.

Beatty, Maupin, Murphy & Davis and *William D. Deakins, Jr., contra.*

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

MESSMORE, J.

This is a compensation case instituted by the plaintiff to recover compensation benefits, alleged to be due on account of the death of her husband, as the result of accidental injuries arising out of and in the course of his employment as a police desk sergeant for the city of North Platte. The case was originally started in the Nebraska workmen's compensation court May 24, 1940, and issues formed therein. On July 29, 1940, a judge of the compensation court found

against the plaintiff. August 9, 1940, plaintiff filed a waiver of rehearing before the compensation court and notice of appeal to the district court. On the same day the compensation court filed a certificate of the waiver and election in the compensation court and forwarded a copy of the certificate of waiver and election to the clerk of the district court, which was filed in the office of the clerk on the same day. On August 12, 1940, the plaintiff filed a transcript of the proceedings before the compensation court and a petition on appeal in the district court. August 20, 1940, defendants filed a special appearance, contending that the court had no jurisdiction over the persons of defendants, for the reason that the petition as aforesaid was not filed in the district court within 14 days after the order of dismissal made by the workmen's compensation court and plaintiff failed to perfect her appeal within the time provided by law. September 11, 1940, hearing was had on the special appearance, and on October 1, 1940, the district court entered an order sustaining the special appearance of the defendants; hence this appeal. This brings us to the question as to whether or not the plaintiff had perfected her appeal as provided by section 48-174, Comp. St. Supp. 1939.

Plaintiff contends that the district court is vested with jurisdiction in a compensation case, in which a rehearing or retrial is waived before the compensation court, where notice of intention to appeal in the compensation court is filed within 14 days, and that it is not necessary that a petition on appeal be filed in the district court within 14 days from the entry of the order appealed from in the compensation court, citing *Hansen v. Paxton & Vierling Iron Works*, 135 Neb. 867, 284 N. W. 352, and *Bell v. Denton*, 136 Neb. 23, 284 N. W. 751. In the former case this court held:

"To give the district court jurisdiction in a compensation case in which a rehearing or retrial is waived before the compensation court, it is only necessary that there be filed, within fourteen days, a waiver of rehearing and a

notice of intention to appeal in the compensation court, and an application or petition for a trial *de novo* in the district court, setting out the errors on which it is sought to reverse or modify the award of the compensation court." The exact language, above quoted, was adopted in the case of *Bell v. Denton, supra.*

The plaintiff's reasoning is that the failure to place a comma after the words "trial *de novo*" and before the words "in the district court" in the *Hansen* case supports her contention. With this contention we are unable to agree.

The function or effect of punctuation marks contained in statutes or court opinions is reflected by the holding of this court in *Zantow v. Old Line Accident Ins. Co.*, 104 Neb. 655, 178 N. W. 507, that, although punctuation marks may be considered as an aid to the interpretation of a contract, they will not control or change the meaning which may be plainly gathered from the words and their arrangement. The same analysis applies to a statute or an opinion or syllabus of a court stating the law interpreting the statute. In the body of the opinion it was said that there is still much uncertainty and arbitrariness in punctuation. "It is always subordinate to the text, and is never allowed to control its meaning. The court will take the contract by its four corners, and determine its meaning from its language, and, having ascertained from the arrangement of its words what its meaning is, will construe it accordingly, without regard to the punctuation marks, or the want of them. The sense of a contract is gathered from its words and their relation to each other, and, after that has been done, punctuation may be used to more readily point out the division in the sentences and parts of sentences. But the words control the punctuation marks, and not the punctuation marks the words." Cases cited in 13 C. J. 535. The foregoing language is quoted in the above case from *Holmes v. Phenix Ins. Co.*, 98 Fed. 240. See, also, *Holt v. Wilson*, 82 Kan. 268, 108 Pac. 87.

We hold that plaintiff failed to perfect her appeal, as provided in section 48-174, Comp. St. Supp. 1939, and as

held in *Hansen v. Paxton & Vierling Iron Works, supra,* and in *Bell v. Denton, supra.*

Plaintiff contends that she was prevented from having her appeal docketed in the district court within the statutory period through the negligence and failure of the deputy clerk to file the same, as directed by her attorney, and that, under such circumstances, the law will not permit her to be deprived of her appeal.

The record discloses that the deputy clerk of the district court received the papers to be filed shortly after 8 o'clock on the night of August 12, 1940. Some contention is made that she was advised to file the papers as of the date of August 12, and there is some dispute as to whether she was told that it would be all right for her to wait until the next morning, August 13, and have the clerk file such papers as of date August 12. The papers were delivered to the clerk of the district court on August 13 and filed as of August 12, 1940. At the time the papers were delivered to the deputy clerk, the office of the clerk had been locked at 5 o'clock on that evening, so, in any event, the papers were not presented to the clerk for filing until August 13, 1940. The question, as presented, is whether there was negligence on the part of the proper officers, charged with the duty of filing such papers, preventing the plaintiff from perfecting her appeal.

Papers of this nature are filed in the office of the clerk of the district court, in contemplation of law, only when deposited with the proper officer in his office, when they are received by him in his official capacity, and not when delivered to the officer at any other place than in his office, and if such officer receives the same at a subsequent date and indorses them as received on a previous date, his act is ineffectual, especially so when the evidence discloses no negligence on the part of the officer, or officers, in accepting the papers for filing. The statutes do not impose on a deputy clerk of the district court the official duty to receive for filing papers from an attorney at a place away from the office or outside of office hours. In the event the

deputy clerk so receives such papers and subsequently files them in the office of the clerk within the statutory time, it would amount to an accommodation on such officer's part. Otherwise, the deputy's failure to perform some act, not required by statute, will not excuse counsel's failure to file such papers as provided for by law to perfect an appeal. See *Old Colony Street R. Co. v. Thomas*, 205 Mass. 529, 91 N. E. 1006; *Hoyt v. Stark*, 134 Cal. 178, 66 Pac. 223.

Cases cited by plaintiff to support her contention are not applicable to the circumstances in the instant case. In each of such cases the officer failed to perform a duty required of him in his official capacity.

In the case of *O'Brien v. Schneider*, 88 Neb. 479, 129 N. W. 1002, this court said (p. 486): "A document is filed with an officer when it is placed in his custody and deposited by him in the place where his official records and papers are usually kept." See, also, *Edwards v. Grand*, 121 Cal. 254, 53 Pac. 796.

We conclude the order of the district court in sustaining defendants' special appearance should be affirmed, and plaintiff's petition is dismissed.

AFFIRMED.

KATHRYN ESSEX, APPELLEE, V. BIRDIE BROWN: JESS HUTTEN, ADMINISTRATOR, APPELLANT.
297 N. W. 659

FILED APRIL 25, 1941. No. 31023.

1. **Appeal.** 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.
2. ———. "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.
3. ———. "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.

4. ———. "Questions of fact will not be considered in this court if there is no bill of exceptions." *Gay v. Reynolds*, 57 Neb. 194, 77 N. W. 661.

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

John Adams, Jr., and *Jess Hutten*, for appellant.

Boyle & Boyle, contra.

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

YEAGER, J.

This is an action in equity instituted originally by Kathryn Essex, plaintiff, against Birdie Brown, formerly Birdie Essex, defendant. Plaintiff alleged in her petition that for ten years she had lived and cohabited with one Charles Essex, and that during that period of time she accumulated money which was delivered to Charles Essex, who purchased with this money the south 20 feet of lot 12, block 80, original city of South Omaha, now Omaha, Douglas county, Nebraska, title to which, for convenience, was placed in the name of the defendant. The action was to set aside and cancel the deed to Birdie Essex, and to have decree placing title to this real estate in the plaintiff.

The defendant filed answer denying the allegations of the petition, and alleging that she was the owner of the real estate in question by reason of the aforementioned deed.

Jess Hutten, administrator of the estate of Charles Essex, deceased, filed a petition of intervention. This is the same Charles Essex with whom plaintiff alleged she had lived for 10 years. Before the commencement of this action Charles Essex had died, and Jess Hutten became administrator of his estate. In the petition of interven-

tion it was alleged that Charles Essex purchased the real estate in question for himself, with his own money, and that he had title placed in Birdie Essex, now Birdie Brown, for his own convenience. Intervener sought a decree declaring that the property belonged to the estate of Charles Essex, deceased, and that Charles Essex died owning the said property.

The case was tried to the court, and the court found in favor of plaintiff and against both the defendant and the intervener. As to the defendant, the court found that the real estate was purchased with moneys belonging to the plaintiff, and that Birdie Essex took title in trust for the plaintiff, Kathryn Essex. As to the intervener, the court found that Charles Essex, at the time of his death, had no right, title or interest in and to the property involved in the action. Decree was entered in pursuance of the findings.

From the decree the intervener has appealed. As grounds for reversal the intervener, appellant herein, has presented three assignments of error, each of which challenges the regularity of the admission of testimony. No other errors are assigned.

The plaintiff, appellee herein, challenges the right of the court to entertain and consider the errors assigned, on the ground that no proper bill of exceptions has been presented to this court, the purported bill of exceptions not having been authenticated by the clerk of the district court.

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.

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.

"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.

The purported bill of exceptions in this case must be disregarded.

In this case, as has already been indicated, the only questions urged as grounds for reversal relate to admissibility of evidence. To determine the force of the arguments of appellant in this connection would necessitate examination of the evidence adduced in the trial court. This court has said: "Questions of fact will not be considered in this court if there is no bill of exceptions." *Gay v. Reynolds*, *supra*.

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, decree and judgment of the district court are affirmed.

AFFIRMED.

MARY G. COLE, APPELLEE, V. M. L. RAWLINGS ICE COMPANY, APPELLANT.
297 N. W. 652

FILED APRIL 25, 1941. No. 31060.

1. **Workmen's Compensation: APPEAL.** "The right of appeal is a substantial one to be sustained if possible. Technical refinements of interpretation will not be indulged in to defeat an appeal. It is only when the clearly expressed language of statutory requirements for appeal have not been met that a court will dismiss an appeal for want of jurisdiction." *Henderson v. Wilson*, 137 Neb. 693, 291 N. W. 96.
2. ———. *Held*, that, inasmuch as appellee had met all jurisdictional requirements for appeal to the district court, she was not deprived of her right of review by reason of a failure to have a hearing in the district court within 14 days after the filing of the bill of exceptions, as provided by section 48-174, Comp. St. Supp. 1939, the language of such statute being, under the circumstances, directory, and not mandatory.
3. ———. Plaintiff is entitled to compensation based upon the contract of hiring in force at the time of the accident, which was $2.50 a day, and which, being reduced to a weekly rate, amounted to $15 a week. On this basis she is entitled to an award of $10 a week for 325 weeks.

APPEAL from the district court for Gage county: CLOYD B. ELLIS, JUDGE. *Affirmed.*

Beghtol, Foe & Rankin, Walter E. Nolte and *Rinaker, Delehant & Hevelone*, for appellant.

Hubka & Hubka, contra.

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

YEAGER, J.

This is an action under the workmen's compensation laws of the state of Nebraska. It arose out of the accidental death of Clayton Cole which came about on December 28, 1938. The action was originally instituted in the compensation court by Mary G. Cole, appellee herein, widow of the deceased Clayton Cole, against M. L. Rawlings Ice Company, the employer of the deceased at the time of his

death, and Casualty Reciprocal Exchange of Kansas City, the compensation carrier of the employer. The purpose of the action was to recover workmen's compensation on account of the death of the said Clayton Cole, claimed by plaintiff to have resulted from an accident sustained in the course and growing out of his employment.

The facts which are important in a determination of this case are that Clayton Cole entered the regular employ of M. L. Rawlings Ice Company on or about July 4, 1938, and so continued to December 10, 1938. His salary or wage during this period was $40 a month. On December 10, 1938, he was discharged on account of seasonal decline in business, but at the time he was informed that if his services were required, and he was available, he would be called, and when called would be paid at the rate of $2.50 a day, or 25 cents an hour. On December 28, 1938, Cole was called for work and was sent from Wymore, Nebraska, to Lincoln, Nebraska, to return a truck. On the return trip the truck overturned, and Cole sustained injuries from which he died on the same day. The employer paid to the widow wages for one day in the amount of $2.50. At the time of the call the employer had employment for Cole for about a week or longer.

The case was first tried to one judge of the compensation court. The defendant, being dissatisfied with the award, sought and obtained a rehearing before the full compensation court. An appeal was taken from the award of the full court to the district court, where the record made in the compensation court was reviewed. On the basis of this review the district court vacated the award of the compensation court, which was for $6 a week for 325 weeks, together with $6 for medical expense and a funeral allowance of $150, and made an award of $10 a week for 325 weeks, without changing the allowance for medical and funeral expenses, against the defendant, Melvin L. Rawlings, who was found to be the sole owner of M. L. Rawlings Ice Company. Judgment was rendered accordingly.

From this award and judgment by the district court, the defendant, Melvin L. Rawlings, has appealed to this court. Since appeal was taken to this court Melvin L. Rawlings has died. Through proper proceedings the case now proceeds with Walter Vasey, administrator with the will annexed of the estate of Melvin L. Rawlings, substituted as appellant.

The appellant admits the employment, that deceased was injured in the course of his employment, and that the plaintiff is entitled to a recovery under the workmen's compensation laws, but not at the rate and in the amount fixed by the district court.

Two issues are presented for determination on this appeal. The first one presents a procedural question, dealing with the power of the district court to hear the case on appeal from the compensation court. All necessary steps were taken to confer jurisdiction on the district court, but appellant contends that the court lost jurisdiction to hear the case since it was not tried within the time fixed by statute, that is, within 14 days after the filing of the bill of exceptions in the district court. In support of his contention appellant points out that the hearing was had 73 days after the filing of the bill of exceptions, and directs our attention to section 48-174, Comp. St. Supp. 1939, the pertinent part of which is as follows: "Within fourteen days after the filing of the bill of exceptions the district court or judge thereof in or out of term time shall proceed to hear argument of counsel on the contentions raised in such petition and render judgment thereon according to the form of law."

This question has never before been presented to this court. However, to some extent an analogy is found in the recent case of *Henderson v. Wilson*, 137 Neb. 693, 291 N. W. 96. In that case a copy of the petition had not been served on the adverse party as provided by statute. This court in the opinion said: "It necessarily follows that, inasmuch as the defendant met all the requirements of the compensation law by filing his petition and transcript in due time, the

district court obtained jurisdiction, and the failure of the clerk of the district court to carry out the duties enjoined by the compensation law, over which this defendant had no control, does not deprive defendant of his right of review in the district court."

In the same opinion it is stated: "The right of appeal is a substantial one to be sustained if possible. Technical refinements of interpretation will not be indulged in to defeat an appeal. It is only when the clearly expressed language of statutory requirements for appeal have not been met that a court will dismiss an appeal for want of jurisdiction."

Under the statute in question here, no duty is imposed upon either appellant or appellee to see to it that the case is heard within 14 days. The burden imposed is on the "district court or judge thereof." To hold that the right to have a hearing shall be denied if not had within 14 days would create hazards in the light of known and common experience that the legislature could not have contemplated when this statute was enacted. It is well known that district judges are frequently, for a variety of reasons, not available in their districts for particular cases for periods far in excess of 14 days. It certainly was not contemplated that such situations should operate to defeat the right to hearing on appeal of cases coming to the district court from the full compensation court. This language, viewed in the light of reason and the purposes of the workmen's compensation laws, must be held to be directory only, and not mandatory.

The other issue is the amount or rate of the award. The appellee contends that the award should be at the rate of $10 a week for 325 weeks, and appellant contends for a rate of $6 a week.

Appellant urges that the rate of compensation should be computed on the basis of the average weekly wage of the deceased from July 4, 1938, to December 28, 1938, being the full period, or the combined periods of employment of deceased by the appellant, all of such period or periods having been within the six months immediately preceding the

date of the accident. He urges that under the facts of this case, as hereinbefore substantially set forth, the employment must be considered to have been continuous, thus making applicable the following provision from section 48-126, Comp. St. Supp. 1939: "In continuous employments, if immediately prior to the accident the rate of wages was fixed by the day or hour or by the output of the employee, his weekly wages shall be taken to be his average weekly income for the period of time ordinarily constituting his week's work, and using as the basis of calculation his earnings during as much of the preceding six months as he worked for the same employer; the calculation, furthermore, to be made with reference to average earnings for a working day of ordinary length and exclusive of earnings from overtime."

As against this, the appellee contends that this statutory provision has no application since the employment was not continuous. She contends that the employment, which began on July 4, 1938, ended on December 10, 1938, and that a new contract of employment was entered into, effective December 28, 1938, which formed the basis for computation of workmen's compensation.

The evidence on this proposition was furnished by Warren Kelley, manager of the M. L. Rawlings' Wymore plant, and M. L. Rawlings himself. Warren Kelley testified as follows regarding the discharge and call to work on December 28, 1938: "Q. Was he in the employ of the M. L. Rawlings Ice Company before you called him? A. No. He was discharged from his duties on December 10. * * * Q. Did you overhear any conversation between Mr. Rawlings, Mr. M. L. Rawlings, and Mr. Cole, relative to his discharge and dismissal? A. I did. Q. And where did that conversation take place? A. In the office of the Wymore plant. Q. Just repeat that conversation. You can just testify to that conversation. What Mr. Rawlings said, and what Mr. Cole said, and just as the conversation took place. A. Mr. Rawlings told Mr. Cole that, due to a drop in the ice business, he would have to discharge him, but that at any time

we had any extra work, and if Mr. Cole wasn't doing anything else, he would call him. Q. He would or might call him? A. He might call him, if he had any extra work." M. L. Rawlings testified: "Q. Mr. Rawlings, about the 10th day of December, in your office, you had a conversation with Clayton Cole, didn't you? A. Yes, sir. * * * Q. Did you tell Mr. Clayton Cole then that he was dismissed or discharged? A. Yes, sir, on account of the sloughing off in business, and that we would give him extra work at the rate of $2.50 a day, if he was called on, which he agreed to do. Q. That is, if he was called on? A. Yes. Q. * * * After you discharged him, did you consider that he was in your employ? A. No, sir. * * * Q. Did you consider you had any kind of a contract for services with Clayton Cole? A. No, sir."

This evidence discloses the severance of employment. There was no further contact until deceased was called for work on December 28, as was disclosed by the testimony of Warren Kelley, which is as follows: "Q. Did you employ him on December 28, 1939? A. 1938. Q. Yes; 1938? A. I did. * * * Q. And when did he come to work, on December 28, 1938? A. Between 6 and 7 o'clock in the morning, sometime or other. I don't remember exactly."

This evidence clearly indicates that within the meaning of the workmen's compensation law there was not continuous employment from July 4, 1938, to the date of the accident. There was a complete severance of the employer-employee relationship on December 10, and a new one created on December 28. *Davis v. Lincoln County*, 117 Neb. 148, 219 N. W. 899. It is true that the proposal for the new employment was made on December 10, but there is no evidence of acceptance until deceased responded to the call on December 28, 1938.

Appellant cites *Mutchie v. M. L. Rawlings Ice Co.*, 122 Neb. 297, 240 N. W. 267, in support of the theory that compensation must be computed on an average wage from July 4 to December 28, 1938. We do not find that case to be in point here. In that case the employment was in fact

continuous. There was no discharge. In that case the employee had been employed for several months on the basis of a weekly wage, then a short time prior to the happening of the accident his wage or salary was changed to an hourly basis and he worked only part time, but employment was continuous.

We hold that the employment of deceased had not been continuous, and there being no claim that it was seasonal, it then follows that compensation in this case must be based upon the contract of hiring in force at the time of the accident. Comp. St. Supp. 1939, sec. 48-126. *Davis v. Lincoln County, supra; Carlson v. Condon-Kiewit Co.*, 135 Neb. 587, 283 N. W. 220; *Drum v. Omaha Steel Works*, 129 Neb. 273, 261 N. W. 351; *Gorham v. Kiewit Sons Co.*, 129 Neb. 277, 261 N. W. 353.

It is not disputed that under the contract of hiring deceased was to receive $2.50 a day for his work. Then reducing this to a weekly rate by taking six days to be a week, which is proper and not unfavorable to appellant in the absence of evidence showing the length of the business week in the business operated by the employer of deceased, the weekly wage was $15. *Carlson v. Condon-Kiewit Co., supra.*

Appellee then, as the widow of deceased, would be entitled to recover 66-2/3 *per centum* of the wages of the deceased for 325 weeks, or $10 a week for such period of time. She is also entitled to recover $6 for medical expense, and a funeral allowance in the sum of $150. Comp. St. Supp. 1939, sec. 48-122.

For the reasons herein set forth, the judgment of the district court is in all respects affirmed, and an attorney's fee in the sum and amount of $150 is allowed for the services of attorney for appellee on appeal to the supreme court.

AFFIRMED.