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REPORTS OF CASES

IN THE

Supreme Court of Nebraska

JANUARY AND SEPTEMBER TERMS, 1942,
AND JANUARY TERM, 1943

VOLUME CXLII

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

SUPREME COURT

DURING THE PERIOD OF THESE REPORTS

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CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1942

H. J. COFFIN, APPELLANT, V. H. E. MAITLAND ET AL., APPELLEES.

5 N. W. (2d) 88

FILED JULY 31, 1942. No. 31354.

Record examined, questions of fact reviewed and determined, and the cause reversed and remanded.

APPEAL from the district court for Loup county: WILLIAM F. SPIKES, JUDGE. *Reversed, with directions.*

B. A. Rose, for appellant.

Glenn E. Runyan and *Merle M. Runyan, contra.*

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

SIMMONS, C. J.

Plaintiff brought an action to foreclose a tax sale certificate on a section of land in Loup county. Decree was entered May 12, 1932, determining the amount due and ordering the land sold if defendants did not pay the amount of the decree, interest, costs and attorney's fee within 30 days. An order of sale was issued February 23, 1935, and on April 8, 1935, the land was sold by the sheriff to the plaintiff. Defendant Elizabeth Langstrom on April 4, 1935, filed an application for a moratorium. No court order is shown on that application. On June 5, 1935, Mrs. Lang-

strom filed objections to the confirmation of the sale. No court order is shown on those objections.

On April 13, 1939, defendant, Elizabeth Langstrom, filed an application to redeem and prayed that plaintiff be required to account for rents received. On March 12, 1941, plaintiff filed his accounting of rents received and on that day the court heard the matter and entered the decree from which plaintiff appeals.

There are presented two questions of fact: When did plaintiff begin to collect the rents and how much did he collect?

Defendant Mrs. Langstrom in her "Application to Redeem" refers to the decree and the sheriff's sale and alleges "That *thereafter* said plaintiff took possession of * * * and leased said premises * * * at an annual rental of Fifty Dollars ($50) per year; that said plaintiff collected the rents from said tenants with the understanding that such sums as he collected would be applied upon the decree." (Emphasis supplied.) This would seem to fix the time when plaintiff began to collect the rents as subsequent to the date of the sheriff's sale on April 8, 1935. The plaintiff in his accounting alleged that the moratorium was applied for at the spring term in 1935 and granted (date not fixed) and "by agreement the rents were to be collected and applied on the taxes" involved in plaintiff's decree and that he collected rents for 1935, 1936, 1937, 1938 and nothing in 1939 and 1940. However, by stipulation made at the beginning of the trial it was recited "that an application for moratorium was filed on or about April 15, 1935, and at a date subsequent thereto an agreement was made between the parties hereto, through their attorneys, in open court, that the plaintiff could *continue* to collect the rent from the premises and apply said rent on the decree or taxes." (Emphasis supplied.) There is no other evidence as to the agreement or its terms.

The plaintiff testified that he rented the land by oral lease to a Mr. Bohy for the years 1935, 1936, 1937 and 1938, together with an additional section and three-quarters of land, for $75 a year; that the rent for the Langstrom land was

"supposed to be about a third" of the $75; that he collected rent for those four years; that out of the 1935 rent he paid Mrs. Langstrom $20 and paid $5 for the trip made to rent the land. He proposed therefore to credit defendants with $25 for each year, 1936, 1937, and 1938.

Mrs. Langstrom did not testify. Her husband testified that he handled the land for her. He testified that plaintiff rented the land to Mr. Bohy in 1933 for $50 a year; that plaintiff had Mrs. Langstrom sign a written lease for a one-year term; that the witness had one copy (which was not produced at the trial although the witness testified he had it "down home some place"); that at that time plaintiff had the rent money and gave him $20 of it and the witness "gave the rest back" to apply on the taxes. On cross-examination Mr. Langstrom was not "positive" as to the year that he received the $20, although he testified that it was a "couple of years" before the application for a moratorium was filed.

Mr. Bohy testified as a witness for the defendants that he started to rent the land in "34 or 35, I couldn't say which," that he paid the rent to plaintiff for the "practically three sections;" that he had not rented it "since 1938" and that another party had it in 1938. On cross-examination he said: "I didn't get it" in 1938; that the rent for the three sections was $75 a year and that the Langstrom section was about on a par with the others. Mr. Bohy was, at the time of the trial, a tenant of plaintiff on other lands.

On rebuttal plaintiff stated that he had no recollection of ever taking a written lease with Bohy to the defendants and stated that he paid the money to Mrs. Langstrom and not Mr. Langstrom.

The trial court found that there were credits due the defendants as follows: $50 on April 1, 1934; $30 on April 1, 1935; $25 on April 1, 1937, and $25 on April 1, 1938. The transcript of the decree makes no mention of credits for April 1, 1936, although it recites that the plaintiff's report is "correct for the years 1936, 1937, and 1938," and that "the statements and allegations of the defendants * * * are true and correct for the years 1934 and 1935."

In this finding and decree based thereon, we think the trial court erred in part. All of the parties were testifying from memory several years after the event. They are in agreement on these facts, *i. e.*, that Mr. Bohy was the tenant who rented the land and that the plaintiff paid to the defendant $20.

The defendant in her application to redeem did not claim that the plaintiff went into possession or collected rents prior to the date of the sheriff's sale in 1935. Although her husband testified, with qualifications, that Mr. Bohy was the tenant in 1933 and that the $20 was paid in 1933, Mr. Langstrom failed to produce the lease which would have substantiated his testimony as to the year.

The defendants offered Mr. Bohy as their witness. He fixed the beginning of the period as either 1934 or 1935 and indicated that it ran for four years. As to the length of his tenancy he corroborates the plaintiff. He is uncertain only as to the beginning of the term. He is also certain that he paid only $75 a year for the three sections and that $25 was for the Langstrom land and as to that corroborates the plaintiff.

The record does not sustain the trial court's finding that the plaintiff collected and kept $50 rent in April, 1934. That was a year before the sheriff's sale; a year before the moratorium was asked for; and a year before Mrs. Langstrom in her application to redeem says that the defendant took possession of the premises, leased them and collected the rents. The only evidence as to $50 rent is by Mr. Langstrom, which is denied by their own witness, Mr. Bohy, and by the plaintiff. The trial court found that the proper rental for the years 1936, 1937, and 1938, was $25 a year. To make that finding the trial court of necessity believed the testimony of Mr. Bohy and the plaintiff as to the amount of rents received during those years. The trial court's finding that the defendant was entitled to credit for $30 as of April 1, 1935, was apparently a charge of $50 for rents collected less the $20 paid. Here the trial court accepts the plaintiff's testimony as to *when* he made the payment, but

rejects it as to the amount of rent collected from which the payment was made.

The plaintiff is corroborated as to the time he began to collect the rents by the sworn statement of Mrs. Langstrom in her application to redeem made almost two years before the trial. As to the length of time he collected rents and of the amounts thereof, plaintiff is corroborated by the defendants' witness, Mr. Bohy. As against this evidence the decree depends upon the rather unsatisfactory evidence of Mr. Langstrom which is hearsay in part. The circumstances all indicate that plaintiff began the collection of rents after the moratorium was applied for in 1935. We are of the opinion that the record sustains the report and accounting made by the plaintiff, with this exception, there is no evidence that the plaintiff was, by the agreement, entitled to deduct the $5 for expenses. As to that item the report should not be approved.

The decree of the trial court is reversed and remanded, with directions to enter a decree in accord with this opinion.

REVERSED.

MARIE AMELIA BLUM, APPELLANT, V. WILLIAM F. C. POPPENHAGEN ET AL., APPELLEES.

5 N. W. (2d) 99

FILED JULY 31, 1942. No. 31389.

1. **Contracts.** "In the absence of anything to indicate a contrary intention, instruments executed at the same time, by the same parties, for the same purpose, and in course of the same transaction, are, in the eye of the law, one instrument, and will be read and construed together as if they were as much one in form as they are in substance." *Thompson v. Jost*, 108 Neb. 778, 189 N. W. 169.
2. ———. "'Language used in a contract prepared by one of the parties thereto, which is susceptible to more than one construction, should receive such a construction as the party preparing the same at the time supposed the other party would give to it, or such a construction as the other party would be fairly justified in giving to it.' *Flory v. Supreme Tribe of Ben Hur*, 98 Neb.

160, 152 N. W. 295." *Ericson v. Nebraska-Iowa Farm Investment Co.*, 134 Neb. 391, 278 N. W. 841.

3. **Mortgages.** Under the facts recited in the opinion, the words "no exceptions" following the words "free from encumbrance" are held to refer to encumbrances running from the title holder to third parties and do not cover a reservation of possession by the grantors in themselves.
4. **Wills.** Where a grantee receives title to property subject to a reserved right of possession in the grantors, and the grantors remain in possession, the wife of the grantee, as his devisee, takes title subject to the burden of the reservation.
5. **Notice.** Possession of land is notice to the world of the possessor's rights therein, and of all interests of which inquiry of the possessor would elicit knowledge.
6. **Mortgages.** The conveying to the mortgagee of the legal title to lands, even when encumbered for their full value, together with the surrender of rents and other valuable rights, is a sufficient consideration for a contract reserving in the grantors a right of possession of a part of the lands so conveyed.

APPEAL from the district court for Grant county: WILLIAM F. SPIKES, JUDGE. *Affirmed.*

John H. Thomsen and *Carl T. Self*, for appellant.

Mitchell & Gantz and *D. E. Williams, contra.*

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

SIMMONS, C. J.

This is an action to secure the possession of certain real estate in Grant county. Plaintiff appeals from a judgment in favor of the defendants.

Plaintiff brought this action in district court alleging that on February 15, 1935, the defendants by warranty deed conveyed a section of land in Grant county to John Blum, a resident of Douglas county; that the deed was recorded August 10, 1936; that by virtue thereof John Blum became seised of a fee simple title to the land "together with the right of possession;" that Blum was plaintiff's husband; that he died July 8, 1939; that by the provisions of his will, duly probated, plaintiff became the owner of the legal title to the

land and entitled to the possession thereof, and that the defendants keep her out of possession. Plaintiff prayed judgment for possession.

Defendants by answer admitted the death of John Blum and denied generally. Further answering, they alleged that John Blum on the 14th day of February, 1935, entered into a written agreement with them, whereby defendants were given the exclusive right to possession of said premises during the lifetime of the defendant William F. C. Poppenhagen, subject only to the condition that defendants pay the taxes and keep the improvements in repair; that they have performed the conditions of the agreement and are entitled to the use and possession of the premises; that the agreement by mutual mistake erroneously described the land by referring to its location as "east of Fifth (5th) P M" when it should have been west of the sixth principal meridian; that the defendants were in actual possession of the real estate on February 14, 1935, and have since been in possession with the knowledge and acquiescence of John Blum under the agreement. Defendants pray for the dismissal of plaintiff's petition, for costs and for such other relief as may be "just, equitable and proper." Plaintiff for reply denied generally.

The parties and the trial court apparently considered the matter as an equity case, and so tried it. That being the theory on which it was tried, we will so consider it here.

The evidence discloses that the defendants, husband and wife, or one of them, were the owners of three adjoining sections of land mortgaged by separate instruments to John Blum, who was a brother of Mrs. Poppenhagen. The mortgages were in default. On February 14, 1935, the defendants, by separate instruments, conveyed the land to John Blum. The deed to the land here involved is the usual deed form. It recited a consideration of "payment of mortgage" (citing where recorded) and "other valuable consideration." In the printed portion of the deed is the language that the premises "are free from encumbrance," followed in typewriting by "no exceptions." The agreement, to which refer-

ence is made in the answer, is entirely typewritten, except as to the day of the month when it was executed. It recites that the defendants have "this day sold" the three sections of land to John Blum. It sets out and refers to the three separate mortgages on each section and recites the total amount due. Then follow these four paragraphs.

"It is agreed by and between the aforesaid parties that in consideration of the first parties having conveyed the foregoing described property to the second party that for a period of five years from this date or until February 15, 1940, said first party is given the option to buy back this land for $11,150, or any section referred to by paying to second party the amount of the mortgage that was held by second party as mortgage on that particular tract before the executions of the deeds referred to.

"It is also agreed by and between the aforesaid parties that the second party is to receive all income from the date of the signing of this instrument from sections 11 & 12 so that in the event of sale of the above described land the income to first party being in lieu of interest that he may have been entitled to.

"It being agreed by and between the foregoing parties that first party reserves the right, and this being agreeable to the second party, that first party may live on said section 2 during the natural lifetime of William F. C. Poppenhagen so long as said first party pays the tax and keeps up the improvements in as good repair as they now are or any time during the life of this agreement.

"It is understood that said sections 11 & 12 have been rented for the year 1935 commencing March 1 and expiring March 1, 1936, and said second party to receive any and all income due the landlord on account of said lease. The lease referred to being only verbal the first party relinquish to second party all rights to rentals and said second party shall be entitled to collect any unpaid share of rent or cash rent as the case may be, that may be forthcoming or due after February 15, 1935, or any time thereafter."

At the same time that the deed was executed and ac-

knowledged, the agreement in question was signed by the defendants, and in accord with Blum's request and direction. The deed is on a Douglas county form. The deed and contract were executed in Grant county. The date of the execution of both instruments is left in blank and filled in by pen and ink. It also appears that John Blum had signed the agreement before the instruments were sent to the Poppenhagens. The defendants testify that they would not have signed the deed had the contract not been made. The evidence of William F. C. Poppenhagen is that Blum sent these papers to the defendants for signature. The deed, after being executed, was then mailed to John Blum in Douglas county. The agreement was recorded on August 1, 1940, after the filing for record in Grant county of the probate proceedings in the Blum estate.

There is no question but that the defendants at all times since, and for some time prior to, the execution and delivery of the instruments here mentioned have been in possession of the real estate and maintaining their home on the land. They have also paid the taxes and kept the improvements in repair and added thereto.

The plaintiff testifies that she knew nothing of these matters until after the decree in the probate proceeding wher she sought possession of the property and it was refused

The mistake in the description of the land in the contract is conceded by the plaintiff.

The trial court found generally and specifically for the defendants; dismissed plaintiff's petition, and held that the defendants have the right to live upon the land during the lifetime of defendant William F. C. Poppenhagen so long as they pay the taxes and keep the improvements in repair as provided in the agreement.

It is patent that it was the intention of John Blum and the defendants that the defendants were to have the right of possession which they claim. Is there any reason in the law why it should be denied to them?

Section 76-109, Comp. St. 1929, provides: "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 deed and contract are to be considered subject to the rule that, "In the absence of anything to indicate a contrary intention, instruments executed at the same time, by the same parties, for the same purpose, and in course of the same transaction, are, in the eye of the law, one instrument, and will be read and construed together as if they were as much one in form as they are in substance." *Thompson v. Jost*, 108 Neb. 778, 189 N. W. 169. See, also, *Nebraska Wheat Growers Ass'n v. Smith*, 115 Neb. 177, 212 N. W. 39.

The two instruments when construed as one contract are also subject to the established rule restated by this court in *Ericson v. Nebraska-Iowa Farm Investment Co.*, 134 Neb. 391, 278 N. W. 841, which is: " 'Language used in a contract prepared by one of the parties thereto, which is susceptible to more than one construction, should receive such a construction as the party preparing the same at the time supposed the other party would give to it, or such a construction as the other party would be fairly justified in giving to it.' *Flory v. Supreme Tribe of Ben Hur*, 98 Neb. 160, 152 N. W. 295."

So construed, it is clear from the instruments that John Blum took the conveyance subject to the reserved right of these defendants to "live on" the land so conveyed "during the natural lifetime" of William F. C. Poppenhagen, provided they paid the taxes and kept up the improvements. That such was their intention is well illustrated by the fact that from February, 1935, until John Blum's death in July, 1939, they did exactly that thing. The record is silent of any protest by John Blum during that period of over four years.

The plaintiff argues that the words "no exceptions" following the words "free from encumbrance" negative any

such construction. The words "no exceptions" appear in that part of the deed form where normally references are made to encumbrances running from the title holder to third parties. Under the circumstances here existing they cannot be construed to cover a reservation of the grantors in themselves.

Plaintiff argues that the "life estate reservation must appear" in the deed, citing *Federal Farm Mtg. Corporation v. Fischer,* 137 Neb. 559, 290 N. W. 444, and *Hylton v. Krueger,* 134 Neb. 66, 277 N. W. 792. Both cases involve annuities. In both cases the deed and the contract were construed together. In the *Fischer* case the deed did not purport to reserve any rights in the grantor and made no reference to any other instrument. Thus far there is a similarity between the *Fischer* case and the instant case. However, it ends there. In the *Fischer* case the separate agreement constituted a promise to pay the grantor a fixed amount of money every six months. There was no reservation in the deed nor language in the separate instrument effectual to create a lien or reserve a right. There was a promise to pay cash; here there is a reserved right of possession. Plaintiff relies upon the language in the opinion that, where "the deed itself contains no provision for payment of an annuity and no specific reference to the contract by which such an obligation may at the same time have been created, there can be no reservation." This language must be considered in the light of the facts of the case there being determined. The plaintiff overlooks the third following sentence that, "Since no reservation is involved, the language used in the agreement must be such as would be sufficient in any independent instrument to create a lien on the property." In the instant case plaintiff does not question the fact that the "language used in the agreement" is sufficient to establish the reservation of possession. In *Hylton v. Krueger, supra,* a reservation was held to exist where a deed and a contract for an annuity were executed simultaneously as part of the same transaction and the contract was specifically referred to in the deed so as to constitute a part of it. We do not

understand how either of these cases can be of assistance to the plaintiff.

Plaintiff submits that she was not a party to this transaction, knew nothing of it, and that her property rights as a wife could not be affected by the contract. So far as this controversy is concerned, it was not necessary that plaintiff be a party to the transaction. By the contract her husband conveyed nothing to the defendants. The defendants reserved a right of possession which did not pass with the title. The contract states that defendants "reserve the right." John Blum did not secure that right of possession. The plaintiff has no cause to complain because of the contract which her husband made. It is also noted that plaintiff by her answer claimed title as beneficiary under John Blum's will, which devised to her all real property "of which I die possessed." The source of plaintiff's title is in John Blum's title. She has no greater title than that which he had. He had title subject to the reserved rights of the defendants. She received title subject to that same burden.

Plaintiff further argues that the contract was not witnessed nor acknowledged as required by law, so as to entitle it to be recorded, and that in any event the will under which she claims was duly probated and a certified copy of the proceedings recorded in Grant county before the contract was recorded. This land was not the homestead of the Blums. It has long been the rule that "A deed to real estate, executed and delivered, is valid between the parties, though not lawfully acknowledged nor witnessed, and is sufficient to convey the land described therein, with the exception of the homestead of the grantor." *Wilson v. Wilson*, 85 Neb. 167, 122 N. W. 856. The defendants were in possession of the land at all times. It has long been the rule that possession of land is notice to the world of the possessor's rights therein and of all interests of which inquiry of the possessor would elicit knowledge. *Blum v. Voss*, 139 Neb. 233, 297 N. W. 84. Here no inquiry was made of the defendants until plaintiff demanded possession. She was then advised of the interest which they claimed.

The particular paragraph of the contract involved herein is the third quoted paragraph. Plaintiff argues that there was no consideration for the contract. The deed recites a consideration as the payment of the mortgage and "other valuable consideration." Certainly the conveying to the mortgagee of the legal title of lands, even when encumbered for their value, together with the surrender of rents and other valuable rights, is a sufficient consideration to support a contract such as the one here involved. But plaintiff argues that the recital of the consideration is found only in the paragraph dealing with the option, that it is not found in the paragraph upon which the defendants rely, and that hence that covenant is without consideration. The contract is not subject to any such restricted construction. The consideration is recited in the first paragraph, at the beginning of the recital of the covenants of the contract. It applies alike to all the covenants.

The judgment of the trial court is

AFFIRMED.

L. W. COLEMAN, APPELLEE, V. NEVA C. BECK ET AL.: LYLE P. TRUMBLEY, APPELLANT.

5 N. W. (2d) 104

FILED JULY 31, 1942. No. 31349.

1. **Mortgages.** Where one buys land encumbered by a mortgage, and covenants to pay the mortgage debt, or as part of the consideration assumes the payment thereof, his promise creates a principal obligation which the mortgagee may enforce against him. As between themselves, the vendor becomes in effect a surety, and the vendee the principal debtor.
2. ———. "Where real estate encumbered by a mortgage is sold and conveyed and there is inserted in the deed a clause which states that the grantee assumes and agrees to pay the mortgage debt, and the deed is accepted by the purchaser of the land with knowledge that it contains the clause, or where the purchaser of land agrees, as a part of the consideration for the sale of the property to him, to assume and pay a mortgage indebtedness existing against the land, he becomes personally liable for the pay-

ment of the mortgage debt, and this is true whether his immediate grantor was so liable or not, and the liability thus created may be enforced by the mortgagee or his assigns, as it was for his or their use and benefit that such promise was made." *Hare v. Murphy*, 45 Neb. 809, 64 N. W. 211.

3. ———. The decree of foreclosure and sale in this case does not adjudicate a relation of joint defendants between Trumbley and the other defendants in the proceeding, nor in any manner purport to affect the real relations of these parties involved to each other or to the cause of action in suit.

4. ———. It cannot be said that the release of deficiency judgment in this case operated to discharge one joint debtor either from the obligation of the cause of action or of the decree entered thereon. The relations between the Trumbleys and the Becks were those of principal and surety on the indebtedness in litigation. Plaintiff was entitled to recognize it for all purposes; and his release of a surety does not increase the legal or equitable responsibilities of the principal, nor as to him change the nature or extent of his contract.

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

Beghtol, Foe & Rankin and *Walter E. Nolte*, for appellant.

Lloyd E. Chapman, contra.

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

EBERLY, J.

This is a suit in equity commenced by L. W. Coleman, plaintiff, against Neva C. Beck and Christoph C. Beck, wife and husband, Lyle P. Trumbley and Helen F. Trumbley, husband and wife, *et al.*, defendants, for the foreclosure of a certain real estate mortgage of which plaintiff was assignee, and for the recovery of a deficiency judgment against the defendants "for any amount which may remain unpaid after applying the proceeds of the sale of the mortgaged premises to the payment of the mortgage indebtedness, interests and costs of suit." The decree of foreclosure and sale of the mortgaged premises in usual form was duly entered. The premises were sold pursuant thereto, but the

proceeds were insufficient in amount to satisfy the amount due on the decree. Thereupon a deficiency judgment was, on application, entered in favor of plaintiff and against defendant Lyle P. Trumbley alone, for the sum of $495.28 and interest. The latter is the sole appellant in the instant case.

The appellant states in his brief: "The sole issue tried by the court below is whether the release of two defendants from a deficiency judgment on a mortgage note made by the released defendants releases subsequent grantees assuming payment of the note, and jointly sued in the foreclosure proceedings."

The petition in this foreclosure case filed by L. W. Coleman, plaintiff and assignee, was in usual form. The appellant herein was made a defendant together with others. Included with other allegations it sets forth that on May 20, 1931, the defendants, Neva C. Beck and Christoph C. Beck, for a valuable consideration, executed and delivered to the Surety Mortgage Company, payee therein named, certain promissory notes in writing, aggregating $3,000; also that as security therefor they executed and delivered to such Surety Mortgage Company, mortgagee, a certain real estate mortgage and thereby mortgaged to the mortgagee therein named certain lands therein described; that certain of the notes therein described had been paid and satisfied and that default had been made by the defendants and certain of such notes remained unpaid and unsatisfied. Copies of these notes so remaining unpaid and of the mortgage were attached to plaintiff's petition. It was further alleged that on June 4, 1931, for a valuable consideration paid, the mortgage and the notes secured thereby were duly assigned and delivered to plaintiff, who is now the owner thereof. It is not alleged that Lyle P. Trumbley ever executed the promissory notes and mortgage securing the same in suit. His sole liability is alleged to have arisen from the fact that on May 28, 1931, the defendants, Neva C. Beck and Christoph C. Beck, wife and husband, executed and delivered to the defendant Lyle P. Trumbley a warranty deed pursuant to

which there was conveyed to him all their right, title and interest in and to the real estate described in and covered by the mortgage first hereinbefore mentioned, subject to said mortgage, which warranty deed contained the following statement: "Grantee assumes payment of $3,000 mortgage to Surety Mortgage Company." It is not alleged that Trumbley thereby became jointly indebted with any of the defendants to the mortgagee named, nor is any fact alleged from which that relation can be assumed.

To this petition the defendants Lyle P. Trumbley and wife filed as their answer a general denial of each and every allegation therein contained. A decree of foreclosure and sale was entered in such foreclosure proceeding on October 23, 1939, in usual form. In this decree it was expressly determined, "That on May 28, 1931, the defendants Neva C. Beck and Christoph C. Beck executed and delivered to the defendant Lyle P. Trumbley a deed of conveyance to said real estate by which they conveyed all their right, title and interest therein subject to said mortgage and which warranty deed contains the following statement: 'Grantee assumes payment of $3,000 mortgage to Surety Mortgage Company.'" The court further found in said decree that there was due plaintiff upon the notes set forth in the petition herein, which said mortgage was given to secure, the sum of $2,942.25. This decree contains no express finding that Trumbley is jointly obligated thereby, but it directed sale of the premises to satisfy the amount due thereon. Such decree further provided: "That if any of the above amount due plaintiff is not satisfied out of the proceeds of the sale the plaintiff will, on motion, be entitled to a deficiency judgment for the amount remaining unsatisfied." On application of Lyle P. Trumbley, a stay of execution for nine months was entered. On the expiration of the stay, an order of sale was issued and a sale had, which was confirmed on September 16, 1940. Thereupon a motion for deficiency judgment against Lyle P. Trumbley was filed by plaintiff, L. W. Coleman; and after due service of notice of the application and hearing by the court, judgment was en-

tered in favor of plaintiff and against defendant Lyle P. Trumbley in the sum of $495.28. As the latter's sole defense, there was introduced in evidence on the hearing of the motion for deficiency the following "Release of Deficiency Judgment," which, omitting formal parts and notarial acknowledgment, reads as follows:

"For value received, the receipt of which is hereby acknowledged, L. W. Coleman, plaintiff in the above entitled action, does hereby release the defendant, Neva C. Beck, and the defendant, Christoph C. Beck, from any and all liability under the decree heretofore entered in the above entitled action and waives any and all claims for a deficiency judgment against the defendant, Neva C. Beck, and the defendant, Christoph C. Beck, or either of them. Dated July 23, 1940.

"Mary Jane Hendricks. L. W. Coleman."

On the basis of the foregoing record, appellant contends that "A negotiable instrument is discharged by any act which will discharge a simple contract for payment of money, or by renunciation," citing sections 62-801 to 62-804, Comp. St. 1929. And that "Mortgagee's release of mortgagor from liability for deficiency judgment discharges subsequent grantee assuming mortgage." He cites to sustain the last contention *Lamb v. Gregory*, 12 Neb. 506, 11 N. W. 755. The doctrine announced by the *Lamb* case is strictly limited by the terms of the opinion to the principle that "The voluntary release of one joint judgment debtor operates as a release of his codefendant." In the record before us Trumbley and Neva C. Beck and Christoph C. Beck do not appear in the capacity of joint debtors. Trumbley, by virtue of his assumption clause, does not become a party to the original promissory notes, either expressly or by necessary implication.

"The doctrine has been frequently recognized by this court that, where one buys land encumbered by a mortgage, and covenants to pay the mortgage debt, or as part of the consideration assumes the payment thereof, *his promise* creates a principal obligation which the mortgagee may en-

force against him. *Cooper v. Foss*, 15 Neb. 515; *Keedle v. Flack*, 27 Neb. 836; *Rockwell v. Blair Savings Bank*, 31 Neb. 128; *Reynolds v. Dietz*, 39 Neb. 180; *Grand Island Savings & Loan Ass'n v. Moore*, 40 Neb. 686; *Meehan v. First Nat. Bank of Fairfield*, 44 Neb. 213; *Green v. Hall*, 45 Neb. 89. It follows, as a logical consequence, that thereupon the vendor becomes in effect a surety, and the vendee the principal debtor, *that is between themselves. Paine v. Jones*, 76 N. Y. 274; *Huyler v. Atwood*, 26 N. J. Eq. 504; *Flagg v. Geltmacher*, 98 Ill. 293." *Merriam v. Miles*, 54 Neb. 566, 74 N. W. 861.

True, by a separate instrument Trumbley is primarily obligated to pay the mortgage indebtedness here involved. This obligation necessarily implies that, by virtue thereof as between the parties to the contract of assumption of the mortgage indebtedness, "the vendor becomes in effect a surety, * * * *that is between themselves*," and by virtue of their own contract and not because of the promissory note to which the terms of their contract relate.

The bill of exceptions settled in this case contains no evidence that the parties to this contract of assumption intended to create a joint obligation and no such purpose is alleged in terms or by necessary implication by the pleadings we have heretofore set out and referred to. It would follow that a decree in equity cannot be based on allegations without pertinent proof, or on proof without corresponding allegations. The relief granted must always be in conformity with the case made in the pleadings and established by the proof, and relief cannot be granted that is at variance with either. It follows as to defendants' joint liability, on which the record in the instant case supplies neither allegation nor proof, the court in its decree of foreclosure and sale would necessarily be excluded from determining that question. *Clark v. Wooster*, 119 U. S. 322, 7 S. Ct. 217; *French v. Shoemaker*, 14 Wall. 314, 20 L. Ed. 852; *Eyre v. Potter*, 15 How. 42, 14 L. Ed. 592; *Harrison v. Nixon*, 9 Pet. 483, 9 L. Ed. 201; *Harding v. Handy*, 11 Wheat. 103, 6 L. Ed. 429; *Carneal v. Banks*, 10 Wheat. 181, 6 L. Ed. 297;

Crocket v. Lee, 7 Wheat. 522, 5 L. Ed. 513; *Simms v. Guthrie,* 9 Cranch 19, 3 L. Ed. 642; *Lang v. Brown,* 21 Ala. 179, 56 Am. Dec. 244; *Higgins v. Higgins,* 219 Ill. 146, 76 N. E. 86, 109 Am. St. Rep. 316; *Ringgold v. Ringgold,* 1 Harr. & G. (Md.) 11, 18 Am. Dec. 250; *Evans v. Gibson,* 29 Mo. 223, 77 Am. Dec. 565; *Reynolds v. Stockton,* 43 N. J. Eq. 211, 10 Atl. 385, 3 Am. St. Rep. 305, affirmed in 140 U. S. 254, 11 S. Ct. 773; *McDonald v. Neilson,* 2 Cow. (N. Y.) 139, 14 Am. Dec. 431; *Rorer Iron Co. v. Trout,* 83 Va. 397, 2 S. E. 713, 5 Am. St. Rep. 285; *Stuart's Heirs v. Coalter,* 4 Rand. (Va.) 74, 15 Am. Dec. 731; *Waldron v. Harvey,* 54 W. Va. 608, 46 S. E. 603, 102 Am. St. Rep. 959.

Appellant also cites *Feitlinger v. Heller,* 112 N. J. Eq. 209, 164 Atl. 6, as controlling the question here presented. The deductions made therefrom, however, are inapplicable in this state due to essential difference between New Jersey and this jurisdiction on the doctrine of assumption of mortgage and the basic doctrines on which the liability of the parties to that contract are determined. Quoting from this New Jersey case:

"Equity regards a grantee's assumption of a mortgage debt as a covenant to indemnify his grantor; as between themselves the grantee is held to be the debtor and the mortgagor the surety; the covenant inures to the mortgagee on the equitable principle that the surety's security is appropriable to the payment of the debt; the liability of the grantee is enforced in equity to avoid circuity of actions, if the grantor be not personally liable at the time of assumption, the covenant is a nullity; if his liability be released and nothing remains to be indemnified against, the covenant is exhausted."

Thus, in New Jersey, it is essential that the immediate grantor, where an assumption of mortgage is involved, be a party to the consideration, and if that consideration fail the obligation is nonenforceable. The Nebraska doctrine was well stated in *Hare v. Murphy,* 45 Neb. 809, 64 N. W. 211, in the following terms:

"Where real estate encumbered by a mortgage is sold and

conveyed and there is inserted in the deed a clause which states that the grantee assumes and agrees to pay the mortgage debt, and the deed is accepted by the purchaser of the land with knowledge that it contains the clause, or where the purchaser of land agrees, as a part of the consideration for the sale of the property to him, to assume and pay a mortgage indebtedness existing against the land, he becomes personally liable for the payment of the mortgage debt, and this is true whether his immediate grantor was so liable or not, and the liability thus created may be enforced by the mortgagee or his assigns, as it was for his or their use and benefit that such promise was made."

See, also, *Union P. R. Co. v. Metcalf*, 50 Neb. 452, 69 N. W. 961; *Tecumseh Nat. Bank v. Best*, 50 Neb. 518, 70 N. W. 41; *Gibson v. Hambleton*, 52 Neb. 601, 72 N. W. 1033; *Morrill v. Skinner*, 57 Neb. 164, 77 N. W. 375; *Martin v. Humphrey*, 58 Neb. 414, 78 N. W. 715; *Thompson v. West*, 59 Neb. 677, 82 N. W. 13.

It follows that, under the Nebraska rule, the validity of the assumption being in no manner determinable by the fact that the vendor may be a stranger to the original consideration on which the contract of assumption is based, *Feitlinger v. Heller, supra,* is neither controlling nor applicable to the instant case.

Nor do the terms of the decree of foreclosure and sale adjudicate a relation of joint defendants between Trumbley and the other defendants in the proceedings, nor in any manner purport to affect the real relations of the parties involved to each other or to the cause of action in suit. A similar question was presented in *Rushton v. Dierks Lumber Co.*, 2 Neb. (Unof.) 563, 89 N. W. 616. Day, C. (later a justice of this court) in the opinion in the *Rushton* case employed the following language:

"It is claimed by the appellants that the finding entered in the decree of foreclosure, to the effect that the amount of the decree is due from Johnston and Folsom, is conclusive as to Folsom's relations to this indebtedness and precludes him from now claiming any rights of a guarantor. * * * In

this case the original petition in foreclosure disclosed Folsom's position as guarantor. It contains no allegation inconsistent with his present position. The finding of the court was simply that the amount of money was due from Johnston to Folsom, and did not undertake to deal with the relation in which Johnston and Folsom stood to each other; the amount so found due was declared to be a lien upon the mortgaged premises. This cannot be held to be an adjudication that Johnston and Folsom are joint debtors, nor as any warrant for the plaintiff treating them as such in contravention of the express terms of Folsom's contract. This finding by an equity court as a basis of a sale of mortgaged premises is not by any means the equivalent of the merger of the whole claim in a joint judgment, such as took place in the case of *Potvin v. Meyers*, 27 Neb. 749."

It cannot be said that the release of deficiency judgment in this case operated to discharge one joint debtor either from the obligation of the cause of action or of the decree entered therein. The relations between the Trumbleys and the Becks were those of principal and surety on the indebtedness in litigation. Plaintiff was entitled to recognize it for all purposes and his rights in view of the existing situation are well defined in the following quotation:

"Not only may a creditor, if he so chooses, release or compound with a surety, but he may do so without in any way affecting his right to hold the principal to his ultimate liability. In other words, not only will such a release have no effect in discharging the principal, but the latter will not be entitled to credit on his obligation for any sum paid by the surety in consideration of his release as such surety. While unquestionably the law is that if the creditor, without the knowledge and consent of the surety, should release the principal debtor, the surety would be thereby released, the release of a surety does not increase the legal or equitable responsibilities of the principal, nor as to him change the nature or extent of his contract. Nor does the merger of the contract in a judgment exclude the operation of this rule."

21 R. C. L. 1049, sec. 94. See, also, *In re Kimbrough-Veasey Co.*, 292 Fed. 757.

It follows that the trial court properly entered the deficiency judgment against the appellant Trumbley.

AFFIRMED.

WILLIAM HENRY LIPE, APPELLEE, V. WORLD INSURANCE COMPANY, APPELLANT.

5 N. W. (2d) 95

FILED JULY 31, 1942. No. 31392.

1. **Insurance.** The words of an accident and health insurance policy issued by the defendant company that "the insurance under this policy shall not cover any person under the age of sixteen years nor over the age of sixty-five years" constitute a condition or limitation set forth in that instrument for the benefit of the insurer and not the insured. As such, it is subject to waiver by the insurer.
2. **Waiver.** "'Waiver' has been defined as a voluntary and intentional relinquishment or abandonment of a known existing legal right, advantage, benefit, claim, or privilege, which except for such waiver the party would have enjoyed; the voluntary abandonment or surrender, by a capable person, of a right known by him to exist, with the intent that such right shall be surrendered and such person forever deprived of its benefit; or such conduct as warrants an inference of the relinquishment of such right; or the intentional doing of an act inconsistent with claiming it." 67 C. J. 289.
3. **Insurance.** Generally, an insurer may waive such provision that a health and accident policy shall not cover any person more than 65 years of age.
4. ———. In fact, the authorized request for, the receipt and the retention of the premium on a policy of health and accident insurance by the insurer, after knowledge of the breach of condition as to age of insured involving the right of forfeiture under the terms of the policy, is an election to waive such condition and to continue such policy in force. Such instrument should then and thereafter be construed as to the parties thereto for the period covered by the premiums thus paid and collected, as though such condition never existed, and during the continuance of such period the insured is fully covered by the terms of the policy involved.

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

Monsky, Grodinsky, Marer & Cohen, for appellant.

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

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

EBERLY, J.

This is a suit brought by William Henry Lipe, as plaintiff, to recover $200 under the terms of a health and accident insurance policy issued by the World Insurance Company, defendant.

The case was brought by the plaintiff in municipal court, where judgment was entered for him as prayed. Appeal was taken from this judgment by the defendant to the district court, a jury was waived, and a trial had to that court, and again judgment was entered for the plaintiff as prayed. From the judgment last entered the defendant now appeals to this court.

The policy in suit includes the following:

"In consideration of the statements made by the insured in the application, a copy of which is indorsed hereon and made a part hereof, and the payment in advance of Ten and no/100 Dollars as membership fee and premium to the first day of January, 1933, and thereafter the payment of Ten and no/100 Dollars quarterly in advance, the World Insurance Company of Omaha, Nebraska, hereinafter called the Company, does hereby insure William Henry Lipe (hereinafter called the Insured) of the city of Walton, state of Nebraska. Insuring Clause Against: (1) Loss of life, limb, sight or time resulting while this policy is in force, from bodily injury sustained, directly and independently of all other causes, through purely external, violent and accidental means (thereinafter called 'such injury'); (2) loss of time on account of sickness which is contracted by the Insured and begins after thirty days from the date of the policy and while this policy is in force, hereinafter called 'such sick-

ness,' subject to all the provisions and limitations herein contained. Suicide or any attempt thereat, sane or insane, is not covered."

Following this clause is a detailed list of specific injuries covered by this policy. In addition, certain standard provisions are set forth and made a part of this contract. Under the caption "Age Limits of Policy" appears the following: "19. The Insurance under this policy shall not cover any person under the age of sixteen years nor over the age of sixty-five years. Any premium paid to the company for any period not covered by this policy will be returned upon request."

The foregoing is the sole and only restriction in this policy relative to excluding certain ages from the benefits of its terms.

The evidence in the record includes the following: Witness Ruth Kuran, who has been employed by the World Insurance Company for eight years last past in the capacity of assistant secretary and chief underwriter, testifies that her duties as such officer are to examine applications and to reunderwrite risks, that is, to examine files as to their desirability for the company to continue the risk or to accept the risk; that it also has been her duty for all these years to examine present policies of the company to determine if the company desires to continue the risk; that for these purposes all the records of the company, including its premium records, are kept under her general supervision and control and available for her use; that witness knew that plaintiff, Mr. Lipe, was a policyholder of this company; that policy No. 41263 had been duly issued to him on October 1, 1932, and premiums had been paid in at the rate of $10 every three months—$10 a quarter; that the company's course of business is to send the assured a notice in writing calling his attention to the date each premium falls due, by a renewal premium notice sent out 20 days prior to the time the quarterly premium becomes due; that there is also a reminder notice sent 10 days prior to the due date, or 10 days following the first premium renewal notice; that upon each

of these renewal premiums being paid by the assured there was issued to him a renewal receipt which purported to continue the policy in force to a date certain stated therein; that this standard form of official premium receipt, issued and in use by the World Insurance Company, had been in force many years.

Further, this witness testified: "Q. And to your knowledge and in accordance with the custom of the company were the premium notices sent to Mr. Lipe for each quarterly premium? A. Yes. Q. Were those quarterly premiums paid in due time according to your records? A. Yes. * * * Q. Now when you examined Mr. Lipe's file in the year 1935, state the purpose for which you examined the file in that year? * * * A. It was to determine whether we would discontinue the policy or continue on the risk. Q. And what was your determination? A. To continue on the risk. Q. And did you do that same thing in each subsequent year 1936, 1937, 1938 and 1939? A. Each year. Q. And for that same purpose? A. Yes. Q. And did you reach the same determination each year? A. Yes. Q. Until what time? A. Until he became seventy years of age. * * * Q. Then what was your determination when he reached seventy years? A. That we could no longer continue the risk from a health standpoint but we would be willing to issue him a straight accident policy. * * * Q. Now, Miss Kuran, when you examined Mr. Lipe's file in the years 1935, 1936, 1937 and 1938 and 1939 for the purposes that you have just testified to, did you have in mind any particular provision of the policy which Mr. Lipe held during those years? A. Yes. * * * Q. And when you issued the premium notices to Mr. Lipe during the years 1935, 1936, 1937, 1938 and 1939 and accepted his premiums, you were familiar with paragraph 19 of his policy here? A. Yes."

The application for policy, addressed to the defendant company and executed by William Henry Lipe, upon which the policy in suit was issued, discloses that it was written on "10-1-32," and that the applicant was at that time 63 years of age.

When the company determined that it could no longer continue the risk from a health standpoint, but would be willing to issue Lipe a straight accident policy, he then applied for such straight accident policy, which was issued to him.

William Henry Lipe testifies as to securing the policy, No. 41263, from the insurer, and the payment of premiums thereon during all the years from 1932 to April 1, 1939; that, about 20 days before the premium was due, he received a premium notice from the company each quarterly period which notified him that the premium was due on a certain date; that he paid the premium each time after he received the premium notice. Further, he testified: "Q. And when you paid the premium on each quarterly period you believed that your policy was in force, didn't you? A. Yes. Q. And you believed that your policy was in force during all of the years 1935, 1936, 1937, 1938 and 1939? A. Yes. Q. And if you had a claim to present against the company during those periods, you would have done so with the belief your policy was in force and the company should pay you? A. Yes. * * * Q. Now during those years 1935, 1936, 1937, 1938 and to July 1, 1939, did the World Insurance Company or any one on its behalf ever tell you that your policy was not in force? A. No. Q. You understood that during those years your policy was in force? * * * A. Yes."

The last official premium receipt received by the assured on April 4, 1939, bearing the signature of the secretary, countersigned by Ingles, its "agent or cashier," contained the statement: "The premium payment evidenced by this receipt continues the policy as numbered herein (41263), subject to all of its provisions, conditions and limitations to July 1, 1939." All premium receipts issued to and received by the assured were identical in form and purpose.

Recurring to the "19th Standard Provision," which constitutes a part of this policy, it is plain that the words "The insurance under this policy shall not cover any person under the age of sixteen years nor over the age of sixty-five years. Any premium paid to the company for any period not cov-

ered by this policy will be returned upon request" constitute a limitation or condition set forth in that instrument for the benefit of the insurer and not the insured. As such, it is subject to waiver by the insurer, which the facts disclosed by the evidence clearly establishes as having occurred.

" 'Waiver' has been defined as a voluntary and intentional relinquishment or abandonment of a known existing legal right, advantage, benefit, claim, or privilege, which except for such waiver the party would have enjoyed; the voluntary abandonment or surrender, by a capable person, of a right known by him to exist, with the intent that such right shall be surrendered and such person forever deprived of its benefits; or such conduct as warrants an inference of the relinquishment of such right; or the intentional doing of an act inconsistent with claiming it." 67 C. J. 289.

The foregoing principles are applicable to insurance policies.

Thus, in a suit upon a health and accident policy involving the same issues as here presented, in a suit prosecuted by the insured against the insurer, where the insurable limit was 50 years, to recover premiums paid, recovery was denied, and the rule was announced: "Generally, an insurer may waive any provision of a policy which is for insurer's benefit, such as a provision that health and accident policy shall not cover any person more than fifty years old." *National Life & Accident Ins. Co. v. Ransdell,* 259 Ky. 559, 82 S. W. (2d) 820.

In this jurisdiction we have long been committed, in principle, to the doctrine that, where an insurance company over a period of years sends premium notices to an insured who is past the inhibited age provided in the policy, and the insured pays such premiums during that period, and the insurer knew the insured was beyond the inhibited age but continued to treat the contract as of binding force by accepting and retaining the premiums paid, such forfeiture or condition is waived, and the insurance company is bound. *Smith v. Liberty Life Ins. Co.,* 118 Neb. 557, 225 N. W. 688; *Modern Woodmen of America v. Colman,* 68 Neb. 660, 665,

94 N. W. 814, 96 N. W. 154; *Modern Woodmen of America v. Berry*, 100 Neb. 820, 161 N. W. 534; *Peterson v. Cosmopolitan Old Line Life Ins. Co.*, 124 Neb. 792, 248 N. W. 312; *Everett v. Metropolitan Life Ins. Co.*, 129 Neb. 386, 261 N. W. 575; *Schoneman v. Western Horse & Cattle Ins. Co.*, 16 Neb. 404, 20 N. W. 284; *Western Horse & Cattle Ins. Co. v. Scheidle*, 18 Neb. 495, 25 N. W. 620. See, also, *Home Mutual Benefit Ass'n v. Rowland*, 155 Ark. 450, 244 S. W. 719, 28 A. L. R. 86; *Venz v. State Automobile Ins. Ass'n*, 217 Ia. 662, 251 N. W. 27; *Boult v. Maryland Casualty Co.*, 111 Fed. (2d) 257; *English v. National Casualty Co.*, 138 Ohio St. 166, 34 N. E. (2d) 31; *Western Casualty Co. v. Aarons*, 85 Colo. 591, 277 Pac. 811.

The assured's rights of recovery, as a matter of contract, are strictly limited by the second sentence of standard provision No. 19 as they appear in the policy, "Any premium paid to the company for any period not covered by this policy will be returned upon request." This is quite different from a stipulation that all payments of premium by the assured after attaining the age of 65 years should be returned to him on request. The right to the return of premiums paid by the assured is wholly dependent, by the express terms of the clause under consideration, on the nonexistence of coverage by the policy. If coverage existed during the entire period paid for, the assured has received all protection he paid for, and no right of action has accrued. But, it clearly appears that the assured was, due to the several waivers of the insurer in the instant case, at all times insured and within the protection of the policy provisions. The result of the situation here presented was well expressed in principle by a noted author on insurance law, as follows:

"In fact, the retention of a premium on a fire insurance policy, after knowledge of the breach of a condition involving a right to forfeiture, is an election to waive such breach and continue the policy in force, and the policy should then be construed as though such condition had never existed." 3 Couch, Cyclopedia of Insurance Law, p. 2276.

In the instant case, clear waivers of the age limit of the policy by the insurer made upon receipt by it of each quarterly premium payment, having ripened into binding estoppels, the policy must be construed as though the condition in the policy relative to age limit, on which the plaintiff relies, was in legal effect nonexistent and wholly eliminated when each quarterly instalment of premium was voluntarily paid by the assured and accepted and received by the insurer. Here, the insured admittedly paid for his insurance after attaining the age of 65 years, believing he was validly continuing this insurance in force. Under the circumstances of the instant case, the assured's belief was strictly in accord with the facts, and he at all times enjoyed the protection his payments of premiums entitled him to, wholly unaffected by the waived condition. At no time during this period after he had attained the age of 65 years did the assured cease to be fully covered by the legally existing terms of the policy in suit. This fact wholly negatives the right of recovery pleaded by the plaintiff, and no recovery can be sustained in his behalf.

The judgment of the district court is, therefore, reversed and the action dismissed.

REVERSED AND DISMISSED.

ORLANDO R. NEISIUS, APPELLANT, V. JOHN REX HENRY ET AL., APPELLEES.
5 N. W. (2d) 291

FILED JULY 31, 1942. No. 31394.

1. **Municipal Corporations.** The words "and any such interest in any such contract shall avoid the obligation thereof on the part of such corporation," contained in section 17-517, Comp. St. 1929, construed to import the avoidance of the obligation of the contract from the inception of the transaction.
2. ———. "Where a statute prohibits an officer of a village from having an interest in any contract with the village, and avoids the obligation of any such contract so made, it is void for all purposes, and any funds paid out because of such purported con-

tract may be recovered back at the suit of the village or of a taxpayer suing in its behalf." *Village of Bellevue v. Sterba*, 140 Neb. 744, 1 N. W. (2d) 820.

3. *Grand Island Gas Co. v. West*, 28 Neb. 852, 45 N. W. 242; *Schechy v. Binkley*, 124 Neb. 87, 245 N. W. 267; *Darnell v. City of Broken Bow*, 139 Neb. 844, 299 N. W. 274, distinguished; and *Call Publishing Co. v. City of Lincoln*, 29 Neb. 149, 45 N. W. 245, overruled in so far as it conflicts with *Village of Bellevue v. Sterba, supra*.
4. **Municipal Corporations.** When a statute prohibits an officer of a municipality from entering into a contract with the city, and avoids the obligation of the contract for so doing, a recovery *quantum meruit* cannot be had.
5. **Officers.** A public officer is required to perform the duties of the office, however burdensome they may be, for the compensation fixed by law.
6. ———. And if he performs new or additional duties which are germane to his office, whether prescribed by law or otherwise, it must be conclusively presumed that they were performed for the salary fixed by law, or that they were gratuitous.
7. ———. The duties of a public officer cannot be divided into two separate jobs and additional salary be paid him in excess of that prescribed by statute as a consideration for his filling the new position thus created.
8. ———. Upon principles of reason, morality and public policy, irrespective of applicable statutes, one who is entrusted with the business of others cannot be allowed to make such business an object of pecuniary benefit to himself.
9. ———. When additional pay or perquisites are accepted by a public officer for the performance of duties germane to his office, a taxpayer may sue to compel their return to the public treasury.
10. ———. Under such circumstances, the fact that the value of the services rendered exceeds the amount received is not material. A recovery *quantum meruit* cannot be had.
11. **Municipal Corporations.** In a suit to recover excess salary received by a public officer, a taxpayer can enforce no greater rights on behalf of the city than the city itself might enforce, and any defense which might be interposed in an action by the city itself is available to the defendant in a suit brought by a taxpayer.
12. **Action.** No inequity resulting from changed conditions of the property or of the parties having been established, the defense of laches on the part of the plaintiff is not available to the defendants.
13. **Limitation of Actions.** The statute of limitations, section 20-209,

Comp. St. 1929, is a bar to the recovery of all amounts of excess salary received more than ten years prior to the commencement of suit.

14. **Municipal Corporations.** The fact that the city was engaged in its proprietary functions when the excess salary was paid does not remove the effect of statutory restrictions and limitations imposed upon the city and its officers generally.

APPEAL from the district court for Dodge county: LOVEL S. HASTINGS, JUDGE. *Reversed, with directions.*

Cook & Cook and *George B. Boland,* for appellant.

Abbott, Dunlap & Abbott, Munger & Rhodes and *Fred H. Richards, Jr., contra.*

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

CARTER, J.

This suit was commenced by the plaintiff as a resident taxpayer of the city of Fremont to recover a judgment against John Rex Henry and the United States Fidelity & Guaranty Company, surety on his bond, for money paid Henry in excess of his statutory salary as chairman of the board of public works of the city of Fremont. By stipulation of the parties, a pending suit for an injunction was incorporated into the present action by amendment to the prayer of the petition, which amendment prayed for an injunction against the city of Fremont, restraining the payment of any funds of the city to Henry as compensation in excess of his salary as chairman of the board of public works. The trial court granted the injunction and denied a money judgment for the benefit of the city. Plaintiff appeals.

The record shows that plaintiff and others made formal demand upon the city of Fremont to institute a suit to recover back the alleged overpayments of salary before the commencement of this action, and that such demand was refused. Plaintiff, as a resident taxpayer, thereupon filed this suit for the benefit of the city of Fremont to recover such alleged overpayments of salary and to enjoin the future pay-

ment of similar compensation to Henry. It is not disputed that, during all the times that excessive payments of salary are alleged to have been made to Henry, the United States Fidelity & Guaranty Company was the surety on the various official bonds furnished by Henry as chairman of the board of public works.

The evidence shows that Henry served continuously as chairman of the board of public works from 1923 to the date of filing of this suit on July 12, 1940. Until 1925 the ordinances of the city provided for a water commissioner, which office included the duties of a light, heat and power commissioner. In 1925 the salary of the members of the board of public works was increased from $100 to $260 a year and the powers of active direction, supervision, control and general management of the city's utilities were enlarged by the abandonment of the office of water commissioner and the assignment of the duties of that office to the board of public works. Subsequent ordinances of the city provided that the board of public works should have the active direction, supervision, control and general management of the city's utilities, including the right to hire employees to perform the duties necessary to their proper operation. The board of public works was specifically authorized to purchase supplies, to enter into contracts for construction work and improvements authorized by the city council, to collect moneys due the various departments, and to do many other things pertaining to the operation of the city's utilities which do not require enumeration here.

An examination of the ordinances of the city reveal, therefore, that the board of public works was at all times after 1925 empowered with the active direction, supervision, control and general management of the power plant, and the light, heat and water systems, subject to the powers of the city council over it. It appears further that during this time the board of public works was empowered to hire employees and delegate duties and powers to them in carrying out the purposes and objects of the board of public works.

The evidence is clear that prior to August 11, 1927, the

board of public works performed all the duties of management, supervision and control, which the ordinances of the city and the action of the city council had delegated to it. It is not disputed that most of this work and responsibility was assumed by Henry as the chairman of the board.

On August 11, 1927, the board of public works, in the absence of Henry, suggested to the city council that a general manager was needed for the city light and power plant and suggested that Henry be appointed to the position with adequate compensation. On the same day the city council authorized the board of public works to employ Henry as general manager. On August 31, 1927, the board of public works fixed the salary of Henry as manager at $125 a month, beginning August 1, 1927. There is no dispute that during all of the time from August 1, 1927, to the time of filing this suit Henry had drawn $260 a year as chairman of the board of public works, in addition to the $125 a month as general manager.

It seems to us that the board of public works was at all times invested with the management, control and supervision of the water and light plant. The board was specifically authorized to hire employees to operate these utilities and, for the purposes of this suit, we will assume they had authority to designate one of such employees as manager. The question to be determined here is whether Henry could properly be designated as such manager with additional salary, and if not, whether he is obligated to return the additional salary thus collected.

It is contended that the contract to employ Henry as manager of the water and light plant was void under the provisions of section 17-517, Comp. St. 1929, which in part provides: "No officer of any city or village shall be interested, directly or indirectly, in any contract to which the corporation, or any one for its benefit, is a party; and any such interest in any such contract shall avoid the obligation thereof on the part of such corporation, nor shall any officer receive any pay or perquisites from the city other than his salary, as fixed by ordinance and this chapter."

It is argued by defendants that this statute does not by its terms, or by implication, render the contract void, but that on the contrary it is carefully worded so as to make it voidable only. If the contract be voidable only under this statute, some affirmative act on the part of the city would be required to terminate liability. We think the statute clearly expresses a contrary meaning. The use of the words "and any such interest in any such contract shall avoid the obligation thereof on the part of such corporation" does not import any affirmative action on the part of the city to avoid the obligation of the contract. The interest of the officer in the contract avoids *ipso facto* the obligation thereof on the part of the city.

In *Village of Bellevue v. Sterba,* 140 Neb. 744, 1 N. W. (2d) 820, this court in a similar case said: "Where a statute prohibits an officer of a village from having an interest in any contract with the village, and avoids the obligation of any such contract so made, it is void for all purposes, and any funds paid out because of such purported contract may be recovered back at the suit of the village or of a taxpayer suing in its behalf."

We think this decision to be controlling in the case at bar. Defendants, however, attack the soundness of the decision and urge that it is contrary to the well-established law of this state. An examination of the cases relied upon will be helpful in determining the correctness of this assertion.

In *Grand Island Gas Co. v. West,* 28 Neb. 852, 45 N. W. 242, the gas company entered into a contract with the city to furnish electric lights at an agreed price. A member of the city council was a stockholder and officer of the gas company. A taxpayer sought an injunction. The court held that the contract was unenforceable, but required the city to do equity by returning the benefits as a condition to the issuance of the injunction. We think the case is distinguishable. The suit was one in equity for an injunction, the granting of which is not wholly a writ of right as its issuance or refusal rests in the sound discretion of the court under the circumstances of the particular case. 32 C. J. 29.

By seeking relief in an equity court, plaintiff subjected himself to the sound discretion of the court in granting an injunction, and as the court required the plaintiff to do equity by returning the benefits received under the unenforceable contract, he was in no position to complain in this court. That this was the theory of the decision is evidenced by the statement in the opinion that "whether an action on a *quantum meruit* could be maintained does not arise in this case, and we express no opinion thereon." Whether the court properly applied the rule requiring one seeking relief in a court of equity to first do equity himself is not a matter of concern here. We find nothing in this case directly in conflict with the holding in the *Sterba* case.

In *Call Publishing Co. v. City of Lincoln*, 29 Neb. 149, 45 N. W. 245, the court, in construing identical language in a former statute, disposed of the whole question without citation of authority in the following language: "The purpose of this peculiar language is quite obvious. It was to leave life in such contracts that they might be enforced by the city, should it be deemed to its advantage to do so, but at the same time to deprive them of all binding force as against the city." The reasoning indulged in fails to give effect to the words "and any such interest in any such contract shall avoid the obligation thereof on the part of such corporation." To "avoid the obligation" is plain language and clearly implies relief from all liability, not only as to unperformed portions of the contract, but from the whole transaction from its very inception. While we disapprove the reasoning of this decision, it does purport to interpret the statute in a way which conflicts with the *Sterba* case. We therefore feel obliged to overrule it in so far as it contravenes the rule announced in *Village of Bellevue v. Sterba, supra.*

In *Scheschy v. Binkley*, 124 Neb. 87, 245 N. W. 267, plaintiff brought an equitable action for an accounting and to recover for funds paid to school board members who performed services for the district in erecting and repairing temporary school buildings. The district was required to

pay for benefits received. We think this decision was correct, but that it has no application to the case at bar. The applicable statute provided that "No school officer shall be a party to any school contract for building or furnishing supplies, except in his official capacity as a member of the board." Comp. St. 1929, sec. 79-513. No attempt was made by the legislature to avoid the obligation of the contract as is done by section 17-517, Comp. St. 1929. A school officer may not be a party to a school contract except in his official capacity, but he is not foreclosed of any right he may have exclusive of the contract. Consequently, if the contract is unenforceable, no reason exists why a recovery *quantum meruit* could not be had. We do not think that this case is a controlling authority in the case at bar.

The last case cited and relied upon is *Darnell v. City of Broken Bow,* 139 Neb. 844, 299 N. W. 274. In this case it appears that a city attorney resigned his office and entered into a contract to foreclose tax sale certificates held by the city for compensation based on an aliquot part of the funds derived from such foreclosure actions. The court held that the city attorney had in fact resigned. The reason for invalidating the contract was that it is against public policy for a city to enter into a contract of employment with an attorney to foreclose tax sale certificates and pay a certain percentage or aliquot part of the public revenues affected thereby to be deducted from the proceeds of the sales. We think the opinion correctly holds that when such a contract is void because of provisions for unlawful compensation contained in it, and not because of any official relationship between the city and the attorney, such attorney, in a proper action, is entitled to compensation on a *quantum meruit* basis. This case is based on the rule, consistently upheld by this court, that where the power to contract exists but was irregularly exercised, a recovery *quantum meruit* may be had. *Western Chemical Co. v. Board of County Commissioners,* 130 Neb. 550, 264 N. W. 699. We find nothing in this case which conflicts with the rule announced in the *Sterba* case.

There is much distinction between a contract with a city which is the result of an illegal exercise of an authorized power and one which is illegal because of a statutory disqualification to make a contract, or to create liability. The former may be ratified or a suit *quantum meruit* maintained. But where one is prohibited by statute from entering into a contract, and the obligation of the contract avoided for so doing, an action *quantum meruit* cannot be maintained. It would amount to nothing more than complete protection to one who would carelessly disregard or intentionally violate the law. Thus the beneficent purposes of the statute would be circumvented within the letter of the law, and the intent of the legislature as effectually thwarted by a strained interpretation of the statute. We conclude therefore that the construction placed upon section 17-517, Comp. St. 1929, in the case of *Village of Bellevue v. Sterba, supra,* is correct and it is reaffirmed.

But whether *Village of Bellevue v. Sterba, supra,* is in all respects applicable to the case at bar or not, there is another reason why the contract between Henry and the board of public works is void.

The record is clear that the active supervision, control and management of the waterworks, power plant and lighting systems were placed with the board of public works. The defendant Henry, before his employment as manager, performed most of the managerial duties for the board of public works. For this work he received as compensation the sum of $260 a year, the maximum amount permitted by the applicable statutes and ordinances. After the appointment of Henry as manager, he continued to perform the same managerial duties, although he devoted more time to the job. Assuming that the board of public works had authority to employ a manager, we think it was precluded from employing Henry under well-established rules of law.

It seems to us that, as long as Henry held the position of chairman of the board of public works, he was bound to perform the duties of that office for the statutory salary of $260. When the powers of the water commissioner were

merged with those of the board of public works, the salary of the board members was increased from $100 to $260 a year. It must be conclusively presumed that the increased salary was compensation for additional duties. Henry accepted the appointment and thereby obligated himself to actively supervise, control and manage the utilities in question for the designated salary. Any attempt to divide his duties between two jobs and to fix a salary for the new position thus created must be condemned as unlawful. If Henry performed additional duties germane to the office he held, and devoted more time to their performance, it must be conclusively presumed that they were so performed for the salary fixed by the statute of the state and ordinances of the city, or that they were gratuitous. The provision of section 17-517, Comp. St. 1929, providing in substance that no officer shall receive any pay or perquisites from the city other than his salary, as fixed by ordinance and this chapter, is a complete bar to the payment of a salary to Henry as general manager while he occupied the position of chairman of the board of public works. Section 16-322, Comp. St. 1929, is also a bar to the receiving of increased compensation during the term for which he was appointed. It is clear that, as a matter of law, the members of an official board cannot employ one of their own number to assist them. Even in the absence of statute, public policy and sound morals forbid a public officer from receiving compensation other than the salary prescribed by law. When additional pay or perquisites are accepted by a public officer for performance of duties germane to his office, a taxpayer has a right to insist that the funds wrongfully received shall be returned to the public treasury. And this right is not nullified by the fact that the reasonable value of the services exceeded the amount received. The value of the services is not material. It is a general rule that an officer who has made a contract for salary, additional to that provided by law, cannot recover *quantum meruit*.

In a case somewhat similar this court used language which is applicable here: "As void acts inhibited by statute, they

were open to collateral attack. As direct violations of the city charter, they were not the acts of the city, but individual trespasses beyond official power and municipal legislation. The city was at liberty to rely on its charter, to denounce those acts as invalid, and to resort to the official bond of the city clerk for redress to the extent of the damages. Estoppel and all other defenses pleaded are without support in law or evidence." *City of Scottsbluff v. Southern Surety Co.*, 124 Neb. 260, 246 N. W. 346.

In *Stone v. Bevans*, 88 Minn. 127, 92 N. W. 520, the court said: "It is therefore immaterial, in view of the admitted facts, that the trial court refused to receive evidence tending to show that the services rendered by the president of the council were meritorious and beneficial, since he had no right to negotiate for or enter into the same with the official body of which he was a member at the time, and it is not now an open question in this state that money thus voted by a municipal body to one of its members may be recovered for the municipality at the suit of a taxpayer."

The trial court, therefore, properly enjoined the city from making further payments of salary to Henry as general manager, while he occupied the position of chairman of the board of public works, on the ground that the contract was against public policy and void. The trial court was, however, clearly in error in permitting a recovery *quantum meruit*. Whether the transaction be treated as one absolutely inhibited by law and the obligation thereof terminated from its inception as provided by section 17-517, Comp. St. 1929, or whether it be treated as additional pay or perquisites prohibited by the same section of the statute, or even if section 16-322, Comp. St. 1929, be resorted to, a recovery *quantum meruit* cannot be had.

Defendants urge that plaintiff's right of recovery is barred by laches and the statute of limitations. In a consideration of these questions it must be conceded that plaintiff can enforce no greater rights on behalf of the city than the city itself might enforce, and any defense which might be interposed in an action by the city itself is available to the de-

fendant in a suit brought by a taxpayer. With this in mind, can the alleged laches of the city be asserted?

We do not think that laches sufficient to bar recovery has been established in the present case. The defendant Henry commenced drawing the additional pay in 1927 and had continued to draw it until this suit was filed in 1940. Taxpayers had a right to assume that its officials would act with due regard to limitations imposed by law. We fail to see how it would be inequitable to enforce the liability. Laches is not based on the mere passage of time as is a statute of limitations; it is founded upon inequity resulting from changed conditions of the property or the parties. Defendant Henry testifies that the death of two members of the board of public works who served at the time Henry was appointed general manager, and for many years thereafter, made it difficult for him to establish the duties he performed and the benefits he rendered to the city of Fremont. This evidence is not sufficient to invoke the doctrine of laches, for the reason that it would have been immaterial in any event. Defendants have not been injured by the delay and the situation has not materially changed. Plaintiff's evidence is that he had no actual knowledge of the true facts until December, 1939. A taxpayer cannot be expected to inquire into the business of a city with the same energy and promptness as would be expected of him in his own affairs. He has a right to rely upon the integrity of elected officials and he cannot be penalized for his own delay until he has knowledge of the wrong. Under the rules announced in *Schurman v. Pegau*, 136 Neb. 628, 286 N. W. 921, laches cannot be invoked as a defense. Neither do we find any reason for the invocation of an estoppel against the city or its taxpayers in bringing the action.

Defendants plead the statute of limitations as a defense. We are of the opinion that all amounts received by Henry more than ten years prior to July 12, 1940, the date of filing this suit, are barred by the provisions of section 20-209, Comp. St. 1929.

It is further contended that the fact that the city was en-

gaged in its proprietary as distinguished from its governmental functions makes inapplicable the limitations and restrictions on the power of a municipality to contract as contained in the statutes. The fact, however, that a city is placed in the same class as a private corporation when it enters upon its proprietary functions is of no assistance to the plaintiff. All corporations, whether private or public, are creatures of the legislature and subject to its will. General statutory limitations and restrictions upon the powers of a municipality ordinarily apply to proprietary as well as governmental functions.

It is further urged that a suit such as the one at bar is controlled by equitable principles. As a general proposition, this statement is correct for the reason that courts of equity apply equitable rules wherever in conscience and good morals they can do so. But it will not interfere in the enforcement of a positive statute enacted for the protection of the public in the safeguarding of public funds. Applicable language was used in *Northern Trust Co. v. Snyder*, 113 Wis. 516, 89 N. W. 460, wherein the court said (p. 552): "County boards, and other boards, councils, and all in official station, should learn the lesson that public revenues are not for private use, for dissipation under the forms of law in payment of illegal claims by or to the persons whom the people trust to guard and devote the same to the proper public use; that there is a power potent, if invoked seasonably, to compel restitution to the public treasury of money illegally, though by forms of law, withdrawn therefrom."

It is the policy of our statute to lessen the possibility of official infidelity by preventing unfaithful officers from enjoying the illegitimate benefits of official service. Whether the infidelity of the officers was due to indifference or wilful disregard of duty, the effect upon the taxpaying public is the same. The application of the rule may in some instances appear unduly harsh, especially where there has been no moral turpitude involved, as in the instant case. But the legislature has seen fit, in the exercise of legislative policy, to require one who is entrusted with the business of a mu-

nicipality not to make such business an object of pecuniary profit to himself and that one who disregards or violates the statute assumes the risks which the statute imposes. A person is not permitted to act for himself and another at the same time in the same matter where their interests might be in conflict. Two different obligations are thus created in the same person, one of interest and the other of duty. Too often interest prevails over duty to the detriment of the public. The legislature has attempted to protect the public by condemning transactions which bring about these conflicting relations where the interests of a municipality are concerned. Only a strict application of the statute to every case which properly falls within it will insure the beneficent result intended by the legislature in enacting the law.

The judgment of the district court is reversed and the cause remanded, with instructions to proceed with the accounting of all items of salary actually paid to the defendant Henry for the ten years immediately prior to July 12, 1940, and to thereafter enter judgment for the benefit of the city of Fremont against the defendants Henry and United States Fidelity & Guaranty Company for such amount, together with interest and costs. An attorney's fee of $350 is hereby allowed and taxed as costs against the defendant United States Fidelity & Guaranty Company.

REVERSED.

IN RE ESTATE OF CHARLES C. SAUTTER. KEITH COUNTY, APPELLEE, V. METHODIST CHILDREN'S HOME OF BEREA, OHIO, ET AL., APPELLANTS: HENRY HARMS ET AL., EXECUTORS, APPELLEES.

5 N. W. (2d) 263

FILED JULY 31, 1942. No. 31329.

1. **Stipulations.** "A formal, judicial stipulation by the parties as to facts, so long as it stands, is conclusive between them, and cannot be contradicted by evidence tending to show the facts

otherwise." *Le Barron v. City of Harvard*, 129 Neb. 460, 262 N. W. 26.

2. **Taxation.** "Statutes exempting certain legacies from an inheritance tax should be strictly construed. To be exempt from an inheritance tax, a legacy must come within the strict letter of the statutory exemption." *In re Estate of Rudge*, 114 Neb. 335, 207 N. W. 520.
3. **Corporations.** A foreign corporation which complies with section 24-222, Comp. St. 1929, thereby becomes a body corporate of this state, and, while such corporation may become a domestic corporation in many respects and treated as such for local purposes, in other respects it retains the character of a foreign corporation, and its status within the state is not equivalent to that which it would have had, were the same created a separate corporation therein.
4. ———. The domestication of a foreign corporation is nothing more than extension to it of the privilege of license as a foreign corporation to do business in this state and its susceptibility to service to do business in this state, within the contemplation of sections 24-222 and 24-1201, Comp. St. 1929.
5. **Taxation.** A foreign corporation, organized exclusively for charitable purposes, which complies with section 24-222, Comp. St. 1929, although becoming a body corporate in this state, is not exempt from payment of an inheritance tax, within the contemplation of section 77-2201, Comp. St. Supp. 1941. By such domestication, it does not become a domestic corporation, with the same legal rights, powers and advantages in all respects as a domestic corporation.
6. ———. Exemption from payment of inheritance tax applies only to domestic institutions organized and operating as charitable institutions, and does not apply to unincorporated foreign associations organized and operating for charitable purposes, within the contemplation of section 77-2201, Comp. St. Supp. 1941.
7. **Charities**: TAXATION. Where foreign corporations, residuary devisees, and an unincorporated foreign association, a devisee and residuary devisee, take real estate under a will and enter into a contract with the heir at law to dismiss an action to construe the will, and agree thereunder to pay the heir the amount of $12,000, to be retained from the distributive share of such foreign corporations and unincorporated foreign association in the estate, and the heir agrees to claim only the bequest and devise given to him specifically under the will, and to quitclaim any interest he may have in the real estate of the deceased under other paragraphs of the will, the will having been admitted to probate and decree of

distribution to be made in conformity with the will, *Held*, such circumstances vest sufficient title to the real estate in the foreign corporations and the unincorporated foreign association to enable them to convey a valid title of their respective interests in real estate therein to a *bona fide* purchaser, especially so where such foreign corporations and unincorporated foreign association, by contract with the heir at law, receive his interest and eliminate the possibility of escheat proceedings being instituted by the state, and such foreign corporations and unincorporated foreign association are not exempt from payment of inheritance tax, within the contemplation of section 77-2201, Comp. St. Supp. 1941, nor prohibited by section 76-502, Comp. St. 1929, from acquiring interest in real estate in such manner as appears in the instant case.

8. **Taxation.** Where foreign charitable corporations, residuary legatees and devisees, and a foreign unincorporated charitable association, legatee and devisee and residuary legatee and devisee, enter into a contract with the heir at law to pay him the sum of $12,000 to dismiss a suit brought to construe the will, such amount to be retained from a partial distribution of the assets of the estate going to such corporations and unincorporated association, the amount of $12,000 is not deductible in the computation of inheritance taxes from the interest of such corporations and unincorporated association, there being no stipulation for decree of distribution of the property other than in accordance with the terms of the will, the property passed under the will, and the compromise payment not being paid as the result of a will contest, the result was nothing more than a bequest to the residuary legatee and devisee, and the right of the heir at law to receive from the estate certain funds which became the property of the foreign corporations and the unincorporated association by virtue of the will; the suit to construe the will was an independent, separate proceeding, as distinguished from the proceedings of probate.
9. **Courts.** The county court has exclusive and original jurisdiction to fix, determine and assess inheritance taxes and to prorate the same proportionately to the taxable interests of the heirs at law, legatees, devisees or beneficiaries, as the case may be.
10. **Taxation.** An appeal properly perfected, as provided in section 77-2211, Comp. St. 1929, and in sections 30-1601 to and including 30-1610, Comp. St. 1929, gives the district court jurisdiction of the subject-matter to fix, determine and assess an inheritance tax against the interests of all parties liable thereto, and to designate the *pro rata* payment thereof to the counties entitled to receive the same for the benefits for which the tax is created.

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

McConnell & Leaton, Conrad D. Philos and *Beeler, Crosby & Baskins,* for appellants.

Zelma D. Derry, R. L. Smith and *Beatty, Maupin, Murphy & Derry, contra.*

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

MESSMORE, J.

This is an appeal from a decree of the district court for Deuel county, entered May 23, 1941, reversing and modifying an assessment of inheritance taxes in the estate of Charles C. Sautter, deceased, entered by the county court of Deuel county against the legatees and devisees named in the will of the decedent. Charles C. Sautter died November 6, 1938, a resident of Deuel county, Nebraska, possessing real estate located in Keith county; also considerable personal estate whose situs was his residence and legal domicile. His last will and testament was admitted to probate in the county court of Deuel county January 6, 1939. The pertinent provisions of the will are clauses three and four:

"Third: In compliance with the terms and provisions of the last Will and Testament of George L. Sautter, deceased, wherein I was given a life estate in certain property, and required to select and designate during my lifetime certain charitable institutions to receive the same, I hereby give, bequeath and devise unto The World Service Agencies of the Methodist Episcopal Church, Chicago, Illinois, the sum of Four Thousand One Hundred Six Dollars and Eighty-three cents ($4,106.83) and real estate" described in the clause.

"Fourth: I give, bequeath and devise unto the German Methodist Orphan Home of Berea, Ohio, the Central Wesleyan Orphan Home of Warranton, Mo., the Nebraska Children's Home Society, of Omaha, Nebraska, the Child Sav-

ings Institute of either Omaha or Lincoln, Nebraska, The World Service Agencies of the Methodist Episcopal church, Chicago, Illinois, and the Women's Foreign Missionary Society of the Methodist Episcopal Church, Topeka Branch, all the rest and residue of my estate, both real, personal or mixed, of whatever nature or wherever found, to be and become theirs absolutely, viz., to share and share alike, the real estate so devised to descend to them and their successors and assigns forever in fee simple."

The county court decreed that the Topeka Branch of the Women's Foreign Missionary Society of the Methodist Episcopal Church, a corporation incorporated in Kansas (hereinafter referred to as the Topeka Branch) was not subject to the payment of such tax. On appeal by Keith county to the district court, that court held the Topeka Branch liable for payment of an inheritance tax. The appellants assign this holding of the district court as error, in that the Topeka Branch is a domesticated corporation and, therefore, exempt.

The record contains a stipulation that the Topeka Branch has complied with the provisions of section 24-222, Comp. St. 1929, reading as follows: "Any corporation organized under the laws of any other state * * * which has filed * * * with the secretary of state of this state, a true copy of its charter or articles of association, shall, on filing with the secretary of state a certified copy of a resolution adopted by its board of directors, accepting the provisions of this article, be and become a body corporate of this state."

Relying on the stipulation, the Topeka Branch confined its proof to a certified copy of its charter, received in evidence to show that the society was a religious and charitable organization. The appellee is not in a position to question the stipulation.

"A formal, judicial stipulation by the parties as to facts, so long as it stands, is conclusive between them, and cannot be contradicted by evidence tending to show the facts otherwise." *Le Barron v. City of Harvard,* 129 Neb. 460, 262 N. W. 26. See 5 Wigmore, Evidence (2d ed.) 604, sec. 2588.

The district court held that, even though the Topeka Branch had been domesticated by complying with the provisions of section 24-222, Comp. St. 1929, nevertheless such corporation, as a matter of law, is not entitled to any greater exemption from inheritance tax laws of this state than it would be if the articles of incorporation had never been filed in this state.

Is the Topeka Branch a domesticated corporation within the terms of such statutory exemption?

Section 77-2201, Comp. St. Supp. 1941, reads in part: "Provided further, that all bequests, legacies, devises, or gifts, to or for the use of any corporation, organization, association, or foundation organized and operated exclusively for religious, charitable or educational purposes, no part of which is owned or used for financial gain or profit to either the owner or user or inures to the benefit of any private stockholder or individual, or to a trustee or trustees exclusively for such religious, charitable or educational purposes, shall not be subject to any duty or tax, and no such duty or tax shall be assessed or collected after the taking effect of this act irrespective of the time of the death of the decedent or the fact of the pendency of his or her estate."

The Topeka Branch is a religious and charitable organization. No part of the funds received by it under the foregoing statute is used for financial gain or profit. Exhibit 1, a certified copy of its charter, shows: "That this Corporation is organized not for profit, and that the purposes for which it is formed are: Missionary Work." There is no proof or contention to the contrary.

In *In re Estate of Rudge,* 114 Neb. 335, 207 N. W. 520, this court held: "Statutes exempting certain legacies from an inheritance tax should be strictly construed. To be exempt from an inheritance tax, a legacy must come within the strict letter of the statutory exemption." Followed in *In re Estate of Robinson,* 138 Neb. 101, 292 N. W. 48.

In 23 Am. Jur. 396, sec. 389, it is said: "Even though a foreign corporation which complies with or accepts the terms of state legislation providing for domestication only

may explicitly be termed a domestic corporation by such statutes, and while it may become such in many respects and be treated as such for local purposes, in other respects it retains the character of a foreign corporation, and its status within the state is not equivalent to that which it would have were the same association created a separate, original corporation therein." On page 398, sec. 392, it is said: "Mere domestication of a foreign corporation does not give it a legal domicile within the domesticating state. A state is powerless to confer, by domestication, any local citizenship upon a foreign corporation which would have the effect of impairing its constitutional rights as a citizen of the state of its creation."

A leading case reflecting the rule announced above is *In re Thomas' Estate*, 185 Wash. 113, 53 Pac. (2d) 305, wherein the will in question provided: "All the rest, residue and remainder of my estate both real and personal and wheresoever situate, I give, devise and bequeath to The Hutton Settlement, a corporation organized and existing under and by virtue of the laws of the state of Washington, and The Salvation Army of Spokane, in equal parts to each, said bequest to The Salvation Army of Spokane to be distributed by it to the different institutions working under its management and control in said city." The Salvation Army was a California corporation, having an office in Spokane, Washington. It set out its corporate existence, an organization under the laws of the state of California, and pleaded its authorization to do business in the state of Washington as a foreign corporation. The probate court declared the property exempt. The statute involved was Rem. Rev. Stat., sec. 11218, and set forth certain gifts to certain organizations for charitable purposes, enumerating them, which were exempt from the inheritance tax; therefore, the gift was, in its terms, made to the Salvation Army of Spokane for local purposes. In the opinion it was said (p. 118): "We must resolve the question of law involved upon principle—by considering what it would be in the power of the corporation to do, rather than what it may be disposed to do. While we may assume

that the California corporation would faithfully execute the provisions of the will in the use of the property, yet the state would have no visitorial power enabling it to enforce compliance. True, the corporation is registered in the state and permitted to do business therein, but it is not compelled to remain in the state." The order exempting the corporation from payment of inheritance tax was reversed, with instructions to deny respondent's petition for exemption.

Similar holdings are reflected by the following cases: *Alfred University v. Hancock,* 69 N. J. Eq. 470, 46 Atl. 178; *In re Estate of Quirk,* 257 Mo. 422, 165 S. W. 1062; *In re Estate of Speed,* 216 Ill. 23, 74 N. E. 809, affirmed in *Board of Education v. Illinois,* 203 U. S. 553, 27 S. Ct. 171; *Humphreys v. State,* 70 Ohio St. 67, 70 N. E. 957; *Carter v. Whitcomb,* 74 N. H. 482, 69 Atl. 779; *Minot v. Winthrop,* 162 Mass. 113, 38 N. E. 512; *In re Hickok's Estate,* 78 Vt. 259, 62 Atl. 724; *State v. Holcomb,* 85 Kan. 178, 116 Pac. 251; 26 R. C. L. 226, sec. 197. It is evident that a majority of the states that have adjudicated the question adhere to the view that tax exemptions to charitable institutions are confined to domestic corporations.

To quote from *In re Prime's Estate,* 136 N. Y. 347, 362, 32 N. E. 1091, 1095: "The argument that gifts for the promotion of charity, education and religion should be encouraged and should not be diminished by exactions of the state, presents a moral and political rather than a judicial question. It is the duty of courts in the interpretation of statutes to declare the law as it is, and the interests of society are best subserved by a close adherence by courts to what they find to be their plain meaning, neither narrowing the application on the one hand, nor extending the meaning on the other, to meet cases not specified, which may seem to be within the reason of the law."

"The domestication of a foreign corporation * * * is nothing more than the extension to it of the privilege or license as a foreign corporation to do business in the state and its susceptibility to service and suit in the state." *Blue Ridge Power Co. v. Southern Ry. Co.,* 122 S. Car. 222, 115 S. E.

306. See, also, *Magna Oil & Refining Co. v. White Star Refining Co.*, 280 Fed. 52; *Ohio & M. R. Co. v. Wheeler*, 1 Black 286, 17 L. Ed. 130.

The authorities cited and analyzed clearly indicate that the use of the words "domestic corporations" has to do solely with the place of their incorporation, and does not refer to any attempt to comply with statutes providing for the domestication of a foreign corporation. If the foreign corporation be incorporated in any foreign state without regard to what steps it may have taken to gain authority to transact business in the taxing state, it is not considered a domestic corporation, but is held to be a foreign corporation for the purpose of imposing the tax, and the exemption is denied.

The general rule that the domestication of a foreign corporation, as distinguished from reincorporation, does not affect its status as a citizen of the state in which it was originally incorporated and does not make it a citizen of the domesticating state, so far as federal jurisdiction is concerned, has been uniformly followed. See *Foy & Shemwell v. Georgia-Alabama Power Co.*, 298 Fed. 643; *Southern Ry. Co. v. Query*, 21 Fed. (2d) 333; *Carolina & N. W. Ry. Co. v. Town of Clover*, 34 Fed. (2d) 480; *Lightfoot v. Atlantic Coast Line R. Co.*, 33 Fed. (2d) 765.

The district court properly held the Topeka Branch subject to inheritance tax in this state.

The appellants contend: The World Service Agencies of the Methodist Episcopal Church of Chicago, Illinois, is an unincorporated charitable and religious society. It is claimed the exemption granted is to any organization, association or foundation operated exclusively for religious, charitable or educational purposes. The county court so held. Attention is called to section 77-2201, Comp. St. Supp. 1941, above quoted.

The district court found that the World Service Agencies was named as the devisee in the will under discussion, is not a corporation but is, rather, an organization or association of the various executive secretaries of the General Confer-

ence of the Methodist Episcopal Church, with its principal place of business at Chicago; that such devisee holds title to property either in its various members or one or more of its officials in trust for the benefit of various foreign corporations, associations and individuals, and is not such an organization or association as is exempt from the payment of inheritance taxes under the Nebraska law.

The record discloses that the church some years ago created what is known as the "World Service." The World Service Agencies and the World Service Commission are directly allied with World Service and coordinate their efforts in making possible the great scope of activities under the World Service. The interchanging of their respective functions is such that, by cooperation, they unify the efforts of the church in World Service. A minute segregation of the different aspects of the World Service Commission, the World Service Agencies (a trade-name) and World Service is not such that one can exist without the other, under the testimony as presented by the record. Without detailing this testimony, we conclude that the holding of the district court, as hereinbefore set out, is applicable to the evidence in this case with reference to taxing the World Service Agencies. The World Service Agencies is unincorporated; the Methodist Episcopal Church is unincorporated and the World Service Commission is incorporated in the state of Illinois, but, jointly, they make World Service possible.

In the case of *Humphreys v. State*, 70 Ohio St. 67, 70 N. E. 957, the court said (p. 84): "Exemptions of charitable institutions would relate only to domestic institutions * * * even if the words 'in the state' had been omitted from the statute. It is not a tax upon property, but upon the right to *receive* property and have it transferred."

In the case of *In re Estate of Quirk*, 257 Mo. 422, 165 S. W. 1062, the statute provided for exemption where property was conveyed for educational, charitable or religious purposes exclusively. All other property was taxed. The beneficiaries under the fund were educational and religious organizations and the funds were for such purposes exclusive-

ly. The question involved was: Did the law contemplate an exemption for charities located outside of the state, and was it the legislative intent to apply the exemption clause to all charities wherever located or only to resident charities? The word "charities" covers all of the exempted subjects in the statute. The court decided that the exemption applied only to Missouri charities, holding: "Under the great weight of the case law we are constrained to hold that it was not the legislative intent by the exemption clause of our statute to include property conveyed for educational, charitable or religious purposes outside of this State." See, also, *Morgan v. Atchison, T. & S. F. Ry. Co.*, 116 Kan. 175, 225 Pac. 1029.

To quote further from section 77-2201, Comp. St. Supp. 1941: "All property, real, personal and mixed which shall pass by will or by the intestate laws of this state * * * to any person or persons or to any body politic or corporate in trust or otherwise, or by reason thereof any person or body corporate shall become beneficially entitled in possession or expectation to any property or income thereof, shall be and is subject to a tax," etc.

The World Service Agencies is an association. An association, as defined by Bouvier's Law Dictionary (Rawle's 3d Rev.) p. 269, is "The act of a number of persons in uniting together for some purpose. The persons so joining." In the supplement thereto it is defined as a number taken collectively. The World Service Agencies, as such, was a resident outside of the state of Nebraska and exists as an auxiliary body of the World Service Commission of the Methodist Episcopal Church, which is a nonresident corporation.

Without repeating, but referring to the language used in *In re Estate of Rudge, supra,* we conclude that under the circumstances the World Service Agencies is such an organization or society that is not exempt from inheritance tax and that part of the statute providing for exemption of charitable, religious and educational organizations, associations, or foundations, refers, under a strict construction thereof, to such corporations, organizations, associations

or foundations organized and operated exclusively for religious, charitable or educational purposes within the state of Nebraska and not a nonresident thereof, and that such was the legislative intent.

Appellants contend: The foreign corporations, devisees of real estate under the will, were prohibited from acquiring title thereto, and, such devolution of title being prohibited, the will was void and the property passed to the heir at law as intestate property.

The foreign corporations were residuary legatees and devisees, except the World Service Agencies who, in addition, received a specific bequest and devise. The trial court held that, by the terms of the will, the title to real estate located in Nebraska was conveyed directly to the foreign corporations named therein for the purposes for which such corporations were formed, and not in the form of any trust, but that the provisions of the laws of Nebraska prohibiting a foreign corporation from holding title to real estate in Nebraska did not operate to exempt such conveyance by will from the payment of inheritance taxes, and such corporations acquired sufficient title to the real estate to enable them to convey a valid title to their respective shares therein to a *bona fide* purchaser, unless the conveyances made by such will were set aside at the suit of the heir at law or of the state prior to such conveyance to purchaser.

Herbert A. Sautter and his wife instituted a suit to have the will construed. Before a decision was rendered in the case, the residuary legatees and devisees and the World Service Agencies entered into an agreement with the heir, providing that he dismiss the suit and quitclaim to certain named trustees all interest such heir may have in the real estate owned by Charles C. Sautter, or in which he had an interest at the time of his death, with exceptions noted in the contract and not necessary to here state. The contract further provided for the return of certain notes to the heir; the second parties to make, execute and deliver to the heir an assignment of $12,000, to be paid by the executors of the estate as soon as they have collected said sum from the as-

sets of the estate, and which would be a distributive share of the parties of the second part (legatees and devisees). Exhibits 9 and 10 are quitclaim deeds from Herbert A. Sautter and wife, as grantors, to L. A. Devoe and Orrin W. Auman, trustees, conveying real estate described in the will and provided for in the contract.

Appellants cite section 76-502, Comp. St. 1929, reading in part as follows: "Aliens and corporations not incorporated under the laws of the state of Nebraska are hereby prohibited from acquiring title to or taking or holding any land, or real estate, or any leasehold interest extending for a period for (of) more than five years or any other greater interest less than fee in any land, or real estate in this state by descent, devise, purchase or otherwise."

Without setting out the many cases on the subject, they establish that it is the public policy of the state under the cited statute that "it is unlawful for either a private or charitable corporation not organized in this state to take the fee title or to act as trustee for another." *Stork v. Evangelical Lutheran Synod,* 129 Neb. 311, 261 N. W. 552. See, also, *Gould v. Board of Home Missions,* 102 Neb. 526, 167 N. W. 776.

The appellants cite *Lord v. Shultz,* 115 Neb. 33, 211 N. W. 210, wherein this court said:

"Statutes of wills, it has been justly observed, are enabling acts, and prior to the statute of 32 Henry VIII (5 St. at Large, cap. 1) there was no general power at common law to devise land. The power was opposed to the feudal policy of holding lands inalienable without the consent of the lord. Our state has adopted the common law so far as applicable, and also has enacted a statute of wills. It would seem to follow that every person must therefore devise his lands in this state within the limitations of our statute or he cannot devise them at all; in other words, the power to devise must be exercised strictly in accord with the terms and conditions prescribed by the sovereign. *United States v. Fox,* 4 Otto (U. S.) 315.

"It is also to be remembered that an ordinary devisee does

not ordinarily occupy the position of purchaser for value. Nor is the heir of a testator as to land devised subject to estoppels created by deed.

"A will speaks only from the death of the testator; title is never in abeyance, but can be considered as passing only pursuant to a valid devise. Under these circumstances there would appear to be no legal obstructions to an heir rightfully challenging the validity of a devise of (violating) any of the provisions thereof."

Therefore, to develop the appellants' contention, under the authorities this court has taken a position that a devise to a foreign corporation is void even though a conveyance to such corporation would only be voidable. Applied to the instant case, the devise being void, the property passed by the laws of descent to the heir, and the inheritance taxes on such real estate can only be assessed against him. The cited authorities are unquestioned and apply to the existent situation in each case. A review of this record adequately discloses in what manner the appellants considered their rights.

The World Service Agencies, one of the defendants, in its answer admits that the will in question was admitted to probate and letters testamentary issued; that the World Service Agencies and such other defendants received certain gifts of cash and real estate under the will and an undivided one-sixth interest in real estate therein described; and that such answering defendant took from the estate as legatee and devisee. The prayer of the answer is that such defendant's share derived from the estate is not liable for any portion of the inheritance tax to be assessed against the estate.

Referring to the contract, the heir and his wife agreed to make no claim against the estate except as set forth in paragraph two of the will, which contains a bequest and devise to him. One of the trustees named in the contract was treasurer of the World Service Commission, as above stated. The will was admitted to probate January 6, 1939. The contract, dismissing the suit for construction of the will, was signed December 13, 1939. The real estate transferred by the heir to the appellants, as provided for in the contract,

was appraised in excess of $35,000. The heir had a contended claim of inheritance of personal property. There must have been a reason to induce the heir to dismiss his action to construe the will, and likewise some reason on his part to so dismiss. This was because the appellants claim they had an interest under the will and would exert their efforts to enforce the same.

This court in *Lord v. Shultz, supra,* held: "Although a corporation may have acquired real estate in such a manner as to render it subject to be escheated to the state by proper action begun for that purpose, yet if such corporation shall, prior to the commencement of such proceedings to escheat, make a *bona fide* sale or conveyance of said real estate for value, the purchaser at such sale will take a good title thereto." It is apparent that the appellants had some kind of a title that could be disposed of under certain conditions, such as the one above set out.

In *Gould v. Board of Home Missions, supra,* it was held: "The power to raise the question of the right of the corporation to take the property is not confined to the state, but the question may be raised by the heir or next of kin in an action to quiet title." The above holding clearly establishes the right of the appellants to take the property. For this reason, the heir brought the action to construe the will. The appellants paid him $12,000 to dismiss the suit. They obtained his interest which was the dominant and only interest and by so doing eliminated the possibility of escheat proceedings being instituted against them by the state.

As stated in *In re Estate of Rudge, supra*: "It is a familiar rule that statutes exempting property from taxation should be strictly construed, and one contending that his property is exempt from such tax must show clearly that he is within the exceptions provided by statute."

The appellants asserted their interests under the will, duly admitted to probate, and subsequent thereto made the agreement with the heir as hereinbefore noted. The payment of the $12,000 was to come out of the distributive share when partial distribution would be made to those who had a right

to, and were named in the will to receive, such distribution. Clearly, the appellants considered they were taking under the will. This being true, the court's holding is correct.

The appellants further contend that money paid from the estate to an heir in compromise settlement of a will construction case is deductible in the computation of inheritance taxes, and that the appellants are entitled to a deduction in the amount of $12,000 paid to Herbert A. Sautter.

To obtain a compromise of the will construction case, the defendants entered into an agreement whereby they relinquished $12,000 of the personal property bequeathed to them by the will and permitted it to be paid by the executors to the sole heir of the testator. In this connection, *In re Estate of Kierstead,* 122 Neb. 694, 241 N. W. 274, is cited, wherein it was held: "When a will contest has been amicably settled between the beneficiaries named in the will and the heirs at law and they have in good faith stipulated for a decree of distribution in accordance with the settlement, and there is no intent thereby to evade or reduce the inheritance tax, the tax should be computed upon the portion received by each beneficiary under the decree." Appellants contend that, applying this holding to the instant case, it is as though persons named in the will had renounced the property and it had passed by intestacy to the heir. The money paid to the heir under such a compromise is therefore taxed to him as devolution of property under the statute of descent. The case does not turn on the form of the settlement agreement or whether or not a decree of distribution is based thereon, but on whether or not an heir has taken any testate property by descent, and the controlling question is whether the settlement is *bona fide* and not made to evade taxes.

In the case at bar, the trial court held that "such concessions to the said Herbert A. Sautter and such dismissal of such action by the plaintiff therein were not connected with and did not affect any proceedings theretofore or thereafter had with reference to the admission of said will to probate, and that by such written agreement, payment and concessions, the devisees in said will did not in any manner re-

nounce the taking of any property given to any of them by said will."

In the *Kierstead* case, Susan Kierstead died June 13, 1927, in Madison county, leaving a last will and testament devising a portion of her estate to the Methodist Episcopal Hospital of Omaha, the Odd Fellows Home at York, Mother's Jewels Home, a Methodist orphanage at York, and the Womans Home Missionary Society of the Methodist Episcopal Church. A sister and 12 nieces and nephews contested admission of the will to probate. Following a second trial, a settlement was effected, and a stipulation was entered into by which a decree of distribution was entered by the district court. The contestants were awarded $25,010, which was paid into court for them. The appraiser held that such sum was taxable to the legatees under the will, and such assessment was approved by the county court. Upon appeal to the district court such sum was found not taxable as property received by the legatees but taxable against those taking under the decree.

The decision in the above case was based upon the stipulation of settlement; a decree was entered determining and decreeing the distribution of the assets of the estate other than as provided by the will, and the inheritance tax was charged to the recipients on the amounts awarded to and received by them under that decree. In the present instance, all appellants, with the exception of the World Service Agencies, who had a special bequest under the will, were residuary beneficiaries only, and, in settlement of the suit pending for construction of the will, they entered into a contract. There was no stipulation for decree of distribution of the property other than in accordance with the terms of the will. The property passed under the will; the payments were not made as the result of a contest of the will, and resulted in nothing more or less than a bequest to the residuary devisees and legatees and the right of the said Herbert A. Sautter to receive from said estate certain funds that became the property of the appellants by virtue of the will. To be more specific, the appellants assigned what they were

to receive under the will to the extent of $12,000 as fully and completely as though they assigned that sum to a stranger to the will to secure payment of moneys owing by them. The property of the estate still descended and vested in them. The decree of distribution must be based upon the terms of the will. The county court can do nothing other than determine and find in its final decree in the Sautter estate that the appellants received the property granted them under the will. The suit to construe the will was a separate, independent proceeding, as distinguished from the proceedings of probate. The parties inject certain elements into this case with reference to the suit to construe the will which do not appear in the record and are not sustained thereby, and this court does not take judicial notice as to what litigants' counsel may have represented in another action or what pleadings such case contained.

The trial court determined this contention correctly, and the case of *In re Estate of Kierstead, supra,* is not authority for appellants' position.

Appellants next contend that the district court was without jurisdiction to enter a decree and judgment in favor of Deuel county. To determine the provisions of the statute under which an appeal from the county court to the district court may be had in inheritance tax matters, it is necessary to analyze article 22, ch. 77, Comp. St. 1929.

"The county court in the county * * * of which the decedent was a resident at the time of his death, *shall have jurisdiction to hear and determine all questions in relation to all taxes arising under this article,*" etc. Comp. St. 1929, sec. 77-2213. (Italics ours.)

The county court has exclusive and original jurisdiction over fixing, determining and assessing inheritance taxes. Keith county perfected its appeal from the county court to the district court under section 30-1601, Comp. St. 1929, which reads: "In all matters of probate jurisdiction, appeals shall be allowed from any final order, judgment, or decree of the county to the district court by any person against whom any such order, judgment or decree may be made or who

may be affected thereby;" under section 30-1602, Comp. St. 1929, which provides that all appeals shall be taken within 30 days after the decision complained of is made; and under section 30-1603, Comp. St. 1929, providing in part: "Every party so appealing shall give bond in such sum as the court shall direct, with two or more good and sufficient sureties, to be approved by the court, conditioned that the appellant will prosecute such appeal to effect without unnecessary delay, and pay all debts, damages and costs that may be adjudged against him."

Deuel county did not appeal, as provided for by section 77-2211, Comp. St. 1929, viz., "Any person or persons dissatisfied with the appraisement or assessment may appeal therefrom to the county court of the proper county within sixty days after the making and filing of such appraisement or assessment, conditioned upon the giving of security to the court to pay all costs, together with all taxes that may be fixed by the court;" did not attempt to appeal from the judgment of the county court fixing, determining and assessing the inheritance tax, and did not file a bond or transcript in the district court under any of the statutory provisions herein cited. This further develops the appellants' contention that the order of the district court fixing, determining and assessing the inheritance tax in favor of Deuel county is void, and we are required to again refer to article 22, ch. 77. We again quote from section 77-2201, Comp. St. Supp. 1941, as follows:

"All property, real, personal and mixed which shall pass by will or by the intestate laws of this state from any person who may die seized or possessed of the same while a resident of this state, * * * to any person or persons or to any body politic or corporate in trust or otherwise, * * * shall be and is subject to a tax at the rate hereinafter specified, to be paid to the treasurer of the proper county for the use of the state (the language of the above provision clearly indicates that the tax is on the *res*, and that the court, in determining and assessing the tax, takes into consideration the *res*), and all heirs, legatees and devisees, administrators, executors

and trustees shall be liable for any and all such taxes until the same shall have been paid as hereinafter directed." The foregoing language clearly indicates that all those having to do with the *res* are liable for the payment of the tax.

Section 77-2203, Comp. St. 1929, provides: "All taxes imposed by this article, unless otherwise provided for, shall be due and payable at the death of the decedent," etc.; section 77-2202 deals with "Estates for Life, Remainders, Tax, When Payable," and section 77-2204 provides in part as follows:

"Any administrator, executor or trustee having any charge or trust in legacies or property for distribution subject to said tax, shall deduct the tax therefrom, or if the legacy or property be not money, he shall collect the tax thereon upon the appraised value thereof from the legatee or person entitled to such property, and he shall not deliver or be compelled to deliver any specific legacy or property subject to tax to any person until he shall have collected the tax thereon, and whenever any such legacy shall be charged upon or payable out of real estate, the heir or devisee before paying the same shall deduct such tax therefrom and pay the same to the executor, administrator or trustee, and the same shall remain a charge upon such real estate until paid, and the payment thereof shall be enforced by the executor, administrator or trustee in the same manner that the payment of the legacies might be enforced."

It is obvious that the foregoing provisions of the statute deal with the *res*, as indicated, and specifically direct the payment and the duties of the personal representative of the deceased with reference thereto.

Section 77-2205, Comp. St. 1929, provides: "All executors, administrators and trustees shall have full power to sell so much of the property of the decedent as will enable them to pay said tax, in the same manner as they may be enabled to do by law for the payment of debts of their testators and intestates and the amount of the tax shall be paid as hereinafter directed."

Section 77-2206, Comp. St. 1929, provides: "Every sum of money retained by any executor, administrator or trustee, or paid into his hands for any tax on any property, shall be paid by him within thirty days thereafter to the treasurer of the proper county, and the treasurer or treasurers shall give, and every executor, administrator or trustee shall take a receipt from him of said payments. The words 'proper county' shall be taken to mean the county in which the property was situated and subject to taxation at the time of the death of the owner."

Section 77-2214, Comp. St. 1929, provides in part: "If it shall appear to the county court that any tax accruing under this article has not been paid according to law, it shall issue a summons commanding the persons or corporation liable to pay such tax or interested in such property to appear before the court on a certain day * * * to show cause why such tax should not be paid."

Section 77-2215, Comp. St. 1929, provides: "Whenever the treasurer of any county shall have reason to believe that any tax is due and unpaid under this article, after the refusal or neglect of the person interested in the property liable to pay said tax to pay the same, he shall notify the county attorney of the proper county in writing," etc.

A careful reading and analysis of the foregoing statutes make it clear that the inheritance tax is a direct charge against the *res*. The beneficiary, legatee or devisee receives the benefit of the estate, whether a person, an individual or a corporation. The provisions of article 22, ch. 77, indicate clearly that the present action is one *in rem* and not one *in personam*. This being true, the assessment of the tax, the proportionate shares to be paid by the beneficiaries, legatees or devisees, whoever they may be, and the manner of enforcing payment have to do with the distribution of the assets of the estate to such parties. Therefore, the matter is a probate matter, and sections 30-1601 to and including 30-1610, Comp. St. 1929, govern appeals in such matters. The following cases are pertinent to a determination of this assignment of error:

In *In re Estate of Nilson,* 126 Neb. 541, 253 N. W. 675, the court said: "The county court has original and exclusive jurisdiction in the settlement of estates by which distribution is made of the assets, and its final orders are binding upon all persons. The proceeding is *in rem.* All persons interested in the assets are considered parties in the county court, whether named or not, and they may appear for the purpose of protecting their interests in the county court or on appeal to the district court. Appeal to the district court removes the whole case to the district court, and all persons interested in the distribution are necessary parties in the district court and entitled to be heard there. *In re Estate of Creighton, supra; In re Estate of Sweeney, supra; In re Estate of Bayer,* 116 Neb. 670; *Blair v. Estate of Willman,* 105 Neb. 735. See, also, *Lewis v. Barkley, supra; St. James Orphan Asylum v. Shelby,* 75 Neb. 591; *Genau v. Abbott,* 68 Neb. 117; *Reischick v. Rieger,* 68 Neb. 348; *Boales v. Ferguson,* 55 Neb. 565; *Youngson v. Bond,* 69 Neb. 356; *Wilson v. Coburn,* 35 Neb. 530; *Williams v. Miles,* 63 Neb. 859; *Andersen v. Andersen,* 69 Neb. 565; Dame, Probate and Administration (3d ed.) 13, 14. These cases also dispose of the appellant's contention that the creditor, not having filed any pleadings in the county court, should not have been permitted to file an answer in the district court or appear as a party therein."

In *In re Estate of Creighton,* 91 Neb. 654, 136 N. W. 1001, the court held: "An order of the county court in the settlement of an estate, by which distribution is made of the assets, is appealable to the district court; the proceeding being *in rem,* all persons interested in the assets are parties. If A asks for an order of distribution that will exclude B from participation in the assets, he cannot afterwards object to the appearance of B to protect his interest in the county court, or afterwards upon appeal to the district court."

In *In re Estate of Sweeney,* 94 Neb. 834, 144 N. W. 902, the will of Bridget Sweeney was filed for probate in the county court on the petition of Peter O'Malley, who was named therein as executor. The county attorney filed ob-

jections to the probate of the will, claiming that the state of Nebraska was interested in the estate by reason of the fact that the deceased died without heirs, and, if intestate, her entire estate would escheat to the state of Nebraska, and for the further reason that the testatrix was incompetent to make a will. O'Malley moved to dismiss the objection of the state for the reason that it was not a proper party and had no interest. The motion was overruled. The county court found that the will was not the last will and testament of Bridget Sweeney and refused to admit it to probate. O'Malley and his wife, beneficiaries under the will, appealed to the district court. Subsequently, John and Michael Burchill filed a petition in intervention in the district court (having filed no pleadings in the county court), alleging that they were sons of a deceased half-brother of the testator, and heirs at law. O'Malley moved to dismiss their petition, charging insufficient facts pleaded, want of right to intervene, that the petition was filed out of time, and that the action was begun and tried in the county court. An amended petition was filed and the same objections thereto raised. After reviewing the contention of the appellants, and stating that the question had been considered in the *Creighton* case, the court followed *In re Estate of Creighton, supra,* holding as follows:

"A proceeding in the probate court to settle the estate of a decedent is a proceeding *in rem,* and every one interested in such settlement is a party in the probate court whether he is named or not, and this is particularly true as to the distribution of an estate under a will. * * *

"Where the court is called upon to determine the probate of a will, it is acting upon the *res* of the estate, and when an appeal is taken from the county court by the executors to the district court it removes the whole case to the district court, and all parties interested in the distribution are necessarily parties in the district court and are entitled to be heard there."

The case of *Nilson v. Tekamah Investment Co.,* 133 Neb. 180, 274 N. W. 465, followed *In re Estate of Sweeney, supra,*

holding: "A proceeding in the probate court to settle the estate of a decedent is a proceeding *in rem*, and every one interested in such settlement is a party in the probate court whether he is named or not." In that case Almitta Nilson brought a suit in the district court against the Tekamah Investment Company to recover upon a deposit made by her with such company. The district court ordered that the administrator of the Nilson estate be made a defendant and objections were filed thereto. The court said that the plaintiff ignored the fact that the vital question presented arises out of a proceeding *in rem*, and set forth the rule as heretofore announced in *In re Estate of Sweeney, supra.*

To analyze: Inheritance proceedings are had in the first instance and determined by the county court, having original and exclusive jurisdiction of probate matters. Such taxes assessed come from the assets of the estate and directly affect the distribution. Therefore, all parties interested in the distribution, whether named or not, may assert their rights in any case involving the assets of the estate, even though the same be on appeal and such parties have not appeared in the county court.

The appeal of Keith county vested the district court with jurisdiction to fix and determine the amount of the tax. The law (Comp. St. 1929, secs. 77-2201 to and including 77-2210) provides and designates to what counties and to whom the tax is payable. In the instant case, the district court determined the liability of the appellants with reference to payment of inheritance tax. Even though Deuel county was not a party to the appeal in the district court and did not intervene or file any pleadings therein, this does not foreclose the right of the county to receive inheritance tax as finally determined by the district court wherein the court has jurisdiction of the subject-matter, the tax being prorated to the respective counties, as hereinbefore set out, and as evidenced by sections 77-2201 to 77-2210, inclusive. The district court had jurisdiction of the *res* by virtue of the appeal of Keith county. The proceeding being *in rem*, each and every party interested therein was entitled to have a decision made con-

forming to the applicable rule. This the trial court did. It is thus obvious that a case of this kind, dealing with inheritance taxes, is not analogous to a case in contract, made by Deuel county, or one in which the interest of Deuel county is separately determined.

Under the circumstances and the authorities above cited, the fact that Deuel county did not follow the provisions of section 77-2211, Comp. St. 1929, is immaterial. The appeal of Keith county, which was proper in all respects, brought to the district court the entire subject-matter of the inheritance tax, and this included the tax on the personal property located in Deuel county and the liability, if any, of the appellants therefor.

We conclude that the trial court properly determined this assignment of error.

For the reasons given in this opinion, the judgment is

AFFIRMED.

WILLIAM ELROY SALMONS, APPELLANT, V. JAMES KING SALMONS, APPELLEE: MERNA ELIZABETH SALMONS, APPELLANT.

5 N. W. (2d) 123

FILED JULY 31, 1942. No. 31422.

1. Wills. The rule in Shelley's case is a rule of property in this state.
2. ———. In a devise in a will where a testator intending to create a life estate uses words of limitation rather than of purchase, the intention of the testator must yield to the rule in Shelley's case and the devisee decreed to be owner in fee simple of the devised real estate.
3. ———. In determining the intention of a testator, it is the duty of the court to examine the will in its entirety, giving consideration to its every provision, giving the words used their commonly and generally accepted meaning, and to indulge the presumption that the testator understood the meaning of the words used.
4. ———. Where in a devise the testator has used words of purchase and of limitation synonymously or interchangeably, the words of purchase must control, and the words of limitation construed to be *descriptio personæ*.

5. ———. In order that the rule in Shelley's case shall have application, it is necessary that the words used shall indicate an intention that the full line of heirs of the ancestor shall take at the time of his death, and by heirs is meant all of his kin who survive him and are capable of inheriting at the time of his death, including descendants and collateral heirs.
6. ———. Since 1907 by the statutes of Nebraska the surviving spouse is an heir as to both personal property and real estate of a deceased husband or wife.
7. ———. Unless excluded by unambiguous words or by clear implication from the language of a will, the description of "heirs" therein includes a surviving spouse.
8. ———. Words used in a devise creating an estate in real estate which words do not include the full line of heirs of the ancestor are words of purchase and not of limitation.

APPEAL from the district court for Stanton county: LYLE E. JACKSON, JUDGE. *Affirmed in part and reversed in part.*

Fay H. Pollock and *Ted C. Tow*, for appellants.

T. L. Grady, contra.

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

YEAGER, J.

This is an action in equity instituted by William Elroy Salmons, plaintiff and appellant, against James King Salmons, a minor, defendant and appellee, and Merna Elizabeth Salmons, defendant and appellant. There are two causes of action. The purpose of the first cause of action is to construe a devise in the will of Harriet Jane Salmons, mother of plaintiff, dated December 31, 1910, and the second is to construe a devise in the will of William B. Salmons, father of the plaintiff, dated January 4, 1912, with a codicil dated August 1, 1923.

The devise which is the basis of the first cause of action is the following:

"Third. I give and devise to my beloved son, Elroy Salmons, so long as he shall live, the west half of the southeast quarter (SE 1/4) of section nine (9) in township twenty-two north of range three (3) east of the 6th P. M. in Stan-

ton county, Nebraska, upon the express condition, that he shall not in any manner encumber said land, or the title thereto, by any mortgage, or other voluntary lien against the same, and in the event my said legatee shall in violation of this condition attempt to encumber, or charge said premises with a mortgage, or other voluntary lien, then all right, title, claim or interest hereby vested in said Elroy Salmons shall at once cease and determine.

"Fourth. Subject to the foregoing provisions, and to take effect upon the termination of the life estate of said Elroy Salmons, either by his death, or by an attempt on his part to create a voluntary lien or charge against said premises, or the title thereto, I give and devise and bequeath to the lawful issue or descendants of said Elroy Salmons the said west half of the southeast quarter of section nine (9) in township twenty-two (22) north of range three east of the 6th P. M. in Stanton county Nebraska. It being my intention to designate by the terms lawful issue or descendants, the lawful issue or descendants alive or in being, upon the termination of the life estate of said Elroy Salmons, by death or otherwise. And if upon the termination of said life estate of said Elroy Salmons, he have no lawful issue or descendants then in being, I direct that the fee simple title of said premises, shall thereupon vest in my beloved husband William Salmons and in his heirs and assigns forever."

The devise which is the basis of the second cause of action is the following:

"Fourth. I give, devise and bequeath all the residue of my real estate of whatsoever kind and nature, * * * to my beloved wife, Harriet Jane Salmons, to be used and enjoyed by her during the term of her natural life and from and immediately after her decease, I give and devise the aforesaid lands to my beloved son, William Elroy Salmons, to be used and enjoyed during the term of his natural life and from and immediately after his death, I give and devise the same to the sons and daughters, if any, of my said son William Elroy Salmons, who may be alive at the time of his death and to them and their heirs forever. Intending hereby to

vest in my said beloved wife the exclusive life use only of the property described in this paragraph, and that upon her death a life estate only in said real estate shall be vested in my beloved son, William Elroy Salmons, and after the death of my son, William Elroy Salmons, the fee simple title shall thereupon vest in the lawful heirs of said William Elroy Salmons, share and share alike as tenants in common."

The plaintiff contends that by reason of the language of the devise in his mother's will, quoted herein, he is, under the rule in Shelley's case, the owner in fee simple of the land described and is not merely the life tenant.

He also contends that by reason of the quoted language of the devise in the will of his father he is, under the same rule, the owner in fee simple of the land referred to which comprises certain lots in Stanton, Nebraska, and 713¾ acres of land in Stanton county, Nebraska, and likewise that he is not merely the life tenant thereof.

Merna Elizabeth Salmons is the wife of plaintiff. She, being incompetent, by guardian *ad litem* filed answer and joined in the prayer that plaintiff be decreed to own all of the real estate in question in fee simple. She is an appellant here with the plaintiff.

James King Salmons, the other defendant, and appellee, is the minor son of the plaintiff. He is represented by T. L. Grady, guardian *ad litem*.

On the first cause of action the trial court found in favor of the plaintiff and decreed accordingly.

On the second cause of action the finding was in favor of the defendant James King Salmons, and decree was entered in accordance with the finding.

From the decree on the second cause of action the plaintiff and the defendant Merna Elizabeth Salmons appealed. From the decree on the first cause of action the guardian *ad litem* for the minor defendant cross-appealed.

In the main both of the causes of action depend upon the questions of whether the words used in the one instance by Harriet Jane Salmons, testatrix, and in the other by William B. Salmons, testator, were words of limitation rather than words of purchase.

If, in each instance, they were words of purchase, then the devises must be upheld and the plaintiff declared to be a life tenant rather than owner in fee simple. If, on the other hand, they are words of limitation, then they run afoul of the rule in Shelley's case, which is a rule of property in this state, and in such instance the plaintiff must be decreed to be owner in fee simple of the real estate in question. *Myers v. Myers,* 109 Neb. 230, 190 N. W. 491; *Sutphen v. Joslyn,* 111 Neb. 777, 198 N. W. 164; *O'Shea v. Zessin,* 138 Neb. 380, 293 N. W. 240.

The parties are in substantial accord on the proposition that the causes of action must turn on questions of whether or not, by the words used, the testatrix and testator, respectively, included the full line of heirs of William Elroy Salmons in the words employed to set forth the devises.

For the purpose of determining these questions it becomes necessary to ascertain the intentions of the testatrix and the testator herein by the established rules of construction. *Yates v. Yates,* 104 Neb. 678, 178 N. W. 262; *Myers v. Myers, supra.*

In determining the intention of a testator it is the duty of the court to examine the four corners of the will and give consideration to every provision therein contained, giving the words used their commonly and generally accepted meaning, and to indulge the presumption that the testator understood the meaning of the words used. *Myers v. Myers, supra; Seybert v. Seybert,* 118 Neb. 246, 224 N. W. 1; *In re Estate of Hart,* 137 Neb. 843, 291 N. W. 502; *In re Estate of Pfost,* 139 Neb. 784, 298 N. W. 739.

With these rules of law as guides, for our further discussion it becomes necessary to determine whether or not the words used in the respective devises are of limitation or of purchase.

The devises are not couched in the same terms; therefore, it becomes necessary to deal with them separately. We will take them in the order presented in the district court, and deal first with the devise by Harriet Jane Salmons, mother of the plaintiff.

The particular words of this devise requiring interpretation are the following: "Subject to the foregoing provisions, and to take effect upon the termination of the life estate of said Elroy Salmons, * * * I give and devise and bequeath to the lawful issue or descendants of said Elroy Salmons * * *." Also the following: " * * * lawful issue or descendants alive or in being * * * ." Elroy Salmons is the same person who is described throughout this case as William Elroy Salmons.

In the case of *Albin v. Parmele*, 70 Neb. 740, 98 N. W. 29, the will carried a limitation over after the expiration of the life estate to the "heirs" otherwise described as "issue" of the life tenant. The terms appear to have been used interchangeably and synonymously. The word "issue" was construed to be a word of purchase and "heir" was used *descriptio personæ* to designate the issue or children of the life tenant. In that light the rule in Shelley's case was held not to apply. This holding met with approval in *Yates v. Yates, supra.*

Can it be said that the words "lawful issue or descendants alive or in being" are less limiting than the word "issue" when used interchangeably and synonymously with the word "heir"? Clearly the testatrix here meant the living issue of William Elroy Salmons, which clearly excluded other classes who were capable of taking as heirs. These were not all of those who would take by descent from William Elroy Salmons.

For the rule in Shelley's case to have application it is necessary that the words used shall indicate an intention that the full line of heirs of the ancestor shall take at the time of his death, and by heirs is meant all those of his kin who survive him and are capable of inheriting at the time of his death, including lineal descendants and collateral heirs. 24 R. C. L. 892, sec. 4.

By the language of this will the children of a child of William Elroy Salmons are excluded as a class as well as is his widow.

By sections 30-101 and 30-103, Comp. St. 1929, which became effective in 1907 (Laws 1907, ch. 49, secs. 1, 3), the

surviving spouse became an heir as to both the personal property and real estate of the deceased husband or wife. *In re Estate of Hanson,* 118 Neb. 208, 224 N. W. 2; *In re Estate of Rosenbery,* 132 Neb. 883, 273 N. W. 805.

In the opinion in the case of *In re Estate of Hanson, supra,* this court said: "So, under the substantive law existing in Nebraska since 1907, either spouse may be an heir of the other. Unless excluded by unambiguous words or by clear implication from the language used in a will, the description therein of 'heirs' includes a surviving spouse as well as a surviving child or surviving children."

This language was quoted with approval in *In re Estate of Rosenbery, supra.* There Rosenbery devised a portion of his estate to his son. The will provided that in case of death of the son that portion of the estate should go to the heirs of the son. The son predeceased the testator. It was held that the widow of the son was entitled to take as an heir.

The conclusion that we reach then is that the words upon which our interpretation of the devise in the will of Harriet Jane Salmons is based are words of purchase and not of limitation, and that as to the first cause of action the rule in Shelley's case has no application.

As to the estate given to the wife in the quoted portion of the will which is the basis of the second cause of action we need not concern ourselves here since the wife died before the testator. We need only concern ourselves with the estate devised to the son.

The devise here by its terms is to the plaintiff for life and then "to the sons and daughters, if any, of my said son William Elroy Salmons, who may be alive at the time of his death and to them and their heirs forever." This declaration is qualified in the same paragraph of the will as to the takers of the remainder as follows: "Intending * * * after the death of my son, William Elroy Salmons, the fee simple title shall thereupon vest in the lawful heirs of said William Elroy Salmons, share and share alike as tenants in common."

The same rules of law and of interpretation apply to this

second cause of action as were applicable to the first, hence it becomes necessary only to determine the question of whether these are words of limitation or of purchase, or in other words whether or not they limit the takers to less than the full line of heirs of William Elroy Salmons.

The devise in the first instance clearly is a limitation upon the line, since living sons and daughters only are named. If the explanatory phrase were to be taken alone the words could be construed to include the full line of heirs. However, we cannot reject the one and accept the other without doing violence to the intention of the testator. We must, if possible, ascertain the intent and construe the devise in such manner as to give effect to the intent of the testator.

It is obvious that he intended that the lands in question should go in remainder to the living children of his son, share and share alike, in fee simple. It is equally obvious that he intended that they should go to no one else. It seems clear that he had the intention in his explanatory sentence by the use of the words "lawful heirs" to make this intention clear.

However, for another reason the words of this devise must be considered as words of purchase and not of limitation.

Heretofore in this opinion, attention has been called to a pronouncement of this court that where two words are used interchangeably or synonymously, one of which indicates limitation and the other purchase, the one which indicates purchase must be accepted, and the one indicating limitation must be considered as *descriptio personæ*. *Albin v. Parmele, supra.* The same reasoning would apply to groups of words. Here we find two groups of words, one of which taken alone would indicate purchase and the other limitation. Taken together they cannot be construed to pass fee simple title under the rule in Shelley's case. If they are considered as having been used synonymously, as seems to be the intent of the testator, those which indicate purchase must be accepted, and those which if taken alone would indicate limitation must be considered as *descriptio personæ*.

We hold, therefore, that the words which are the basis of the first cause of action and also the second cause of action are words of purchase and not of limitation.

The decree of the district court on the first cause of action is reversed, and as to the second cause of action it is affirmed.

AFFIRMED IN PART AND REVERSED IN PART.

ROSE, J. I do not concur in the opinion that the rule in the Shelley case is law in Nebraska.

The following opinion on motion for rehearing was filed March 19, 1943. *Former judgment affirmed.*

1. Wills. The rule in Shelley's case is not favored and is given a strict construction. Its application may not be extended, the courts being inclined to circumscribe its operation within the strict limits of its own boundary, so that it is only when the facts bring a case under the strict letter of the rule that they will apply and enforce it.
2. ———. It is when there is an irreconcilable repugnancy between the clauses of a will that the later will prevail over the earlier.
3. ———. If there is an irreconcilable repugnancy between two provisions of a will, the later will prevail over the earlier, unless from a consideration of the entire will a contrary intention is evinced.
4. ———. In the construction of a will the entire instrument will be considered, and if, from its language, the intention of the testator can be ascertained, such decree will be entered as best effectuates the intention therein expressed.
5. ———. Repugnancy will not be raised by construction, but the instrument will, if possible, be so interpreted as to give effect to all of its provisions.

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

YEAGER, J.

This is an opinion on rehearing. The original opinion is reported *ante*, p. 66, 5 N. W. (2d) 123. The statement of facts is contained therein and since there is no factual controversy a new statement is not required here.

The motion for rehearing suggests proper rules of law

were not applied in the interpretation of the two wills and particularly in the ascertainment of the intent of the testator with regard to the will which is the basis of the second cause of action.

To this subject of intent we will first direct our attention. The intent of the testator up to a certain point is plain and unequivocal. He never intended to create an estate in William Elroy Salmons other than a life estate. This certainly defeats completely the claim that the testator intended by his explanatory statement, "Intending hereby to vest in my said beloved wife the exclusive life use only of the property described in this paragraph, and that upon her death a life estate only in said real estate shall be vested in my beloved son, William Elroy Salmons, and after the death of my son, William Elroy Salmons, the fee simple title shall thereupon vest in the lawful heirs of said William Elroy Salmons, share and share alike as tenants in common," to give to William Elroy Salmons a fee simple title to the real estate in question. If it be concluded that William Elroy Salmons shall take a fee simple title it cannot be because of the intent of the testator but in spite of it. If he takes a fee simple title he takes not by the intent of the testator but by arbitrary rule of law that has become a rule of property which sets at naught the intention of the testator. In other words if he takes, he does so under the rule in Shelley's case.

We think that the question of intent, if controlling, must be resolved against William Elroy Salmons. This then being true we are called upon to determine whether in the statement of the devise the testator limited the estate as he intended to do or did he by inadvertence or lack of legal understanding create an estate not intended by him.

There can be no question that in the first instance his statement indicated a devise in remainder to the living sons and daughters, if any, of William Elroy Salmons in fee simple. Thus his *intention* was clearly expressed.

The intention of the testator, as found from an examination of the will and all of its parts, cannot be carried out

by a finding that in the last sentence of paragraph "Fourth" of the will the testator intended that the remainder should descend to the full line of heirs rather than to those to whom it was specifically limited in the sentence where the intention was clearly expressed and wherein the grant of conveyance was contained.

In addition to what was said in the original opinion on this subject we conclude that, to give effect to the clearly expressed intention of the testator, it must be held that the words "lawful heirs of said William Elroy Salmons" as used in the last sentence of paragraph "Fourth" were used in the same sense and with the same meaning and purpose as "sons and daughters, if any, of my said son William Elroy Salmons, who may be alive at the time of his death and to them and their heirs forever."

The former statement in order of appearance in the will is a full, complete, clear, unambiguous and specific grant of a particular estate as the language clearly imports. The latter is in no wise a grant and does not purport so to be. May this confusing purportedly explanatory statement be allowed to override the lawful purpose and clearly expressed intention of the testator? We think not, and especially in view of the existing attitude toward the rule in Shelley's case. This rule is not a favorite of the law.

"The rule in Shelley's case is not favored. It is given a strict construction. Its application is not to be extended, the courts being inclined to circumscribe its operation within the strict limits of its own boundary so that it is only when the facts bring a case under the strict letter of the rule that they will apply and enforce it." 69 C. J. 507.

The reasoning here does not run afoul of the rule whereby an earlier provision in a will is controlled by a later one. This rule is not one of general application. In fact the scope of its application is limited and narrow. The rule as stated in the syllabus in *Martley v. Martley*, 77 Neb. 163, 108 N. W. 979, is as follows: "When there is an irreconcilable repugnancy between the clauses of a will, the later will prevail over the earlier." In paragraph 5 of the syllabus in *In re Estate of Smith*, 117 Neb. 776, 223 N. W. 17,

the rule is stated as follows: "Where an irreconcilable repugnancy exists between two provisions of a will, the later will prevail over the earlier, unless from a consideration of the entire will a contrary intention is evinced." This language was approved in *In re Estate of Curtis*, 123 Neb. 97, 242 N. W. 257. In paragraph 2 of the syllabus in *In re Estate of Skinner*, 122 Neb. 438, 240 N. W. 549, the rule was stated as follows: "Where two provisions of a will are irreconcilable, the later will prevail over the earlier."

As has been disclosed by the quotations set forth this rule has no application except where there is an irreconcilable repugnancy between clauses in the will. It has no application when from a consideration of the entire instrument the intention of the testator can be ascertained and his purpose effectuated.

In paragraph 2 of the syllabus in *In re Estate of Smith, supra*, which is a quotation from *In re Estate of Vandeveer*, 110 Neb. 651, 194 N. W. 791, we find the following: "When it becomes necessary to construe a will, the entire instrument will be considered, and if, from its language, the intention of the testator can be ascertained, such decree will be entered as best effectuates the intention therein expressed." Again in *Martley v. Martley, supra*, it is stated: "Such a repugnancy will not be raised by construction, but the instrument will, if possible, be so interpreted as to give effect to all its provisions."

It will be observed therefore that in the declaration in our opinion of the nonapplication of the rule in Shelley's case to the will here being considered, we have, in accordance with the general rule well established by our authorities, carried into effect the true intention of the testator and necessity has not arisen for a resort to the rule of a later clause in a will taking precedence over an earlier one since we have found no irreconcilable repugnancy.

It has been strongly urged that in our reliance upon the case of *Albin v. Parmele*, 70 Neb. 740, 98 N. W. 29, to the extent that we did rely on it we have disregarded later decisions of this court which have renounced the rule therein set out. Contrary to the contention, careful examination

of the later cases discloses that the rule has not been renounced. It has been extended but not in such manner as to affect the conclusions arrived at in our former opinion. *Godden v. Long*, 104 Neb. 13, 175 N. W. 655; *Wilkins v. Rowan*, 107 Neb. 180, 185 N. W. 437. In those cases it is held that "issue" or "issue of the body" will be construed to mean lineal descendants, rather than children, in the absence of qualifying words showing a contrary intent. This still does not include the full line of heirs under Nebraska law but includes only lineal heirs.

We pointed out in our former opinion that the testator in his granting clause limited those who might take to less than the full line of heirs, *i. e.*, "to the sons and daughters, if any, of my said son William Elroy Salmons, who may be alive at the time of his death and to them and their heirs forever." In his explanatory statement he did not employ this full description but instead used the term "lawful heirs," yet it cannot reasonably be said that he did not refer to a limited class of takers, as is pointed out in our former opinion. See Comp. St. 1929, secs. 30-101 and 30-103; *In re Estate of Hanson*, 118 Neb. 208, 224 N. W. 2; *In re Estate of Rosenbery*, 132 Neb. 883, 273 N. W. 805.

This conclusion, from the standpoint of reason as well as the precedent contained in *Albin v. Parmele, supra*, requires the statement that here where the testator used words of purchase and of limitation interchangeably, the words of purchase must control, and the words of limitation construed to be *descriptio personæ*, as was stated in the former opinion.

We observe no reason for departing from our former opinion, therefore it is, as supplemented hereby, adhered to.

FORMER OPINION SUSTAINED.

CARTER, J., dissenting.

In my opinion, the court is required to give effect to the explanatory sentence in the fourth paragraph of the will. It must be presumed that the testator was familiar with the canons of will construction long established by this court. Consequently, it is presumed that testator intended

that every word should have some meaning. There being two inconsistent and repugnant clauses in the will involving the same property, it must be presumed that he intended the last clause in point of local position to prevail as expressing the latest testamentary intention. It must also be presumed that the testator intended that the clearly expressed general intent should prevail over a particular intent expressed in a part of the will. It must likewise be presumed that the testator intended that the later clause, inconsistent with the prior language in the same paragraph of the will, should be construed as modifying, explaining or clarifying the former. These presumptions must be given effect because they are rules of construction which this court has repeatedly announced and upon which the testator could rightfully assume that he might rely. The opinion of the majority rejects entirely the subsequent explanatory clause of the will. The rejection of this clause, and the failure of the court to apply the established canons of construction which the testator had a right to assume would be done, constitutes the will, as interpreted by the majority, as that of the court and not that of the testator.

Paine, J., joins in the foregoing dissent.

JOSEPH L. FISHER, APPELLEE, V. ORA A. KEELER ET AL., APPELLANTS.

5 N. W. (2d) 143

FILED JULY 31, 1942. No. 31432.

1. **Courts.** The jurisdiction of the district court is general, original and appellate in all matters civil and criminal, except as otherwise provided by law.
2. **Appeal.** The district court, or a judge thereof, has power and jurisdiction to examine into and determine the sufficiency of supersedeas bonds and the sureties thereon up to the time when appeal to the supreme court is made complete.

APPEAL from the district court for Holt county: DAYTON R. MOUNTS and ADOLPH E. WENKE, JUDGES. *Motion to dismiss appeal conditionally sustained.*

J. J. Harrington and *Flansburg & Flansburg*, for appellants.

Frederick M. Deutsch and *Julius D. Cronin, contra.*

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER and YEAGER, JJ., and ELLIS, District Judge.

YEAGER, J.

This matter is presented here on motion of Joseph L. Fisher, plaintiff and appellee, to quash the supersedeas bond of Ora A. Keeler and others, defendants and appellants, for the following reasons:

The bond is not conditioned as required by the order of the district court.

Neither of the sureties upon the bond furnished justification as required by section 20-2224, Comp. St. 1929.

The sureties have not sufficient property to enable them to justify agreeable to section 20-2224, Comp. St. 1929.

The bond was not filed within 20 days from the date of the judgment and decree.

The first objection we think is without merit. The conditions provided in the decree are the following:

" * * * the amount of said bond is fixed at $2,000, to be approved by the clerk of this court, conditioned that the appellant will prosecute such appeal without delay and pay all condemnation money and costs which may be found against him in the final determination of said cause, and further conditioned that said appellant will abide and perform the judgment or decree rendered or final order which shall be made by the supreme court in said cause, and further conditions that such appellant will not, during the pendency of such appeal, permit, or suffer to be committed any waste upon such real estate, and pay all costs and all rents or damages to such real estate which may accrue during the pendency of such appeal and until the appellee is legally restored thereto."

The conditions in the bond as filed are the following:

"The condition of this bond being that the defendants,

Ora A. Keeler, Mary Keeler, Harold Keeler and Louise Keeler, will prosecute said appeal to the supreme court and without delay, and will pay the judgment rendered by the district court in favor of the plaintiff, and all costs, rents, damages and waste that may be adjudged against them or any of them, by the supreme court and will fully abide by and comply with all orders and any judgment, or judgments, made and entered by the supreme court in said case, then this bond to be null and void, otherwise, to be and remain in full force and effect."

A comparison discloses that the conditions imposed by the court and those contained in the bond are substantially the same.

The second objection is clearly meritorious. The sureties failed to justify as provided by the statute. The bond was approved by the clerk of the district court, but clearly in violation of the duty imposed upon him by law.

This renders it unnecessary for this court to make any finding with regard to the third objection. The bond with its lack of justification of sureties being insufficient, it is not necessary at this time to pass upon the showings made here as to the financial responsibility of the sureties whose names are appended to the bond in question.

The attack upon this bond was first presented to the district court. Relief was there denied on the sole ground that, the cause having been adjudicated, that court was without jurisdiction to act. We think that in this the district court was in error.

While it is true that under the statutes the only provision for approval of supersedeas or appeal bonds in civil appeals from the district court is by the clerk of that court (Comp. St. 1929, sec. 20-1918), and while under a decision of this court this duty is a mandatory one so far as the clerk is concerned (*State v. Cook*, 51 Neb. 822, 71 N. W. 733), reason requires that the court shall have the right to exercise control over steps following judgment and pending perfection of appeal necessary to carry into effect statutory exactions.

The district court is not a court of limited jurisdiction.

On the contrary, its jurisdiction is general, original and appellate in all matters civil and criminal, except as otherwise provided. Comp. St. 1929, sec. 27-302.

Certainly under its general powers the district court should have the right to inquire into and, if the facts warrant, overrule the action of the clerk of the district court when the clerk has accepted a supersedeas bond bad in form and substance. Any other view would throw the doors open to untold mischief and injustice.

We hold, therefore, that the district court, or a judge thereof, has power and jurisdiction to examine into and determine the sufficiency of supersedeas bonds and the sureties thereon up to the time when appeal to the supreme court is made complete.

As to the fourth objection, while the record is not as clear as might be desired the bond appears to have been filed in time.

The bond in question being insufficient, it is ordered that a substitute supersedeas bond be furnished to this court with sufficient sureties to be approved by the clerk of the supreme court within 20 days, and for failure to comply the appeal will stand dismissed.

The motion to dismiss appeal is

CONDITIONALLY SUSTAINED.

LOUISE K. DUDGEON, APPELLANT, V. JOHN E. DUDGEON, APPELLEE.

5 N. W. (2d) 133

FILED JULY 31, 1942. No. 31409.

1. **Divorce.** Society has an interest in the marital status, its continuance and its dissolution. Thus, divorce is not favored or encouraged, but is discouraged.
2. ———. The trial court has power to set aside a decree of divorce upon an application therefor filed within the six months after the decree is rendered, and a decree does not become final upon the mere passage of such period if such an application be pending. Comp. St. 1929, sec. 42-340.

3. ———. If an innocent spouse be induced to procure a decree of divorce by fraud or duress, he or she will not be forced to accept a dissolution of the relationship, but may have such decree set aside upon application therefor made before the decree becomes final.
4. **Pleading.** It is error to exclude competent evidence tending to prove material allegations of a pleading.
5. **Divorce.** In the absence of legal collusion (which the court may meet on its own motion) the prevailing spouse may have a decree of divorce in his or her favor vacated and set aside as a matter of right, if application therefor is made within six months after rendition, unless some unconscionable result would be produced thereby.
6. ———. Collusion which is proscribed by divorce statute consists of an agreement, express or implied, for the suppression of facts or the simulation or fabrication of evidence material to the issue of the existence of lawful grounds for a divorce.

APPEAL from the district court for Douglas county: HERBERT RHOADES, JUDGE. *Reversed, with directions.*

Henry F. Pedersen and *Gross & Crawford,* for appellant.

Cranny & Moore, contra.

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER and YEAGER, JJ., and ELLIS, District Judge.

ELLIS, District Judge.

This is an appeal by plaintiff wife from the action of the district court denying her application to set aside a decree of that court granting her an absolute divorce.

The chronology of the proceedings in the district court is as follows:

July 29, 1940, plaintiff filed petition alleging cruelty and praying for absolute divorce, custody of adopted minor child and other relief.

September 3, 1940, defendant filed answer.

September 16, 1940, plaintiff filed motion to amend her petition by changing prayer from one for absolute divorce to prayer for separate maintenance.

September 30, 1940, defendant filed cross-petition alleging cruelty and praying for divorce.

October 4, 1940, amended petition was filed but is missing from files and does not appear in transcript.

November 1, 1940, by consent of parties petition and amended petition of plaintiff and cross-petition of defendant were dismissed without prejudice.

January 22, 1941, an order was entered reciting that on motion of plaintiff and defendant the order of November 1, 1940, was vacated and set aside and that the case proceed to trial on the *original* petition and the *original* answer.

January 22, 1941, the plaintiff appeared in person and by her counsel and defendant appeared by his counsel. Plaintiff presented evidence and was granted a divorce. It appears that the parties had agreed upon a division of property, child support and alimony and this agreement was incorporated in the decree. A transcript of the testimony presented at this hearing is included in the bill of exceptions and from that it appears that plaintiff's only complaint against the defendant was based on his conduct and relations with other women.

June 3, 1941, plaintiff filed a verified motion to vacate the decree. In this motion plaintiff alleged that at the time of the revival of the action she was in a highly nervous state of mind and by threats and misrepresentations of the defendant she was influenced and prevailed upon to revive the action and obtain a divorce; that at and prior to that time the defendant represented to the plaintiff that, notwithstanding the taking of the decree, he would consider himself the husband of the plaintiff and that plaintiff could and would have the right to vacate the decree at any time; that the taking of the decree would improve his health and unless taken his general and mental condition would be such that he would have to leave Omaha for parts unknown; that if he did so great loss would result to plaintiff and their minor child; concealment by defendant of his financial condition; that plaintiff because of love and affection for the defendant had a desire to assist and help him, was apprehensive of defendant's condition and desired protection for their minor child; that plaintiff, believing the representa-

tions and promises of the defendant, did in cooperation with defendant and his attorney revive said action and obtain a divorce.

The plaintiff further alleged that subsequent to the decree the defendant on many occasions had professed great love and esteem for plaintiff; had reminded her that he was still her husband; that she could set the decree aside at any time before the same became final; that his involvement with another woman had been rectified; that plaintiff was the only object of his affection; and that defendant had cohabited with plaintiff during February and March, 1941.

To the plaintiff's motion the defendant filed an answer amounting, in substance, to a general denial.

At the hearing on September 11 and 16, 1941, upon the issue thus created the plaintiff offered testimony to support the allegations of her motion as to the conduct of the defendant prior to the taking of the decree and constituting the inducement to her action in obtaining that decree. Objections to this evidence were sustained. Plaintiff made an offer of proof sufficient to support her exception to the ruling and likewise tending to support the allegations of her motion.

On this ruling we think the trial court was in error. Aside from the allegation of cohabitation after the decree, the gist of plaintiff's application was misrepresentation, fraud and duress occurring and existing at and prior to the taking of the decree. These things could not be established by evidence alone of what transpired after the decree. Unless the plaintiff be permitted to introduce evidence of what transpired between the parties before the decree she was doomed to defeat upon this phase of her application. We think that plaintiff's application alleged grounds for setting aside the decree and therefore it was prejudicial error to exclude competent evidence offered in support of such allegations. To hold otherwise would in effect close the door against practically all actions to vitiate decrees based in fraud or duress.

Since the trial court indicated an opinion that the plaintiff could have no right in any event to set the decree aside

and the parties have presented this question to this court, we deem it not only proper but necessary to discuss this basic question.

From a factual standpoint the case seems to be one of first impression in this jurisdiction and we must, therefore, turn to fundamental principles.

"The state, or public, has an interest in the marital status, its continuance, and its dissolution. The court cannot require a party to procure or to consent to a divorce, either ecclesiastical or civil; rather, it is conceded in all jurisdictions that public policy, good morals, and the interests of society require that the marriage relation should be surrounded with every safeguard and its severance allowed only in the manner and for the causes specified by law. Thus divorce is not favored or encouraged, but is discouraged; the husband and wife are not the only parties to a suit for divorce, but the state, or the public, is considered to be impliedly a party, whose interests should be considered and must be protected by the court." 27 C. J. S. 527, sec. 8.

That the foregoing reflects the underlying philosophy of the law of this state is demonstrated by the pronouncements of this court in the following cases:

For a declaration of the public policy of this state see *State v. Crocker*, 132 Neb. 214, 271 N. W. 444.

Lippincott v. Lippincott, 141 Neb. 186, 3 N. W. (2d) 207: While in the *Lippincott* case the wife challenged the validity of a prior decree which she obtained as plaintiff in the court of another state and sought to avoid it on the ground of fraud in invoking the jurisdiction of the foreign court, it none the less illustrates the length to which the courts will go in protecting the innocent spouse and the public interest in the marital relation. Incidentally, this case fully disposes of defendant's contention in the principal case that plaintiff is estopped to attack the decree which she obtained.

In *Winder v. Winder*, 86 Neb. 495, 125 N. W. 1095, the husband as plaintiff, and in fact the offending party, obtained a decree. Within 60 days the defendant wife filed a motion to set aside the decree. She had been represented

by counsel, and while this court found that her property rights had been amply protected, that the property settlement had probably been more advantageous to her than she would have received at the hands of the court, and that the evidence did not support her claim of weak mental condition, it nevertheless approved the action of the trial court in denying her application and in setting aside the decree on its own motion. This was done in the face of the plaintiff husband's remarriage. "Proper regard for the dignity and respect due to the court requires that it should emphatically frown upon such agreements. This is more especially so in divorce cases, where the public constitutes a third party. The preservation of the family, upon which our whole social fabric rests, and the welfare of innocent children require that the bonds of matrimony shall not be set aside by an agreement between the parties."

In *Blakely v. Blakely*, 102 Neb. 164, 166 N. W. 259, the action was brought by the husband. The wife entered her voluntary appearance but did not defend. Plaintiff was granted a divorce and paid in cash $2,000 of the permanent alimony granted to defendant. Within six months defendant first filed a motion to vacate that part of the decree relating to alimony and then a petition to vacate the decree on the grounds of misrepresentation by the plaintiff of the amount and value of his property and other facts alleged to amount to duress. The trial court struck defendant's amended petition and dismissed the proceeding. This was held to be reversible error and the court said that the application to set aside the decree should have been granted. "In the very recent case of *Everson v. Everson*, 101 Neb. 705, this court construed section 1606, Rev. St. 1913, 'to mean that during the six months' period the action is still pending before the court; that the trial court has power over it similar to that which trial courts have always exercised over their judgments during the term; that it is not a final order in any sense except for the purposes of appeal, but more in the nature of an interlocutory order which the court can, at any time, for good reason, vacate or modify.' "

It may be noted that section 1606, Rev. St. 1913, continues to exist unchanged as section 42-340, Comp. St. 1929. It should also be noted that this section stays the automatic finality of a divorce decree at the expiration of six months where proceedings for vacation or modification are then pending.

In *Carmony v. Carmony*, 112 Neb. 651, 200 N. W. 830, the defendant wife was granted a divorce on her cross-petition. Within six months she presented proof of the remarriage of her husband and the court set aside the decree. This appears to have been done *ex parte*. This action of the trial court was affirmed and this court said: "Under the divorce statute (Rev. St. 1913, sec. 1606) providing that a decree of divorce shall not become final or operative until six months, except for the purpose of review, and that the 'district court may at any time within said six months, vacate or modify its decree,' the court had the same power, after the term and before the six months had expired, to set aside the decree as it formerly had during the term before the enactment of this statute."

The foregoing would seem to demonstrate the underlying philosophy of the public policy and law of this state with reference to the marital relationship and its severance. Also a markedly liberal attitude toward applications for vacation or modification of divorce decrees which is peculiar to this particular class of judgments and obviously a departure from the rules applicable to judgments in general.

In *Lake v. Lake*, 124 App. Div. 89, 108 N. Y. Supp. 964, it is said: "The right of a party to the marriage contract to have that contract dissolved by reason of the infidelity of the other party thereto is given as a favor to the injured party. It was never intended to be used as a means whereby the wife should be forced to dissolve the contract. The court, at the request of a wife so desiring, grants a divorce by reason of the infidelity of the husband, but that request must be voluntary. If the wife's request be coerced, if the judgment be obtained upon a request of the wife, which she has been forced to make, that judgment should be set aside

by the court which granted the same. The statement of the proposition would seem to be sufficient to its establishment. If aught else be necessary, however, the mischief that would follow any other rule would make such a holding imperative. If any married man can by coercion force his wife to procure from him a divorce that he may marry another woman, or for any other purpose, the insecurity of that relation becomes at once apparent, and the legislature might better change the rule and grant divorces on request simply than to leave wives subject to coercion, which would be practiced upon them in order that the husband may get his freedom. Where, therefore, it appears to the court that the wife's application has not been free and unrestrained, the judgment of divorce should be annulled."

The Colorado court has held: "Where the court granted an interlocutory decree of divorce to the wife, thereby adjudging her an innocent party, she is entitled to have the decree set aside on her motion without evidence, since to deny such a motion would be to force the innocent party to take a divorce against her will." *Willoughby v. Willoughby,* 206 Pac. 792 (71 Colo. 356). In this case there was a contract or stipulation between the parties with reference to property and the husband contended the purpose of his wife's motion was to get more money out of him rather than to effect a reconciliation. With reference to this the court said (71 Colo. 356): "The dissolution of the marriage is no part of the contract. The contract would be unlawful if it were. It is a separate matter. * * * Were we to hold otherwise we should sanction the purchase of a divorce, which, however often it be done covertly, is a violation of law, public policy and decency."

With reference to contracts intended to facilitate procuring of a divorce this court said in *Davis v. Hinman,* 73 Neb. 850, 103 N. W. 668: "Any contract having any such purpose, object or tendency cannot be sustained, but must be regarded as being against sound public policy, and consequently illegal and void. The marriage relation is one to be encouraged and maintained when formed. Such is the well-settled

policy of the law; and its dissolution or determination is not to be left to the caprice of the parties. If dissolved, it must be done in accordance with some positive enactment of law and in due course of judicial proceeding. The good order and well-being of society, as well as the laws of this state, require this."

See, also, *Walton v. Walton*, 86 Colo. 1, 278 Pac. 780, and *Tierney v. Tierney*, 86 Colo. 362, 281 Pac. 737, in which cases it was held that a plaintiff who has obtained an interlocutory decree in a divorce action may not be compelled by a guilty defendant to have a final decree over her objection.

While under the Colorado practice an order is required at the end of the interlocutory period of six months to make the first decree final, whereas under our practice this result happens automatically, the reasoning of the Colorado court appears sound and equally applicable in this state.

The following cases also support the right of the innocent spouse to have an interlocutory decree in his or her favor set aside before the same becomes final solely on the ground of a determination to abandon the proceedings: *Adams v. Adams*, 57 Misc. 150, 106 N. Y. Supp. 1064; *McVickar v. McVickar*, 123 Misc. 644, 205 N. Y. Supp. 834; *Nicolai v. Nicolai*, 283 Mass. 241, 186 N. E. 240; *McLaughlin v. McLaughlin*, 44 R. I. 429, 117 Atl. 649; *Kenner v. Kenner*, 240 App. Div. 713, 265 N. Y. Supp. 137.

The acts of the wrong-doer create in the other spouse the right to relief, but it must be kept in mind that the wronged spouse, having legal grounds for relief, is not bound to assert the same in court either as a plaintiff or as a defendant by way of cross-petition. If the wronged spouse does choose to seek relief, in this state, he or she has a choice between two statutory remedies, *i. e.*, an action for absolute divorce (*a vinculo matrimonii*) or for divorce from bed and board (*a mensa et thoro*), or the plaintiff may resort to the equitable remedy of a decree for separate maintenance. These are rights in the injured spouse, to be selected and exercised in his or her sole discretion. The wrong-doer does not by breach of the solemn obligation of the relationship acquire

the right to compel recourse by the other spouse to any remedy or to dictate which of the three available remedies shall be invoked.

It must also be borne in mind that, if the result of the judicial process is to force the innocent spouse to accept a decree of divorce, the practical result is to grant a divorce to the guilty party to which he or she is not entitled under either the law or good morals.

The defendant cites authorities and argues that, while a divorce decree will be set aside for collusion, this will not be done at the behest of one who procured the decree. Without indicating our agreement or disagreement with this contention, we do not think it has application in the case before us. A desire of both parties for a divorce is not collusion. Neither do acts which merely facilitate proceedings in a divorce case show collusion. Strictly speaking, collusion which is proscribed by our statute and as referred to in the cases consists of an agreement, express or implied, for the suppression of facts or the simulation or fabrication of evidence material to the issue of the existence of lawful grounds for a divorce. See *Winder v. Winder, supra.* There is no suggestion that plaintiff has in any wise been guilty of collusion as thus defined.

In this connection the case of *Hall v. Hall,* 70 Mont. 460, 226 Pac. 469, involved facts very similar to the allegations of plaintiff in the instant case and, notwithstanding some evidence of collusion, the decree was vacated on application of the wife who obtained the decree. The court said: "Conceding that a party to the collusion may not obtain relief as a matter of right, nevertheless, if the court grants the motion, the result is not different from what it would be if the motion were denied and relief granted by the court *sua sponte.*" The accuracy of this observation is reflected in the result of the decision in *Winder v. Winder, supra.*

The reluctance of the law to dissolve the marital relation is reflected in the statutory waiting period of six months. This provision expresses the persisting desire and continuing hope of society for reconciliation. If the prevailing

spouse entertains a hope of reconciliation, as the plaintiff expressed in this case, even though such hope may be a weak and tenuous one, the whole policy of the law, reflecting as it does the public interest, would seem to be opposed to forcing such spouse to forego that hope and accept a divorce against her wishes.

We conclude that in the absence of legal collusion (which the court may meet on its own motion) the prevailing spouse may have a decree of divorce in his or her favor vacated and set aside as a matter of right, if application therefor is made within six months after rendition, unless some unconscionable result would be produced thereby. The application should not be granted *ex parte*, but only upon notice to the other party and an opportunity to be heard.

We do not share the appellee's concern over the effect of this conclusion upon the property interests of the parties. In view of the utter lack of finality of the decree during the six months' period, the possibility of its being vacated for the reasons and under the circumstances appearing in the *Winder* and similar cases, and the ever present possibility of abatement of the action by death with restoration of the rights of the surviving spouse as an heir, we do not think that either of the parties or strangers are likely to be prejudiced by vacation of the decree on application made during the interlocutory period. We think it is, or at least ought to be, the practice for all parties affected or likely to be affected by the decree to hold in abeyance any substantial changes in their personal or business affairs until the decree becomes final by the running of the six months' period.

The court has and should exercise its power upon vacation of a decree to make such orders as may be necessarily incident to the nullification of that part of its decree respecting property interests and for the greatest possible restoration of the parties to the *status quo* existing at the time of the decree.

The cause will be reversed and remanded, with directions to the trial court to afford the defendant a reasonable opportunity to make any further showing that he cares to make

against the application of the plaintiff, and if no unconscionable result of so doing be established, to vacate the decree of divorce and make such other orders as may be appropriate.

Plaintiff is allowed an attorney's fee of $100, to be taxed as costs in this court.

REVERSED.

WILLIAM BASSINGER V. STATE OF NEBRASKA.

5 N. W. (2d) 222

FILED AUGUST 7, 1942. No. 31370.

1. **Criminal Law.** In a criminal case where there is no satisfactory showing that the defendant could not have a fair trial in the county where the crime was committed, it is not prejudicial error to deny a change of venue.
2. **Jury.** "It is not error to overrule a challenge to the array that does not plead facts showing in what way the statute regulating the manner of drawing the jury panel was violated." *Uerling v. State*, 125 Neb. 374, 250 N. W. 243.
3. **Criminal Law.** Where there is no showing that a defendant could not properly prepare his defense prior to the time set for trial, it is not prejudicial error to deny a continuance.
4. ———. Where photographs of a murdered man and the scene of the crime tend to throw light upon or illustrate any controverted issue, and a proper foundation is laid, it is not prejudicial error to admit them in evidence.
5. ———. Where an article of clothing, shown to have been worn by the defendant both before and after a murder was committed, is exhibited to and identified by and testified about by several witnesses without objection, in the manner set out in the opinion, it is not prejudicial error to admit it in evidence.
6. ———. Where it appears that a murder was committed by using some sort of a hammer, and a hammer handle is found at the scene of the crime and identified as the handle from a hammer in the possession of the defendant prior to the murder, it is not prejudicial error to admit the handle in evidence.
7. **Homicide.** Where the evidence justifies a finding of guilt of murder in the first degree, it is not error prejudicial to the defendant for the trial court to submit to the jury the question of guilt of the lesser included offense of murder in the second degree.
8. ———. Where an information charges that the defendant did strike, beat, wound and maim the deceased causing his death, and

the state offers evidence showing that the murder was committed by the use of some sort of a hammer and that defendant had a hammer in his possession a short time prior to the murder, and that the handle of that hammer was found at the scene of the crime, it is not error for the trial court to refuse to instruct that the state must prove beyond a reasonable doubt that the murder was committed with that hammer and that hammer only.

9. **Criminal Law.** Section 29-2308, Comp. St. 1929, provides: "No judgment shall be set aside, or new trial granted, or judgment rendered, in any criminal case on the grounds of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, if the supreme court, after an examination of the entire cause, shall consider that no substantial miscarriage of justice has actually occurred." Pursuant to the above provision of the statute, we have examined the entire cause and have determined that no substantial miscarriage of justice has actually occurred and that error prejudicial to the defendant did not occur.

ERROR to the district court for Otoe county: WILMER W. WILSON, JUDGE. *Affirmed.*

Andrew P. Moran, for plaintiff in error.

Walter R. Johnson, Attorney General, and *Herbert T. White, contra.*

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER and YEAGER, JJ., and ELLIS, District Judge.

SIMMONS, C. J.

The defendant was convicted of the first degree murder of William George and sentenced to life imprisonment. He appeals.

For the most part the facts are not in serious dispute. That the deceased was murdered is not questioned. The dispute comes as to whether or not the defendant committed the crime.

William George and his wife lived in what is described as a "shack" near the river front in Nebraska City. This building had willow poles for its framework, covered with burlap on the sides near the ground, wire screen above that and a tar paper roof. Cooking in good weather was done

outside. In the inside were two beds and other personal belongings. They had also a trailer which was parked near-by. George and his wife were uptown on the evening of September 11, 1941; they returned home and went to bed in the same bed about 10 or 11 o'clock. The wife slept on the inside near the wall and George on the outside. Mrs. George testified that after they had gone to sleep she was aroused by her husband speaking and witnessed the attack which resulted in his death. Mrs. George testified that she tried to protect her husband from his attacker, that her husband tried to get out of bed and fell back in the position in which he died.

The deceased had five separate wounds on his head, caused, according to the doctor, by blows from some sort of a hammer. One of the wounds caused his death. He had also several wounds on his body. He had a wound on his right ring finger or knuckle and a swollen lip; these latter wounds, according to the physician, were several hours older than the head wounds.

Mrs. George positively identified the defendant as the assailant. She says that, after she was able to get out of bed, she put on shoes and a wrap and secured her husband's money from his pants, and sometime during these minutes hid it in a pillow, where it was later found by the officers. She says the defendant required her to go with him to find his shoes up near a corn patch, that they then returned, where he compelled her to enter the trailer and submit to intercourse. She testified that she then went to the near-by railroad station and reported the crime to the man on duty. This fixes the time of the murder at about 3 a. m., September 12, 1941. She told the agent that the crime had been committed by a tall, well-dressed man who had a black moustache, and that he was accompanied by a short man. She remained there until the officers were called and returned to the "shack" with them. She told the officers of the tall man, but later repudiated the story and said she was told by the defendant to tell it and was afraid to do otherwise.

There is some controversy about how the assailant entered the "shack." The screen door was not fastened. There was a tear in the burlap at the end of the aisle between the two beds. Mrs. George testified that it was not there before the murder. The defense produced witnesses indicating that it was made some days or weeks before. The sheriff saw tracks made by some one either in bare or stocking feet just outside of the "shack" by that torn place.

Other than the direct evidence of Mrs. George, there was evidence connecting the defendant with the crime. The defendant and Mrs. George had been acquainted for some time. She says that he had on two or three occasions suggested that she go to Kansas with him and be his housekeeper and that she had refused to do so. She says that defendant knew that George had some money and that on the day before the murder George had sold two hogs for cash. On the evening before the murder the defendant called at his brother's home sometime between 9 and 10 o'clock and, as testified to by the brother, the defendant told him that he had just had a fight with George; that he had "rolled him" and that the fight was provoked by things that George had said about the defendant and Mrs. George. Mrs. George denied that any such fight occurred. Both the brother and his wife testified that the defendant also borrowed a ball peen hammer from his brother that night, stating that he wanted to use it to set a saw the following day and that he took the hammer with him when he left that evening around 10 o'clock. The defendant told the sheriff that he had borrowed a claw hammer from his brother and stated that it had a long homemade handle; this description does not fit the one in evidence. No such hammer was found at any of the places suggested by the defendant. Defendant, on the day following the murder, went to work cutting logs in the timber near Plattsmouth as usual. His movements were testified to. He did not set a saw that day before his arrest, and the evidence did not indicate that he had occasion to do so.

Mrs. George testified that after the assault the defendant picked something round off the bed and put it in his pocket

and was hunting for something else and told her he was hunting a hammer handle. A hammer handle, broken near the head, was found on the floor in articles near the head of the bed the following day. The hammer head was not produced. The brother's wife identified the handle as that of her husband's hammer, which had been loaned to the defendant. The shirt which the defendant was wearing the night of the crime was not found. Overalls identified as those which he was wearing the morning after the crime had blood stains upon them, but the expert was unable to say whether or not it was human blood.

The defense was an alibi. As to the time of the crime, it consisted of the testimony of the defendant's daughter who stated that her father slept that night at her home, apparently in the same room with her and her husband, that she was up four times after 11 o'clock with a sick baby and was awake on other occasions, and that on every occasion her father was in bed and asleep. He was there when officers came about 5:30 a. m. to get him. He was later released and again arrested about noon the same day.

Several statements which the defendant made to the officers when they were investigating the offense were related to the jury and checked and evidence offered tending to disprove their truth.

In all of the evidence there are many contradictions.

The defendant waived a preliminary hearing. The information was filed in the district court on September 24, 1941. Preliminary to the trial defendant made an application for a change of venue. This was overruled. He then challenged the array. This was overruled. He then moved for a continuance over the term. This was overruled. He assigns these matters as error requiring reversal.

The daily newspaper at Nebraska City carried the usual amount of publicity, including statements made by the defendant, the widow and others, and reported also on the coroner's inquest which was concluded prior to the filing of the information. The application for a change of venue was based on the proposition that all of this publicity had made

it impossible for the defendant to have a fair trial in Otoe county. The state made a showing by over 200 affidavits of citizens from various sections of the county, all to the effect that the affiants saw no reason why the accused could not have a fair and impartial trial in Otoe county. The securing of these affidavits, the defendant charges, further inflamed the passion and prejudice against him.

The challenge to the array is based on the proposition that the trial jury for the regular September term had been chosen and called at the time the murder was committed, that they were in Nebraska City and about the courthouse during parts of these preliminary proceedings and must have been affected by the publicity and public clamor against the defendant. It is further based on the proposition that one O'Connell who was a member of the trial jury panel was called and served as a member of the coroner's jury; that on September 22 he served as a juror in the trial of a case and was then discharged from further jury service; and that of necessity he must have told others on the panel about the evidence before the coroner's jury. It is further based on the proposition that the sheriff, whose name was indorsed on the information as a material witness against the defendant, aided in drawing and impaneling the jury; and that his deputy, also a witness, subpœnaed the jury and had charge of them at times. Because of all of these matters, the defendant contends that the entire jury panel was disqualified.

On October 8 the county attorney secured permission to indorse the names of 28 additional witnesses on the information. The defendant moved to continue the case over the term. All of these motions of the defendant were denied on October 8 and the case set for trial October 14.

On October 8 it was stipulated that in addition to the names on the regular panel additional names sufficient to make 24 in the panel should be selected by lot from the jury list submitted by the county commissioners and that 12 others should be selected from the same list to act in the capacity of talesmen should they be needed. The trial began

October 14 at 9 a. m. The jury was secured that day and 13 of the state's 20 witnesses testified before 5 p. m. that afternoon. The *voir dire* of the jurors is not shown. The record does, however, contain the statement of the trial court that out of the 36 prospective jurors so made available but 29 were examined and that the defendant "started waiving on your second, third and fourth challenge." It does not appear that there was difficulty in securing a fair and impartial jury, satisfactory to the defendant at the time of the trial. Nor does it appear that there was anything illegal or improper in the selection of the array or the relation of the sheriff and his deputy to it. This court has held: "It is not error to overrule a challenge to the array that does not plead facts showing in what way the statute regulating the manner of drawing the jury panel was violated." *Uerling v. State*, 125 Neb. 374, 250 N. W. 243. There is no showing that the defendant's rights were in any wise jeopardized, nor does he make a showing that he was in any wise prejudiced by the trial during the term it was held, nor that he was unable to properly prepare his defense before the trial began. We see no error in the court's order denying these motions.

Defendant's next assignment of error is that the verdict is not sustained by the evidence. This is based on the argument that the state's evidence is unsatisfactory, conflicting, unbelievable, and that the defendant's defense of an alibi was proved. We have reviewed the evidence. That murder in the first degree was committed is clear. The evidence pointing to the defendant as the murderer, if believed by the jury as it evidently was, is sufficient to support the jury's verdict. The defendant did not testify in his own behalf. He elected to allow the evidence of Mrs. George, his brother and sister-in-law and others to go to the jury undenied and unexplained by him and of necessity undenied and unexplained by others. He relied upon his defense of an alibi. The jury believed the witnesses for the state. They obviously did not believe his alibi defense. To determine such disputed questions of fact is the function and duty of the jury.

The defendant next argues that the court erred in admitting exhibits 1 and 4 in evidence. Exhibit 1 is a photograph showing the deceased lying dead on his bed, the bed and a part of the room. Exhibit 4 shows a part of deceased and a part of the bed and the torn burlap in the side of the "shack." These pictures were taken by flashlight shortly after the officers arrived and show the scene as they found it. The pictures were identified by the officer and the photographer before being admitted in evidence. They show that a crime had been committed and the condition of the body when found by the officers. The defendant, citing *McKay v. State,* 90 Neb. 63, 132 N. W. 741, and *Flege v. State,* 93 Neb. 610, 142 N. W. 276, contends that these pictures served only to excite the minds and inflame the passions of the jury. They do not connect the defendant with the crime, save that exhibit 4 was used to show where the hammer handle was found and to show the opening in the burlap. However, the pictures are evidence not only to show that a crime was committed, but also the degree of that crime. These were issues for the jury to determine. They enable a better understanding of the controverted issue of the torn burlap and the place of entrance of the assailant and the place where the hammer handle was found. They were properly admitted within the holding that, when such evidence has no tendency to establish the guilt or innocence of the accused and is effective only to inflame the passions of the jury, it should not be received; when, however, evidence of this character tends to throw light upon or illustrate any controverted issue, then it is admissible. *Muzik v. State,* 99 Neb. 496, 156 N. W. 1056, and *Egbert v. State,* 113 Neb. 790, 205 N. W. 252.

Defendant next argues that the admission of a pair of overalls in evidence was prejudicial error. The overalls in question are striped overalls. Defendant's brother testified that defendant had on striped overalls the evening before the crime. At that time, the brother says, there were blood stains on the defendant's shirt, but we find no mention of blood on the overalls; defendant told one of the witnesses

that he was wearing these overalls the night before the murder. The defendant had on these overalls the day of the crime when he was arrested the second time. The overalls were exhibited to the witnesses; the expert demonstrated how he determined that there were blood spots upon them; the sheriff identified them; the court received them in evidence, then excluded them after the expert testified on cross-examination that he did not know whether or not the spots were human blood or when the blood got there. They were then offered with the indications of the blood spots removed. In the light of these circumstances, we see no prejudicial error in the admission of the overalls.

Defendant next argues that the admission of the hammer handle in evidence was prejudicial error. This is predicated on the fact that it was not found until some time after the crime and when relatives and friends were cleaning up the "shack" (that it was found in the "shack" is not questioned in the evidence); that finger prints and palm prints were not taken and that the identification by the defendant's sister-in-law was not positive. When shown the handle she testified that she had seen it "a couple or three days before" the murder, that she saw the defendant take the hammer away from her home. She described and pointed out identification marks and said she was "almost positive" it was the same hammer handle that was on her husband's hammer. As we see it, sufficient foundation was established to permit the exhibit to go to the jury. The argument presented goes to the weight that body should give to the testimony.

Defendant next argues that the court erred in denying his motion for an instructed verdict of not guilty. We have already determined this matter in considering the sufficiency of the evidence.

Defendant next assigns as error the giving of the following instruction: "You are instructed that in order to warrant a conviction on circumstantial evidence, the circumstances, taken together, should be of a conclusive nature and tendency, leading on the whole, to a satisfactory conclusion,

and producing, in effect, a reasonable and moral certainty that the accused, and no one else, committed the offense charged; and it is the invariable rule of law that, to warrant a conviction upon circumstantial evidence alone, such facts and circumstances must be shown as are consistent with the guilt of the party charged, and as cannot, upon any reasonable theory, be true, and the party charged be innocent; and in this case, if all the facts and circumstances relied upon by the state to secure a conviction can be reasonably accounted for upon any theory consistent with the innocence of the defendant, then the jury should acquit the defendant."

Defendant's objection to this instruction is that it does not strictly follow the language long used by this court and last stated in *Watson v. State*, 141 Neb. 23, 2 N. W. (2d) 589, that the word "facts" is omitted once (although included twice along with "circumstances"); that "should" and not "must" is used (although "must" is used in the following clause); that "a" is used instead of "such;" that the court used (but should not have used) "nature and tendency" "leading" to a "satisfactory conclusion" and "producing" in "effect" a "reasonable and moral certainty;" and that the court should have used "necessary" and "essential" and "competent evidence beyond a reasonable doubt;" that the court erred in referring to an "invariable rule of law" when it did not state it as it has heretofore been stated; that it should not have used "circumstantial evidence *alone*" because there was direct evidence in this case also. These objections are a mere play on words. If, as defendant argues, the use of the word "alone" told the jury "they could disregard all the direct evidence," then the instruction was quite favorable to the defendant in that it would tell them to disregard the testimony of Mrs. George identifying the defendant as the assailant of her husband. We see no error prejudicial to the defendant in the instruction.

The defendant next argues that the court in advising the jury as to the crime charged used the word "feloniously" in the instruction and did not define the word. Error is not pointed out, and we see none.

Defendant next argues that the court should not have instructed the jury as to the elements of murder in the first degree and contends that the evidence does not justify the instruction. We have already determined that question in considering the sufficiency of the evidence.

Defendant next argues that the court should not have instructed as to murder in the second degree as "the state did not prove murder in the second degree," citing *Clark v. State,* 131 Neb. 370, 268 N. W. 87. The cited case does not support the contention. There the jury were instructed on murder in the first and second degrees, when the evidence supported only a finding of manslaughter. Here the evidence justified the jury in finding the defendant guilty of murder in the first degree. We do not understand how defendant could be prejudiced by the jury's being instructed in such a way as to enable them to find him guilty of the less serious offense. In *Hopt v. Utah,* 110 U. S. 574, 4 S. Ct. 202, it appears that the defendant, if guilty of the crime, was guilty of murder in the first degree. The court, however, held that "it was for the jury * * * to say whether the facts made a case of murder in the first degree or murder in the second degree," and that it was proper for the court to instruct the jury as to the statutory definition of murder in the first and second degrees. See, also, *People v. Thiede,* 11 Utah, 241, 39 Pac. 837. If the trial court by this instruction opened the door and made it possible for the jury to find the defendant guilty of murder in the second degree and escape the penalty which the law imposes for murder in the first degree, it was not error prejudicial to the defendant.

The defendant next argues that the court erred in refusing to give requested instruction No. 17; that where the state "advances a theory or claims that the murder was committed in a certain manner or with a certain weapon then the state must prove beyond a reasonable doubt not only that the defendant may have had such weapon, but that is the weapon and the only weapon used * * * and unless you find beyond a reasonable doubt that the defendant had a hammer and that the murder was committed by a blow of the

hammer such as the state claims the defendant had, then your verdict should be one of not guilty." The defendant cites no authority to support his contention. In *Olive v. State,* 11 Neb. 1, 31, 7 N. W. 444, the defendants were found guilty of killing "by means to the jurors unknown." There was some evidence as to how the deceased was killed. In that case this court said:

"It not unfrequently happens in cases of homicide that the condition of the remains of the deceased is such that it is absolutely impossible to know with reasonable certainty by which of several means life was taken, while there is no doubt whatever as to who was the guilty party. In such a case a count of the description of the one now under consideration enables the jury to find a verdict, when if it required them to agree upon the particular instrument or means used by the slayer, they might be unable to do so.

"While in our opinion the evidence would support a finding that death was caused either by hanging or shooting, it is not so clear by which mode as to warrant us in saying that, in this respect, the verdict was unjustifiable."

In *Long v. State,* 23 Neb. 33, 41, 36 N. W. 310, the indictment charged the commission of the murder with a "bludgeon." The court instructed the jury that if the death was produced by striking "with a bludgeon, bolt, or club" it would be sufficient. This court there said: "The testimony failed to show the character of the instrument with which death was produced, the body of the deceased being almost entirely consumed by fire, the house in which she resided being burned over her body at the time of her death. There was some proof tending to show the description of an iron bolt or club soon after the death of deceased. * * * It is not essential that the testimony should prove the instrument to be the identical one charged, providing the death was produced in substantially the same way." The rule is stated in 2 Wharton, Criminal Evidence (11th ed.) 1810, as follows: "The trend of modern decisions, it will be found, is to the effect that the substance of homicide being the felonious killing, proof of any killing in any manner or by any means

that conform substantially with the indictment is sufficient." The state charged in the information that the defendant "did strike, beat, wound and maim" the deceased, that he died "as a result thereof," and that the defendant "thus committed murder in the first degree." The information makes no reference to the instrument with which the wounds were inflicted. The state established by uncontroverted evidence that the wound causing death could have been made with a hammer such as was shown to have been in the possession of the accused a few hours prior to the murder. To require the state to prove that that hammer and that hammer only was the one used in the commission of the murder would be to hold that a murderer could escape the penalty of his crime merely by concealing the nature or the exact identity of the instrument with which he committed the assault. The state is not required to carry such a burden. The instruction was properly refused.

Finally, the defendant contends that the court erred in refusing to give a tendered instruction to the effect (1) that the defendant and no other person committed the crime; (2) that it was committed in the manner and with the weapon that the state contends; and (3) that the murder might have been committed by some other person or in some other manner or with some other weapon than that which the state claims was used and, if so, then they should find the defendant not guilty. This requested instruction contains two propositions, separately stated in (1) and (2) and consolidated in (3). Proposition (1) was fully covered by instruction No. 3 given by the court. There is no dispute in the evidence as to the "manner" in which the murder was committed. The proposition as to the "weapon" has been decided in connection with tendered instruction No. 17. The court did not err in refusing to give this instruction.

Section 29-2308, Comp. St. 1929, provides: "No judgment shall be set aside, or new trial granted, or judgment rendered, in any criminal case on the grounds of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or proce-

dure, if the supreme court, after an examination of the entire cause, shall consider that no substantial miscarriage of justice has actually occurred." Pursuant to the above provision of the statute, we have examined the entire cause and have determined that no substantial miscarriage of justice has actually occurred and that error prejudicial to the defendant did not occur.

The judgment is affirmed.

AFFIRMED.

ROSE FILLEY, APPELLEE, V. SAMUEL MANCUSO ET AL., APPELLANTS.
5 N. W. (2d) 91

FILED AUGUST 7, 1942. No. 31404.

Fraudulent Conveyances. The uniform construction of section 36-401, Comp. St. 1929, concerning conveyances to defraud creditors, has been that such a conveyance is good as between the parties and is void only as to such creditors as attack it.

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

Joseph O. Burger, for appellants.

Beckman & Beckman, contra.

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

SIMMONS, C. J.

This is an action to set aside a deed as having been made in fraud of plaintiff, a judgment creditor of defendants Mancuso. From a decree in plaintiff's favor defendants, grantors and grantees, appeal.

Plaintiff's petition, liberally construed, alleges that she recovered a judgment against one Samuel Mancuso in Douglas county on January 18, 1938, for the sum of $5,207.74, and interest and costs; that execution has been issued and

returned unsatisfied; that Mancuso claims he is insolvent, that he has no property liable to execution; that Mancuso, at the time of the rendition of said judgment, held legal title to, and was the owner of, certain described real estate in Douglas county; that on September 22, 1938, Mancuso and wife executed and delivered a deed conveying said real estate to Gordon V. and Virginia M. Potter; that said deed had been recorded; that said conveyance was made for the purpose of defrauding the plaintiff, and after plaintiff's judgment lien had attached; and that it was null and void as to the plaintiff.

The copy of the deed attached to the petition recites a consideration of two dollars; describes the Potters as husband and wife and names them as grantees as joint tenants and not as tenants in common.

Plaintiff joined as defendants Mancuso and wife and the Potters (described in the title of the petition as husband and wife) and the tenants. Plaintiff prayed that the deed be declared null and void, that the real estate be sold on execution issued on said judgment and the proceeds applied on said judgment lien.

Defendants denied all of said allegations. Plaintiff's proof consisted of proving (1) that Mrs. Potter was the daughter of Mancuso; (2) that plaintiff recovered a judgment against Mr. and Mrs. Mancuso on January 18, 1938, for $5,207.74 and interest at 10 per cent. per annum and costs; (3) the conveyance of the property by the Mancusos to the Potters on September 22, 1938, and the recording of the deed.

The defendants offered no evidence.

The trial court found (1) that the conveyance was made without a valid consideration and with intent to hinder, delay and defraud creditors and that the Potters received title with full knowledge of the fact that plaintiff was a judgment creditor; (2) that there was due from the defendant Samuel Mancuso to the plaintiff on said judgment the sum of $7,301.93, which included the costs of the present action and apparently the costs of the first action.

The trial court decreed that the deed was null and void; "vacated" and "set aside" the deed; "canceled and annulled" the record thereof; and "subjected" the property to the "payment of the debt set forth in the plaintiff's petition," and directed that the sheriff proceed as upon execution and sell said real estate.

From this decree the defendants Mancuso and Potter appeal and present two matters: First, that the court erred in determining the amount due upon the judgment as of the date of the trial; second, that the court erred in decreeing that the deed was null and void and canceling the record thereof. The defendants Mancuso do not here contend that they are not indebted to the plaintiff, but rather that their indebtedness is upon the judgment pleaded in the petition, proved at the trial, and upon which judgment the plaintiff prayed that the property be sold on execution. We think that the trial court erred in making a finding of fact as to the amount due on the judgment. The matter was not in issue. There was no evidence as to the amount due. If this finding is effective as a new judgment against the defendant Samuel Mancuso, a question we do not determine, then it would result in compounding the interest on the original judgment and charging interest on the costs of the original action. Clearly the plaintiff is not entitled to such a judgment. If it was not effective, then it has no place in this decree. Defendants do not here question the right of plaintiff to subject the property to sale to satisfy the judgment, but it is to satisfy the judgment of January 18, 1938, that the property may be sold and upon which the proceeds of the sale must be applied.

Defendants next urge that the trial court erred in holding the deed null and void and canceling the same of record; that the deed is valid as between the parties thereto and as to all persons except the plaintiff; and that the decree should have been limited to subjecting the property to sale under execution on plaintiff's judgment. With this contention we agree. The uniform construction of section 36-401, Comp. St. 1929, concerning conveyances to defraud creditors, has

been that such a conveyance is good as between the parties and is void only as to such creditors as attack it. *Beels v. Flynn*, 28 Neb. 575, 44 N. W. 732; *German Nat. Bank of Hastings v. Leonard*, 40 Neb. 676, 59 N. W. 107; *Baldwin v. Burt*, 43 Neb. 245, 61 N. W. 601; *Goodman-Buckley Trust Co. v. Poulos*, 124 Neb. 697, 248 N. W. 64.

The effect of this decree is to revest the title in Mr. Mancuso. He has not asked for that relief, and under plaintiff's theory of the case, that the transfer was made for the purpose of defrauding a creditor, he is not entitled to that relief. This court held in *Goodman-Buckley Trust Co. v. Poulos, supra*, that "It is a general rule that a court of equity will not aid a fraudulent grantor to recover from his grantee property or its proceeds transferred in fraud of creditors."

The judgment of the district court is reversed and the cause is remanded, with instructions to enter a decree in accord with this opinion.

REVERSED.

ESTHER DEBUS, APPELLEE, V. HENRY J. AMEN ET AL., APPELLANTS.
5 N. W. (2d) 92

FILED AUGUST 7, 1942. No. 31390.

1. **Automobiles.** A motorist is guilty of actionable negligence and liable for resulting damages, where he drives into the center of the intersection of city streets without slackening an excessive speed or changing his course and runs violently into the automobile of another motorist who has the right of way and who is free from negligence.
2. ———. In an action to recover damages for personal injuries, it is not error to submit to the jury the issues raised by the pleadings, where the evidence is sufficient to support a verdict in favor of plaintiff, on those issues.
3. **Damages.** In an action against defendants to recover damages for causing a collision between motor vehicles in an intersection of streets, evidence narrated in opinion *held* sufficient to support a verdict for $2,500 in favor of plaintiff.

4. Appeal. Where the record for review shows that a mere error in an instruction did not prejudice the party aggrieved by the verdict, the error is not reversible.

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

Max Kier, for appellants.

Frederick J. Patz, contra.

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

ROSE, J.

This is an action by Esther DeBus, plaintiff, to recover from Henry J. Amen and Edward Krumm, defendants, damages in the sum of $10,650 for negligently injuring her person and her automobile.

In the petition plaintiff alleged that, while she was carefully and properly driving her Ford automobile north on Eighth street in the city of Lincoln about 4:20 p. m. January 8, 1941, and while the front half of her car was north of the center line of intersecting F street and east of the center line of Eighth street, a Dodge motor truck owned by Henry J. Amen, defendant, and driven from the east on F street by his employee, Edward Krumm, defendant, ran into plaintiff's car, striking it on the right door and on the right front fender, causing the injuries of which complaint is made.

It was further alleged that the collision and resulting injuries to plaintiff and to her Ford car were caused by the negligence of defendant Edward Krumm in operating the motor truck of his employer, Henry J. Amen, defendant, at a greater speed than reasonable and proper at the time and place; in driving it in a careless manner without keeping a proper lookout or having it under control.

In answer to the petition, defendants admitted the occurrence of the collision, but denied negligence on their part, and alleged that the sole cause of the accident and of the resulting injuries to plaintiff was her own negligence in driving her Ford car improperly at a high speed without keep-

ing a proper lookout and in failing to yield the right of way.

The reply to the answer contained a general denial.

The trial resulted in a verdict in favor of plaintiff for $2,500. From judgment therefor, defendants appealed.

On appeal defendants take the position that a verdict should have been directed in their favor on the ground that the oral evidence and physical facts show as a matter of law that plaintiff was guilty of contributory negligence in a degree more than slight and such as to bar a recovery.

The collision occurred at or slightly north of the center of the intersection of Eighth and F streets in Lincoln. Eighth street runs north and south and F street east and west. They cross each other at right angles. At the time of the accident, there were no stop signs at Eighth and F. Plaintiff approached the intersection from the south while going north on Eighth street, and Krumm, driving west, approached the intersection from the east. Plaintiff testified that she stopped at a stop sign on D street, which is two blocks south of F, and proceeded north at about 12 miles an hour; that when about four car lengths south of F she looked to the left, west, where she could see about a third of a block on F, and saw no traffic; that, when about three car lengths south of F, she looked to the right, east, down F to the second house and did not see any traffic coming west; that, when about two car lengths south of F, she looked again to her right and did not see any car coming from the east; that, when even with the sidewalk line running east and west on the south side of F, she saw the Amen truck coming west in the center of F street toward Eighth between four and five car lengths from the intersection; that, without sensing any danger and thinking she could proceed in safety, she started across the intersection at about 10 miles an hour; that, when near the center of the intersection, with the front end of her car three feet north of the center line of F, she saw the Amen truck coming straight toward her without changing its course or slackening its speed which was 25 miles an hour; that she tried to get out of the way and turned her Ford to the left; that the front of the truck struck the right

door and the right front fender of her Ford; that, after the motor vehicles came to rest, Krumm came to her car before she had been taken from the wreck and said: "I didn't see you in time to stop." Eyewitnesses for plaintiff testified in substance: Plaintiff came into the intersection first, going 10 or 15 miles an hour. Krumm approached the intersection at 30 or 35 miles an hour in the center of F street without slackening his speed or changing his course or blowing a horn and struck the front right side of plaintiff's Ford. If these witnesses told the truth, plaintiff had the right of way and was free from negligence and defendant Krumm violated traffic rules of the city of Lincoln and negligently caused the collision.

On the contrary, Krumm testified in effect: He was first in the intersection. When the cars collided in the intersection he was going between 10 and 15 miles an hour and plaintiff between 30 and 35. While plaintiff was in her Ford after it came to rest, Krumm opened the left door and she asked: "Who was the man I hit?" He admitted he was the man and she said: "I didn't see your car at all." Eyewitnesses called by defendants testified that Krumm was first to enter the intersection; that his speed was about 15 miles an hour and that of plaintiff 25 miles; that the DeBus Ford struck the Amen truck.

In connection with the testimony outlined, the cross-examination of plaintiff and her witnesses and the physical facts disclosed by the entire record do not warrant the conclusion of defendants that the contributory negligence of plaintiff was such as to bar her claim for damages. On the record of conflicting evidence, the issues of negligence, of contributory negligence, of proximate cause and of plaintiff's injuries were clearly questions of fact for the jury, not questions of law for the court. The trial judge heard in detail all the evidence in the long record and held that plaintiff had made a case for submission to the jury. The jury also heard all the evidence, viewed the scene of the accident and rendered a verdict in favor of plaintiff. Error in the failure of the trial court to direct a nonsuit has not been found.

An instruction on the measure of damages is condemned by defendants as erroneous. In the event of a verdict in favor of plaintiff, she was permitted by the instruction to recover the difference between the value of her automobile immediately before and after the accident. This instruction, if erroneous, did not prejudice defendants for the reasons that recovery for damages to plaintiff's car was specifically limited to $210 and there was evidence of greater damages.

Referring to plaintiff, the same instruction on the measure of damages is also criticized by defendants because it permitted the jury to take into consideration "the pain and suffering which she has already endured and the pain and suffering, if any, which she will suffer in the future, remembering that the plaintiff cannot recover for pain and suffering in the future unless the same has been established by the evidence with reasonable certainty."

Plaintiff's personal injuries resulting from the collision, as shown by uncontradicted evidence, included: Concussion of the brain; bruises on the right leg and right ankle; fractured cartilage of the nose; fracture and displacement of right collar bone; broken ribs; injury to left lung; permanent deformity of right collar bone; limited action of right arm and right shoulder. The evidence tends to prove intense suffering from these injuries and that pain from the natural use of the right arm and shoulder has not yet subsided. In view of the evidence and of the verdict, which does not seem to be excessive, the instruction on the measure of damages is not erroneous to the prejudice of defendants.

AFFIRMED.

STATE, EX REL. WALTER R. JOHNSON, ATTORNEY GENERAL, RELATOR, V. CONSUMERS PUBLIC POWER DISTRICT, RESPONDENT: CITY OF SIDNEY ET AL., INTERVENERS.

5 N. W. (2d) 202

FILED AUGUST 7, 1942. No. 31433.

1. **Quo Warranto.** A proceeding in *quo warranto* is a civil action, as defined by our Civil Code, and is governed by the provisions thereof.
2. **Pleading.** The forms of pleading in civil actions in courts of record and the rules by which their sufficiency may be determined are those prescribed by our Civil Code.
3. **Statutes.** Our Civil Code as a statute complete in all its parts should be so construed as to make all of its parts harmonize with each other and render them consistent with its general scope and object.
4. ———. "That which is implied in a statute is as much a part of it as that which is expressed." 59 C. J. 973.
5. **Quo Warranto.** Under the terms of our Civil Code, issues of law or of fact in *quo warranto* are required to be joined by the respondent by filing an appropriate demurrer or an appropriate answer to the information filed against him.

Original proceeding in *quo warranto* by the state, on the relation of the attorney general, against Consumers Public Power District. *Motion to dismiss overruled.*

Walter R. Johnson, Attorney General, and *Edwin Vail,* for relator.

Lee & Sheldahl, for respondent.

L. J. TePoel, Morrow & Miller, E. D. Crites, P. J. Heaton, Robert J. Bulger and *Bern R. Coulter,* for interveners.

Flansburg & Flansburg, amici curiæ.

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

EBERLY, J.

This original proceeding in *quo warranto* was instituted by the attorney general of the state of Nebraska in conformity with the direction of the Chief Executive, to "determine

by what warrant" the "Consumers Public Power District," respondent herein, "exercises possession, ownership and control of all and singular and any part or portion of the interconnected and integrated electric system known as the Western Division of the Western Public Service Company," and as described in the amended information filed herein "and any part or portion thereof, located within the boundaries of any individual city or town;" and to require said respondent "to cease and desist from exercising any ownership of, or control over, said properties, or any part thereof; and be excluded from the exercise of any pretended rights, franchises, or privileges with respect thereto."

The cities of Sidney, Chadron, Scottsbluff, and Bridgeport, Nebraska, each, upon leave of this court first obtained, filed its separate petition in intervention in this cause, claiming an interest in the matter in litigation in this proceeding and in the success of the plaintiff herein, and each joining with the plaintiff in claiming for each of such municipalities what was sought in the amended information in *quo warranto* filed in this cause.

To this amended information of the attorney general the Consumers Public Power District filed its motion "to abate and dismiss the amended information heretofore filed in this cause against it for the reasons and upon the grounds" set forth in such motion. A similar motion was presented by the respondent as to the separate petitions of intervention of the city of Chadron, the city of Bridgeport, the city of Sidney, and the city of Scottsbluff.

The first issue presented by the briefs of the parties is a question of procedure, "whether or not a motion to dismiss, such as that filed by respondent, is a proper procedure."

Original jurisdiction in *quo warranto* is vested in this court by section 2, art. V of the Constitution, in the following words: " * * * The supreme court shall have jurisdiction in all cases relating to * * * *quo warranto* * * * , and such appellate jurisdiction as may be provided by law. * * * " Sections 20-21,112 to 20-21,139, Comp. St. 1929, constitute the only statutory provisions applicable to the subject of

quo warranto. Of these, sections 20-21,112, 20-21,115, 20-21,116, 20-21,117, Comp. St. 1929, relate to the question before us. The first section of the statutes last referred to prescribes who the defendants to the action may be. Section 20-21,115 directs that "Such information (in *quo warranto*) shall consist of a plain statement of the facts which constitute the grounds of the proceeding, addressed to the court, which shall stand for an original petition." Section 20-21,-116 provides that "Such statement (which shall 'stand for an original petition') shall be filed in the clerk's office, and summons issued and served in the same manner as hereinbefore provided for the commencement of actions in the district court." Section 20-21,117 provides: "The defendant shall appear and answer such information in the usual way, and issue being joined it shall be tried in the ordinary manner." The provisions quoted were originally enacted in 1866 as title XXIII of the Code of Civil Procedure. In this connection, section 20-802, Comp. St. 1929, reads as follows: "The rules of pleading formerly existing in civil actions are abolished and hereafter the forms of pleading in civil actions in courts of record, and the rules by which their sufficiency may be determined, are those prescribed by this Code."

Quo warranto is a civil action both in substance and in form. *State v. Standard Oil Co.*, 61 Neb. 28, 84 N. W. 413.

The conclusion follows that the rule of construction prescribed by the Code provision last cited is applicable to the instant case.

Again, we are here occupied with ascertaining the proper construction of certain Civil Code provisions. The proper rule is that the meaning of a section of statute must be determined from the entire scope and purpose of legislation and that the statute should be given effect as a whole. *Jones v. York County*, 26 Fed. (2d) 623. In construing provisions of our Civil Code effect must be given to every word, clause or sentence therein. In other words, our Civil Code as a statute complete in all its parts should be so construed as to make all of its parts harmonize with each other and render them consistent with its general scope and object. *State*

v. Bartley, 39 Neb. 353, 58 N. W. 172; *State v. City of Lincoln*, 101 Neb. 57, 162 N. W. 138.

Recurring to the provisions of the statute quoted relating to *quo warranto* we note that, when summons is "issued and served in the same manner as hereinbefore provided for the commencement of actions in the district court," the statutory requirement is that the defendant shall appear and answer such information in the usual way. We take it that the requirement is that the defendant shall "answer" in the usual way as contemplated by the provisions of the Civil Code.

The employment in section 20-21,116, Comp. St. 1929, quoted, of the words, "as hereinbefore provided for the commencement of actions in the district court," clearly designates section 20-503, Comp St. 1929. "That which is implied in a statute is as much a part of it as that which is expressed." 59 C. J. 973.

The effect of the language above quoted is to incorporate as part of the summons to be issued in *quo warranto* actions the requirements of section 20-503 to the effect that "The summons shall be dated the day it is issued. It shall be directed to the sheriff of the county, and command him to notify the defendant or defendants named therein that he or they have been sued, and *must answer* the petition filed by the plaintiff, giving his name at the time stated therein," etc. (Italics ours.) The definition of the term "answer" and the requirements as to pleadings exacted thereby as the same is employed in this "summons," the issuance of which is required as a commencement of all civil actions (section 20-501) including *quo warranto*, is determined by section 20-803, which provides: "The only pleadings allowed are * * * The answer or demurrer by the defendant * * * ." It also follows that complete compliance with section 20-21,117 has been had when, after being served with summons, the defendant appears and files his answer or demurrer to the pleading of plaintiff. Either properly constitutes an "answer to such information in the usual way."

It appears that the practice in *quo warranto* actions gen-

erally conforms to the conclusion here arrived at. "A *quo warranto* information is subject to demurrer the same as a declaration, petition, or complaint in a civil action. Thus, the information may be demurred to for failure to set forth sufficient facts, and any defect in the structure of the information may be taken advantage of by demurrer. While a complaint or information met by a demurrer is to be construed against the pleader, yet all facts well pleaded are, in accord with demurrers in other cases, admitted. Pleadings subsequent to the information may likewise be met with demurrer, as for example, a plea or replication." 22 Standard Ency. of Procedure, 79.

"The sufficiency of an information in the nature of *quo warranto*, or of a plea thereto traversing usurpation and justifying, or of a replication, may be raised by demurrer. In accordance with the general rule governing demurrers the truth of the allegations in the plea is conceded by a demurrer. A demurrer, however, admits only such facts as are well pleaded. It does not admit conclusions of law stated by the pleader, or the construction placed by him upon statutes." 22 R. C. L. 712, sec. 39.

"The legal sufficiency of a pleading, such as a petition, complaint, information, or plea in a *quo warranto* action or proceeding may be questioned by demurrer; but a pleading cannot be adjudged insufficient in point of law upon a motion to quash or dismiss, or at least such a motion will not be sustained where it is based upon a defect which may be cured or remedied by amendment." 51 C. J. 352.

The conclusions from the provisions of our Code of Civil Procedure cited or set forth herein, and from the authorities generally above quoted and referred to, are, eliminating such questions as requirng the information in *quo warranto* to be made more definite and certain, that the respondent is required to "answer such information in the usual way" (Comp. St. 1929, sec. 20-21,117); that he is limited to filing his demurrer or answer to the information filed against him (Comp. St. 1929, sec. 20-803); and that the issue so joined

"shall be tried in the ordinary manner" (Comp. St. 1929, sec. 20-21,117).

In the instant case the respondent has not answered or demurred to the information of the attorney general as thus required. It has entitled its pleading as a "Motion to dismiss amended information," and in the first paragraph thereof moves the court "to abate and dismiss the amended information," and has verified the same under oath as to the contents thereof and the allegations and grounds thereof. A like motion was filed by the respondent to the several petitions of intervention filed herein by the several interveners by leave of court first obtained. The question thus presented is whether in so doing the requirements of the Code have been substantially complied with by the respondent. In support of its pleading the following cases are cited by it: *State v. Drainage District,* 100 Neb. 625, 160 N. W. 997; *State v. Atchison & N. R. Co.,* 38 Neb. 437, 57 N. W. 20, and, also, another case by the same title reported in 24 Neb. 143, 38 N. W. 43; *State v. Tillma,* 32 Neb. 789, 49 N. W. 806; *Harpham v. State,* 63 Neb. 396, 88 N. W. 489; *State v. Davis,* 64 Neb. 499, 90 N. W. 232; *State v. Nolan,* 71 Neb. 136, 98 N. W. 657; *State v. Gower,* 73 Neb. 304, 102 N. W. 674. All of the cases so cited (which were disposed of on demurrer to informations in *quo warranto*) evidence that the practice observed in this jurisdiction is in accord with the conclusion heretofore stated in this opinion, viz., that the respondent in his pleading is properly limited to demurrer or answer. In none of the cases above listed is a motion to abate and dismiss such as appears in the present case approved as proper practice.

However, one case is cited by respondent, *State v. Donahue,* 91 Neb. 311, 135 N. W. 1030, in which a pleading employed and presented by the respondent was entitled, "Motion to Quash Information in *Quo Warranto.*" As to this the court in its opinion says in part: "A motion was filed by the respondent which was treated by the counsel and the court as a general demurrer to the information. This motion was overruled, and the respondent now contends that

this ruling was wrong and that the information fails to state any cause of action against the respondent," etc. The point thus raised in the *Donahue* case was finally determined by this court, the fourth paragraph of the syllabus relating thereto then adopted being as follows: "If the allegations of an information are indefinite, the remedy is by motion. A general demurrer will not be sustained if the information as a whole charges a wilful neglect of duty within the provisions of the statute."

It thus appears that the question so presented was disposed of by the court as involving a general demurrer.

The distinction between the situation in the *Donahue* case and the instant case arises in part from the fact that in the former case the "motion to quash" filed by the respondent was by unanimous consent treated by counsel and court as a general demurrer, and the question thereby raised by this pleading, so considered, was so determined. Here, the attorney general expressly refuses consent, and expressly demands that rules of practice applicable, and the provisions of our Code of Civil Procedure upon which they are based, be enforced. This is not a mere captious objection. The results of the two procedures involve fundamental differences. A demurrer sustained, the case still pends. *Larson v. Sloan*, 77 Neb. 438, 109 N. W. 752. The right of amendment is provided for (section 20-854), a refusal of which presents a question for judicial review. On the other hand, a "motion to abate and dismiss" sustained, the case ends. Amendments thereafter, if permitted, are allowed solely as a matter of judicial grace, and not of right.

In the absence of a rule of court permitting, or of a statute authorizing, or consent of parties in interest justifying, none of which is present in the instant case, we are not ordinarily permitted to regard and treat a motion to dismiss and a general demurrer as interchangeable.

The applicable rule has been stated by a text-writer in the following terms: "There is a distinction between the functions performed by a demurrer and a motion to strike out, or to expunge, or to dismiss, or to make more definite and

certain, or for judgment on the pleadings, or a statutory motion for a compulsory amendment, and they cannot be used interchangeably, though the same pleading may be open to attack both by motion and demurrer." 6 Standard Ency. of Procedure, 851. See, also, *Illinois Central R. Co. v. Adams*, 180 U. S. 28, 21 S. Ct. 251; *Littlefield v. Maine Central R. Co.*, 104 Me. 126, 71 Atl. 657; *Symons-Kraussman Co. v. Reno Wholesale Liquor Co.*, 32 Nev. 241, 107 Pac. 96; *Ellis v. Reddin*, 12 Kan. 306.

In the instant case, we have two motions to dismiss, each of which contains allegations of new facts and charges which, in effect, add to and modify the allegations contained in the pleadings against which they are directed. To accept and treat these motions as, in effect, general demurrers under the Civil Code of Procedure would require their treatment in all respects as such.

"The merits of a general demurrer to a petition must be determined from the allegations of the petition alone." *City Savings Bank v. Carlon*, 87 Neb. 266, 127 N. W. 161.

The new matter set out in these motions to "abate and dismiss," if they are to be considered as general demurrers, cannot be used to sustain them. More than this, its presence as an inseparable part of these pleadings, if such are to be construed to be in legal effect the equivalent of general demurrers, would constitute these pleadings "speaking demurrers" and require them to be overruled. 49 C. J. 423.

It follows, therefore, that, respondent having failed to answer or demur to the information in *quo warranto* as required by the provisions of our Code of Civil Procedure, the motions to abate and dismiss tendered by it are overruled, with permission to further plead within 20 days of the entry of this order, if so advised.

MOTION TO DISMISS OVERRULED.

CARTER, J., dissenting.

In my judgment, the motion to dismiss should have been treated as a demurrer. The opinion of the majority shows the futility of litigation when technical procedural rules are

permitted to impede rather than facilitate the final adjudication of disputed questions.

PLATTE VALLEY IRRIGATION DISTRICT ET AL., APPELLANTS, V. ALBERT C. TILLEY ET AL., APPELLEES.
5 N. W. (2d) 252

FILED AUGUST 7, 1942. No. 31319.

1. **Venue.** "An action against a public officer for any neglect of official duty must, under the provisions of section 20-404, Comp. St. 1929, be brought in the county where the cause or some part thereof arose." *State v. Cochran*, 138 Neb. 163, 292 N. W. 239.
2. ———. A suit to obtain an injunction, and the establishment of the relative rights of the parties to the action, against the executive and administrative officers of the state to compel the enforcement of appropriative water rights according to priority by restraining unlawful diversions by junior appropriators is properly brought in the county where the damages occurred.
3. ———. Where a court has jurisdiction of the subject-matter of an action and obtains service of summons upon a defendant amenable to service in that county, who has a substantial interest in the subject of the suit adverse to plaintiff, a summons may properly issue to a defendant public corporation domiciled in another county.
4. **Action.** Ordinarily, a suit to determine the relative rights of the parties will be determined as of the time of the commencement of the action. The fact that a default no longer exists at the time of trial will not require a dismissal where the decision may affect similar future acts.
5. **Waters.** The granting of an appropriation by the state, which includes the right to construct a diversion dam in the river, carries with it the incidental right to impound unappropriated waters behind the dam to facilitate the diversion of water under its appropriative right.
6. ———. Where it appears that the pondage so held was captured during the nonirrigation season, or from waters not usable for irrigation purposes during the irrigation season, a senior irrigation appropriator is not entitled to its release for irrigation purposes as a part of the natural flow of the stream.
7. ———. Under the circumstances shown, the rights of an appropriator for power and storage purposes will not be jeopardized by its refusal to obey an order of the bureau of irrigation to re-

lease pondage behind its dam where it appears that such order was not in accord with priority rights and was coerced by a void peremptory writ of mandamus.

8. ———. A senior appropriator of public waters has a prior right over all junior appropriators so long as water can be delivered to its headgate in usable quantities.

9. ———. The obtaining of irrigation water by the procurement of a restraining order enjoining the closing of the headgate of a canal ordered closed by the bureau of irrigation will be treated as a condition and the waters remaining will be administered according to priority.

10. ———. The securing of restraining orders by filing injunction suits in bad faith is hereby condemned as an intolerable menace to the orderly administration of the appropriated waters of the state.

11. ———. Violations of the orders of the bureau of irrigation by other appropriators do not furnish a basis for injunctive relief by a junior appropriator where the effect of such injunction is to deprive a senior appropriator of his prior right to water.

12. ———. An injunctive order obtained by a junior appropiator against officers charged with administering the appropriated waters of a stream can have no effect against an injunction procured by a senior appropriator in which the junior appropriator and administrative officer of the state have been made parties to the suit.

13. ———. A junior appropriator who takes water contrary to the closing orders of the bureau of irrigation, and without regard to priority, may be enjoined at the instance of an injured senior appropriator.

14. ———. It is the duty of the bureau of irrigation, if its closing orders be not obeyed, to shut and lock the headgate of an offending appropriator of public waters.

15. ———. The bureau of irrigation may not, without shutting and locking the headgates of offending appropriators, sit by and permit unlawful diversions of water with impunity.

16. ———. In a suit for general equity relief by a senior appropriator against junior appropriators, the court should determine and declare the relative rights of the parties and render a decree making effective the enforcement of the rights thus found to exist.

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

Hoagland, Carr & Hoagland, for appellants.

Walter R. Johnson, Attorney General, John L. Riddell, Beeler, Crosby & Baskins, Neighbors & Danielson, Mothersead & York, Yale H. Cavett, Frank P. Johnson, F. J. Reed, F. E. Williams, Howarth N. Olsen, Auburn H. Atkins, E. E. Richards, James H. Anderson and *Lewis F. Shull, contra.*

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

CARTER, J.

This is a suit in equity to compel the officials of the bureau of irrigation, the Platte Valley Public Power and Irrigation District, and numerous junior appropriators of water from the North Platte river, to respect plaintiff district's priority of appropriation, to enjoin unlawful diversions of water to which the plaintiff district as a senior appropriator is entitled, and to secure a decree establishing the relative rights of the parties to the waters of the North Platte river. The trial court found for the defendants and dismissed the action. The plaintiffs appeal from the judgment of dismissal.

The Platte Valley Irrigation District, which will hereafter be referred to as the plaintiff district, has an appropriation for irrigation from the North Platte river of 300 second-feet of water with a priority date of May 31, 1884. There is no dispute among the parties that plaintiff district was entitled to receive 191 second-feet of water to irrigate approximately 14,000 acres of land within its district during the irrigation season of 1940, the irrigation season involved in this suit. The plaintiffs Milton H. Fry, William D. Eshleman and Paul Koch are owners of irrigated farm lands within the plaintiff district and are entitled to the beneficial use of a portion of the waters appropriated by the plaintiff district. It is not questioned that the plaintiff district has an appropriation for irrigation prior in time to that of any of the appropriators of the waters of the North Platte river that have been made parties to this litigation.

The defendant Platte Valley Public Power and Irrigation District, hereinafter referred to as the defendant power district, maintains a diversion dam in the North Platte river

about 30 miles above plaintiff district's headgate for the purpose of diverting water from the river into its storage reservoir, then through its hydroelectric generating plant and back to the river. Its only appropriation of natural flow is for power purposes, subject to the rights of prior appropriators. It is claimed by the plaintiff district that the defendant power district is without authority to impound the waters of the river behind its diversion dam when they are needed by prior appropriators for irrigation purposes.

The defendants Winters Creek Canal Company, Castle Rock Irrigation District, Enterprise Irrigation District, Minatare Mutual Canal & Irrigating Company, Central Irrigation District, Bridgeport Irrigation District, Alliance Irrigation District, Lisco Irrigation District, Chimney Rock Irrigation District, Farmers Irrigation District, Nine Mile Irrigation District, Ramshorn Irrigation District, Browns Creek Irrigation District and the Short Line Irrigation District are public corporations organized under the irrigation laws of the state, holding appropriations of water from the North Platte river for irrigation purposes junior in point of time to that held by the plaintiff district. When mentioned as a group they will hereafter be referred to as the defendant irrigation districts, otherwise by the names hereinbefore used. The defendant irrigation districts are charged generally with unlawful diversions of water belonging to the plaintiff district contrary to the orders of the bureau of irrigation, thereby depriving plaintiffs of the water to which they are entitled.

The defendants Roy L. Cochran, Governor of Nebraska in 1940, Dwight Griswold, Governor of Nebraska when the case was tried, Albert C. Tilley, secretary of the department of roads and irrigation, and state engineer in 1940, Wardner G. Scott, secretary of the department of roads and irrigation, and state engineer when the case was tried, and Robert H. Willis, at all times herein mentioned the chief of the bureau of irrigation, hereafter referred to as the defendant state officers, were made parties defendant because of their alleged failure to administer the waters of the river in ac-

cordance with the priority rights of the parties, and against whom the plaintiffs demand a mandatory injunction to compel the enforcement of the rights of the parties according to priority.

The defenses of the parties defendant will be discussed in connection with the evidence adduced and will not be quoted with particularity in this part of the opinion. It is a decision upon these questions, in connection with the evidence with reference thereto, together with a determination of the relative rights of all the parties, that is presented by the record in this case.

Each of the defendants appeared specially and objected to the jurisdiction of the court over said defendants. The question has been previously determined by this court. In *State v. Cochran,* 138 Neb. 163, 292 N. W. 239, this court said: "An action against a public officer for any neglect of official duty must, under the provisions of section 20-404, Comp. St. 1929, be brought in the county where the cause or some part thereof arose." It was therein determined that the cause of action, in a case similar to the one at bar, arose in the county where the resulting damages occurred. In *Loup River Public Power District v. North Loup River Public Power and Irrigation District,* p. 141, *post,* 5 N. W. (2d) 240, this court in reaffirming the decision in *State v. Cochran, supra,* said: "A suit for an injunction, and the establishment of the relative rights of the parties incident thereto, against the executive and administrative officers of the state to compel the enforcement of appropriative water rights by restraining unlawful diversions of water by junior appropriators is properly maintainable in the county where the resulting damages occur." We necessarily conclude that the defendant state officers, charged with negligence in the performance of their administrative duties, could properly be subjected to the jurisdiction of the district court for Lincoln county, the county where the damages occurred.

It is further urged by some of the defendant irrigation districts that as public corporations they could not be subjected to suit except in the county of their domicile. This

question was also determined in *Loup River Public Power District v. North Loup River Public Power and Irrigation District, supra,* wherein we said: "Where a court has jurisdiction of the subject-matter of an action, and obtains service of summons upon a defendant properly amenable to service in that county and having a substantial interest in the subject of the suit adverse to plaintiff, a summons may properly issue to a defendant public corporation domiciled in another county, under the provisions of section 20-504, Comp. St. 1929." Under the authorities cited, the district court for Lincoln county obtained jurisdiction over the persons of all the defendants and had, as well, jurisdiction of the subject-matter of the suit.

This suit was commenced on September 13, 1940, to secure a mandatory injunction against the defendant state officers and injunctive relief against the other defendants, to secure for plaintiff district the water to which it was entitled and which it had not received since July 1, 1940. It is alleged and the evidence shows that plaintiff district was not receiving the amount of its appropriation at the time of filing this suit. Certain of the defendant irrigation districts allege that, prior to the trial of the case, water was released which permitted plaintiff district to divert the water to which it was entitled and that, consequently, the illegal and wrongful acts of the defendant irrigation districts and of the defendant power district no longer infringed upon the rights of plaintiff district and that this defeated plaintiffs' right to relief. We think the rights of the parties under the circumstances here shown are to be determined by the situation existing when the suit was commenced. This question also seems to have been decided in *State v. Cochran, supra,* wherein it is said: "We doubt not that, if a default had existed at the time the writ of mandamus was applied for, the court would have jurisdiction to determine relators' right to it even if the default no longer existed when the case came on for trial. Neither do we doubt the right of the court, if default exists, to issue the writ of mandamus and make it effective as to the performance of similar duties in the fu-

ture. Any other rule would require the courts to administer justice piecemeal. But we are obliged to adhere to the rule that a default must exist when the writ is applied for, to properly invoke the extraordinary writ of mandamus." A default existed when the suit was started and the court had jurisdiction to determine plaintiffs' rights and the relative rights of the parties to the litigation under the facts which existed at that time. See *Patterson v. Barber Asphalt Paving Co.*, 94 Minn. 39, 101 N. W. 1064; *City of Austin v. Cahill*, 99 Tex. 172, 88 S. W. 542; *United States v. Workingmen's Amalgamated Council*, 54 Fed. 994.

The controversy between the plaintiffs and the defendant power district resolves itself around the failure of the latter to release certain waters impounded behind defendant power district's diversion dam some 30 miles above the plaintiff district's headgate. The evidence shows that the defendant power district had five water appropriations from the state with priority dates ranging from January 1, 1934, to May 8, 1937. All of its appropriations are reservoir appropriations except one which is from the natural flow of the stream for 975 second-feet for power purposes. All are inferior in point of time to the appropriation of the plaintiff district.

The defendant power district constructed a dam at its headgate in 1936 for the purpose of making the diversions authorized by its appropriative rights. The dam is about nine feet in height and impounds approximately 900 acre-feet of water. The record shows that plaintiff district, at a time when there was insufficient natural flow in the river to supply the amount of its appropriation, demanded that the pondage behind the dam be released for the purpose of augmenting the natural flow of the river to the amount of plaintiff district's appropriation. It was the contention of plaintiff district that this pondage was public waters subject to distribution under prior adjudications. With this theory we cannot agree. The very purpose of the dam was to raise the water to a height which would permit diversions into its storage reservoirs. The granting of the right to construct the dam carries with it the incidental right to hold

water behind it, subject to the rights of other appropriators on the river. The evidence is clear that the pondage so impounded was captured during the nonirrigation season or from waters during the irrigation season not subject to appropriation by the plaintiff district. This being true, the water is not subject to appropriation as a part of the natural flow of the stream and is entitled to be held by the defendant power district as a use incidental to the operation and maintenance of defendant power district's works. Comp. St. 1929, sec. 46-617. The evidence shows that the water was first accumulated during the nonirrigation season and held intact until July 21, 1940. On that date the defendant power district, by some arrangement made with the plaintiff district, released water to it for a number of days. The water thus released was recovered on or about August 1, 1940, on the occasion of rains which provided water in excess of the appropriation to which plaintiff district was entitled, and which seems to have been done in accordance with the agreement. In any event, the pondage was not subject to any rights held by the plaintiff district.

It is urged, however, that the defendant power district refused to obey the orders of the chief of the bureau of irrigation on August 15, 1940, wherein defendant power district was ordered to release 100 second-feet of water as long as the pondage remained, in addition to the natural flow of the stream. The record shows that such an order was made and that defendant power district did not comply with it. It appears that on August 14, 1940, plaintiff district brought a suit to obtain a peremptory writ of mandamus to compel the chief of the bureau of irrigation to order the pondage released. The peremptory writ was granted without notice and the chief of the bureau of irrigation complied with it by issuing the order. The defendant power district ignored the order. On August 23, 1940, the district court for Lincoln county, on its own motion, vacated the peremptory writ which it had previously entered. Plaintiff district appealed to this court from the order vacating the peremptory writ of mandamus and we held that the issuance of the writ was

void for want of notice and affirmed the court's action in vacating the peremptory writ. *State v. Cochran*, 139 Neb. 324, 297 N. W. 587. It seems to us that as the peremptory writ of mandamus was void, and the order not in accord with priority rights, the interests of the defendant power district were in no respects jeopardized by a failure to comply with such order. We are of the opinion that the trial court was in all respects correct in finding that plaintiff district had no right to the water impounded behind the dam and in assessing the costs incurred by the defendant power company against the plaintiff.

The record shows that on or about June 27, 1940, plaintiff district commenced a series of complaints to the defendant state officers in which it demanded that water be provided in accordance with its priority. From June 27 to August 6, plaintiff district received all the water to which it was entitled on only a few days, most of those being from July 31 to August 4. On August 6, 1940, the Blue Creek Irrigation District commenced an injunction suit in Garden county against the defendant state officers and obtained a ten-day restraining order from the county judge of that county. Joined with the plaintiff in this suit were five landowners owning land adjacent to Blue Creek in which they claim to have a riparian right to use the water thereof for irrigation purposes. The prayer of the petition is, among other things, that plaintiffs' appropriation rights be decreed to entitle them to take water sufficient to water 2,874.7 acres of land in the Blue Creek Irrigation District and that defendant state officers be enjoined from preventing their so doing. On August 15, 1940, the suit was dismissed by plaintiffs without prejudice. Although the issues in this case were never determined, and we make no attempt to do it here, it is quite evident that, in any event, the Blue Creek Irrigation District was not entitled to take water under its appropriative rights at the time the restraining order was issued. We think, also, that if the plaintiff landowners desire to assert any riparian rights to the waters of Blue Creek by diversion through the Blue Creek Irrigation Dis-

trict headgate, it will be necessary that such rights be specifically determined in order that they will not interfere with the orderly distribution of the waters of the stream. The headgate and canal of the district were constructed for the purpose of diverting the district's appropriated waters and are subject to the general regulation and control of the bureau of irrigation in distributing the appropriated public waters of the stream. Any riparian rights existing are appurtenant to the lands adjacent to the stream. Riparian waters may be diverted only on the lands to which they are appurtenant. If, by chance, the district's headgate is upon the land of a riparian claimant, we know of no right on his part to divert it through such headgate canal without the approval of the district and the bureau of irrigation. We conclude therefore that the assertion of riparian rights by plaintiff landowners in this suit was merely a subterfuge by which the Blue Creek Irrigation District secured a restraining order to which it was never entitled. The fact that the suit was dismissed just prior to the termination of the ten-day restraining order is further evidence of that fact. We conclude, therefore, that as against all prior appropriators the Blue Creek Irrigation District, and the plaintiffs who joined with it, had no right to injunctive relief and that the suit in question was not brought in good faith and constituted a trespass against the rights of senior appropriators on the river. We realize that the Blue Creek Irrigation District is not a party to this suit, and that no binding adjudication as to it can be made. The discussion of the rights of the parties to that litigation is important therefore only as it affects the rights of the parties to the suit at bar.

On August 5, 1940, one Basil Roberts commenced an action in the district court for Garden county against the defendant state officers, alleging that he was a lessee of lands in the Hooper Irrigation District and entitled to the riparian use of the waters of Blue Creek for irrigation purposes. The allegations of the petition are that he, in order to save expense, diverts his riparian waters through the headgate of the Hooper Irrigation District. With the state officers

enjoined, the Hooper Irrigation District proceeded to take water for all the lands in its district. What we said on this subject in the discussion of the Blue Creek Irrigation District injunction suit has application here. On August 16, 1940, this suit was dismissed without prejudice. The evidence shows also that the lands irrigated by Roberts do not touch the banks of Blue Creek and consequently are not riparian lands. We necessarily hold that the petition states no ground for injunctive relief against the defendant state officers. It is evident to us that the suit was not brought in good faith and constituted a trespass against the rights of senior appropriators on the river.

The institution of the injunction suits by the Blue Creek Irrigation District and Basil Roberts provoked the commencement of nine other similar suits by irrigation districts having rights prior in time to the plaintiffs in those suits, but junior in time to the appropriation of the plaintiff district in the suit at bar.

On August 9, 1940, the Lisco Irrigation District filed its suit and obtained a restraining order from the county judge of Garden county enjoining any interference with the district's headgate. This restraining order was kept in effect until August 20, 1940, when a dismissal without prejudice was filed. On September 4, 1940, a second suit was filed and a restraining order obtained which remained in force until the suit was dismissed without prejudice on September 14, 1940. The allegations of the petition were that there was sufficient water in the river to supply plaintiff and all senior appropriators, and that the closing or threatened closing of plaintiff's headgate was arbitrary and capricious on the part of the defendant state officers. The evidence produced in the present case disproves that fact. It is evident to us that this suit was not commenced in good faith and was merely a method of obtaining waters by trespassing upon the vested rights of others entitled thereto.

On August 7, 1940, the Union Irrigation and Water Power Company filed its suit and obtained a restraining order similar to that obtained by the Lisco Irrigation District. The

grounds alleged to obtain it were the same. An extension of the restraining order was granted by the county judge of Garden county. The case was dismissed without prejudice on August 20, 1940. It is clear from the undisputed evidence in the case at bar that the action was not brought in good faith and was merely a method of taking water belonging to others under the forms of law.

On August 13, 1940, the Enterprise Irrigation District filed its petition and obtained an order from the county judge of Scotts Bluff county restraining the defendant state officers from closing its headgate. The basis of the action was that the injunction orders commenced in Garden county permitted unlawful diversions by junior appropriators, but for which the headgate of the Enterprise Irrigation District would not have been ordered closed. Unlawful diversions by other junior appropriators are also alleged to have been permitted by the defendant state officers. We are of the opinion that these allegations do not constitute a cause of action. If the mere allegations that an injunction was wrongfully issued by a court having jurisdiction of the subject-matter, or that thefts by junior appropriators make necessary the closing order, are sufficient to invoke the injunctive powers of a court of equity, the orderly administration of the stream will be replaced with chaos and dissention. It is urged that the correctness of the right to injunctive relief has been finally determined, no appeal having been taken from the district court's final order. While this may be true as between the parties to that litigation, it has no such binding effect upon the plaintiff district. The record shows that plaintiff district attempted to intervene in the injunction suit and was denied the right of intervention by the trial court. We think a senior appropriator whose rights may be affected, if the prayer of the petition is granted, has an absolute right to intervene to protect his interests. Comp. St. 1929, sec. 20-328. Having been denied that right, it would be highly illogical to assert that the doctrine of *res adjudicata* applied to him. We necessarily conclude that as to the plaintiff district, under the evidence in this

record, the action of the district court for Scotts Bluff county, in granting the injunction order, deprived it of no rights and that the water taken by the Enterprise Irrigation District under said injunction order belonged to appropriators senior to it. The issuance of an erroneous restraining order, even if sought in bad faith, or the theft of waters by junior appropriators along the stream, cannot justify the taking of water belonging to senior appropriators, either directly or by the promiscuous use of the injunctive powers of an equity court.

Similar suits were commenced on or near August 13, 1940, by the Bridgeport Irrigation District, the Minatare Mutual Canal and Irrigation Company, Castle Rock Irrigation District, Winters Creek Irrigation District, Central Irrigation District, and the Alliance Irrigation District. All came to the same result as did the Enterprise case. It will serve no good purpose to repeat the details concerning these cases and we will conserve space by making our comments in the Enterprise case applicable to all.

The rights of all the parties to this suit have been adjudicated and their priorities finally determined. No question is here presented as to the amount of water to which any of the parties are entitled. It is the duty of the chief of the bureau of irrigation to administer the waters of the North Platte river and its tributaries in accordance with the adjudicated rights of the parties. The orderly administration of the stream becomes particularly important when there is a shortage of water and the burden is cast upon the bureau of irrigation to calculate the amount of available water, distances, lag, losses, gains, and many other conditions in delivering water to appropriators. It is urged that the use of spot readings, and other similar sources of information employed by the bureau of irrigation, are too inaccurate to warrant admission as competent evidence. It is not claimed that such evidence imparts complete accuracy. It is simply the best available evidence at the time and is properly admissible, not as conclusive proof, but as evidence of the facts it purports to show. Our remarks in *State v. Cochran, su-*

pra, with reference to this subject are directed to the fact that accurate figures are not obtainable and that uncertainty to some extent is bound to exist. This does not, however, make such evidence inadmissible.

The suits brought by the Blue Creek Irrigation District and Basil Roberts in Garden county, as we have heretofore said, were not brought in good faith. Such suits are a menace to the orderly administration of the waters of the stream. It not only permits the tortious diversion of waters to persons not entitled to them, but it jeopardizes the rights of every senior appropriator on the river above and below the wrongful diversion. It never was the province of courts of equity to extend its protective mantle to the perpetrators of wrongs and iniquities. Such suits are condemned, not only in law, but by principles of morality as well. Restraining orders in such suits are not to be peddled out to applicants as groceries over a counter, and a court which will so do violates his oath of office and brings disrespect upon the judicial position he holds. It is a serious reflection upon the judiciary when the orderly administration of the waters of a great river are spasmodically thrown into confusion and chaos by the ill-advised and irresponsible exercise of judicial authority. It creates an intolerable condition which ought, and must be, eliminated. In this connection it might be well to refer to the Canons of Judicial Ethics adopted by this court, wherein it is said in Canon 16: "He (the judge) should remember that an injunction is a limitation upon the freedom of action of defendants and should not be granted lightly or inadvisedly. One applying for such relief must sustain the burden of showing clearly its necessity and this burden is increased in the absence of the party whose freedom of action is sought to be restrained even though only temporarily." The Lisco Irrigation District and Union Irrigation and Water Power Company, in the procurement of their restraining orders, are in no better position than the two first above named. We find that the Blue Creek Irrigation District, Hooper Irrigation District, Lisco Irrigation District and the Union Irrigation and Water Power Com-

pany appropriated water wrongfully without the semblance of right during the irrigation season of 1940 and that the water so acquired belonged to and was the vested property of senior appropriators on the North Platte river.

The record discloses that the two injunction suits in Morrill county and the five in Scotts Bluff county were commenced primarily because of the wrongful diversions by the Garden county appropriators. It is alleged, and the chief of the bureau of irrigation concedes, that if the headgates of the districts in Garden county had been closed as he had ordered, it would not have been necessary to issue closing orders against the Scotts Bluff and Morrill county districts. However, we are obliged to say that the diversions of water by the issuance of a wrongful restraining order must be treated as a condition. The bureau of irrigation, as an arm of the state, ought to respect the orders of the courts. It certainly is not within the province of the chief of the bureau of irrigation to review and determine the correctness of judicial orders issued by courts having jurisdiction of the subject-matter. This being true, he must of necessity treat the situation as he would any other loss over which he has no control. It being a condition, it affords no basis for an injunction which in effect prevents the distribution of remaining waters to appropriators according to priority. We realize that the injunctions procured in Scotts Bluff and Morrill counties were tried on their merits and final judgments sustaining them entered. We cannot, of course, review their correctness in this proceeding except as to their effect on the plaintiff district which was not a party to those actions. In this respect we are of the opinion that the rights of plaintiff district were in no way affected and that the waters thus diverted were, in part at least, waters belonging to that district. We cannot refrain from saying that the suits filed by the Scotts Bluff and Morrill county irrigation districts, viewed in the light of the evidence in the present case, were improvidently commenced. The issues pleaded which were not alleged in the Garden county cases, plus the fact that they were upheld by the district court, re-

strains us from making an outright statement that they were not brought in good faith. We realize the intense desire on the part of appropriators to save burning crops, especially when water is flowing by their headgates. But one has no more right to take the water of a senior appropriator than he has to take grain from a neighbor's granary and convert it to his own use. Until conscience and good morals play some part in the administration of the public water of a stream, the services of the chief of the bureau of irrigation in the capacity of a policeman will be required and, so long as his acts do not become arbitrary and capricious, the courts are obliged to give effect to them. In connection herewith it might be noted that the conduct of counsel in aiding and abetting the procurement of restraining orders in bad faith is subject to serious criticism, and even, if the practice be persisted in, to the invocation of the disciplinary powers of this court. We desire to call attention to Canon 30 of the Canons of Professional Ethics adopted by this court, wherein it is said in part: "The lawyer must decline to conduct a civil cause or to make a defense when convinced that it is intended merely to harass or to injure the opposite party or to work oppression or wrong. * * * His appearance in court should be deemed equivalent to an assertion on his honor that in his opinion his client's case is one proper for judicial determination." These are not idle words and were adopted with the expectation that ethical lawyers would give credence thereto, and that those who persist in violating the rule shall thereby subject themselves to serious penalty. Some leniency of expression should be shown because it involves a practice long indulged in by the irrigation interests of the state, yet we feel obliged to say that future infractions will meet with suitable corrective measures. And what we have here said pertaining to the conduct of counsel applies as well to the attorneys for the plaintiff district as to counsel for the defendant irrigation districts for the reason that it appears in the record that plaintiffs' counsel aided and abetted the Blue Creek Irrigation District and Basil Roberts in procuring their restraining orders.

We hold that plaintiff district was entitled to the waters wrongfully appropriated by the Scotts Bluff and Morrill county irrigation districts, or so much thereof as was required to provide the amount of their appropriation, assuming, of course, that a beneficial amount could be delivered at its headgate. We think, therefore, that the plaintiff district's right to an injunction is superior to any rights possessed by the defendant irrigation districts and that plaintiff district was entitled to a mandatory injunction compelling the delivery of the disputed waters to the plaintiff district.

It might be contended that, as the state officers had already been enjoined by the final order of the district court for Scotts Bluff county, the district court for Lincoln county was without power to issue a mandatory injunction to compel the doing of the very act previously enjoined. If the parties and issues were the same, the court first assuming jurisdiction would have the sole jurisdiction of such a proceeding. That is not the case here. An injunction order against the state officers issued at the instance of a junior appropriator must give way to an injunction or mandamus order issued at the behest of a senior appropriator when the junior appropriator has been made a party to the litigation.

It is further alleged that the Chimney Rock Irrigation District, Alliance Irrigation District, Ramshorn Irrigation District, Short Line Irrigation District, Farmers Irrigation District, Nine Mile Irrigation District and Browns Creek Irrigation District neglected to obey the orders of the bureau of irrigation with reference to opening and closing their headgates, and to have taken water for irrigation purposes without right.

As to the Nine Mile Irrigation District, the evidence shows that water passed through the district's headgate for one day as the result of mistake which was corrected to the satisfaction of the chief of the bureau of irrigation. There is evidence that water found in the ditch on other days was not diverted through the district's headgate, but consisted of seepage and run-off waters which flowed into the ditch be-

low the headgate. The evidence is sufficient to sustain the finding of the trial court that this district neither violated the closing orders of the bureau of irrigation nor abstracted water to which it was not entitled.

As to the Farmers Irrigation District, it was urged that it was taking unappropriated waters from Akers Draw, Sheep Creek, Dry Spotted Tail, Wet Spotted Tail and Tub Springs, they being natural drains carrying live waters to the North Platte river. The evidence shows that these waters were captured and used by the Farmers Irrigation District, but that such waters were measured and applied upon the amount of water to which it was entitled by virtue of its appropriation right. This being done with the consent and approval of the bureau of irrigation, we find nothing in it incompatible with the proper distribution of the waters of the stream in accordance with priority. It is further shown that the bureau of irrigation closed the headgate of this district for one day and then permitted it to reopen on the theory that a usable quantity of water could not be delivered to the plaintiff district. No evidence was offered to show that this determination on the part of the bureau of irrigation was arbitrarily made. The evidence therefore sustains the finding of the trial court that the Farmers Irrigation District was guilty of no wrong charged in plaintiffs' petition.

There is no evidence in the record of any violation of orders or taking of waters to which it was not entitled by the Browns Creek Irrigation District. The trial court's finding in favor of the district was therefore correct.

The evidence shows without question that the Chimney Rock Irrigation District, Ramshorn Irrigation District, Short Line Irrigation District and the Alliance Irrigation District, in addition to the waters taken while the restraining order was in effect, wrongfully diverted waters of the river which did not belong to them and in which senior appropriators had a vested right.

The defendant state officers contend that they have administered the waters of the stream in the utmost good faith

and that no cause of action therefore exists against them. As we have heretofore said, the bureau of irrigation as an arm of the state should obey the judgments and orders of courts having jurisdiction of the subject-matters upon which such orders are based. We therefore hold that the obeyance of the restraining orders issued and the giving of notice of such orders to the attorney general constitute a full compliance with duty as found by the trial court. However, it is our considered opinion that as to the Chimney Rock Irrigation District, Ramshorn Irrigation District, Short Line Irrigation District, and the Alliance Irrigation District during the times they had no restraining order in force, the bureau of irrigation did not perform its full duty. The evidence shows that closing orders were issued against these districts which were not obeyed. We think the duty is then cast upon the bureau of irrigation to enforce its order by closing and locking the headgate of the offending districts. This does not appear to have been done. We are inclined to the view therefore that the bureau of irrigation was derelict in its duty to this extent. On all other points we think the evidence shows a good faith and efficient administration of the waters of the river in accordance with law.

In determining the relative rights of all the parties to this suit, we have come to the following conclusions: That plaintiff district was, on the date of the commencement of its suit, entitled to a temporary injunction against the Lisco Irrigation District, Winters Creek Canal Company, Castle Rock Irrigation District, Enterprise Irrigation District, Minatare Mutual Canal & Irrigating Company, Central Irrigation District, Bridgeport Irrigation District, Alliance Irrigation District, Chimney Rock Irrigation District, Ramshorn Irrigation District and the Short Line Irrigation District, restraining the diversion of water from the North Platte river in violation of the closing orders of the bureau of irrigation and contrary to the rights of senior appropriators, including the plaintiff district; that a mandatory injunction issue against the bureau of irrigation to compel the enforcement of its orders closing the headgates of the Chim-

ney Rock Irrigation District, Ramshorn Irrigation District, Short Line Irrigation District, and the Alliance Irrigation District during the times the closing of its headgate was not restrained, by shutting and locking the headgates of the districts in accordance with authority granted by section 81-6304, Comp. St. 1929, and that said districts be permanently enjoined from taking the appropriated waters of senior appropriators contrary to the closing orders of the bureau of irrigation; and that the cause be dismissed as to the Farmers Irrigation District, Nine Mile Irrigation District, Browns Creek Irrigation District and the Platte Valley Public Power and Irrigation District.

It is further ordered that the costs incurred by the Nine Mile Irrigation District, Farmers Irrigation District, Browns Creek Irrigation District and the Platte Valley Public Power and Irrigation District be taxed against the plaintiff district, and that all other costs be taxed against the Lisco Irrigation District, Winters Creek Canal Company, Castle Rock Irrigation District, Enterprise Irrigation District, Minatare Mutual Canal and Irrigating Company, Central Irrigation District, Bridgeport Irrigation District, Chimney Rock Irrigation District, Ramshorn Irrigation District and the Short Line Irrigation District.

REVERSED.

LOUP RIVER PUBLIC POWER DISTRICT, APPELLANT, V. NORTH LOUP RIVER PUBLIC POWER AND IRRIGATION DISTRICT ET AL., APPELLEES.

5 N. W. (2d) 240

FILED AUGUST 7, 1942. No. 31410.

1. **Venue.** Where an unlawful diversion of water takes place in one county and damage occurs as a result thereof in another county, the party injured may commence his action in either of such counties.
2. ———. "An action against a public officer for any neglect of official duty must, under the provisions of section 20-404, Comp.

St. 1929, be brought in the county where the cause or some part thereof arose." *State v. Cochran*, 138 Neb. 163, 292 N. W. 239.

3. ———. A suit for an injunction, and the establishment of the relative rights of the parties incident thereto, against the executive and administrative officers of the state to compel the enforcement of appropriative water rights by restraining unlawful diversions of water by junior appropriators is properly maintainable in the county where the resulting damages occur.
4. Waters. An irrigation district is a public as distinguished from a municipal corporation, and is not confined to the strict and narrow limits applied to municipal corporations.
5. Venue. Where a court has jurisdiction of the subject-matter of an action, and obtains service of summons upon a defendant properly amenable to service in that county and having a substantial interest in the subject of the suit adverse to plaintiff, a summons may properly issue to a defendant public corporation domiciled in another county, under the provisions of section 20-504, Comp. St. 1929.
6. Waters. An appropriation of public waters for power purposes, together with the necessary dams, ditches and other works used therewith, are appurtenant to the power plant and the real estate upon which it stands.
7. ———. A wrongful act, which reduces the quantum of water necessary for a senior appropriator's needs within the limits of his appropriation, constitutes a damage to his appropriative and other property rights connected with the use thereof.
8. ———. Limitations imposed upon an appropriator of public waters by the state in adjudicating his right and fixing his priority are restrictions upon such appropriator only and may not be treated as a grant to another appropriator.
9. ———. Each appropriator of public waters must derive his rights from his own grant.
10. ———. Under the provisions of section 81-6317, Comp. St. 1929, an appropriation of public waters may be allowed in an amount less than that applied for. If the applicant be dissatisfied therewith he must appeal, otherwise it becomes final.
11. ———. Under such circumstances, a final allowance of one acre-foot for each acre of land irrigated is final and mandatory upon the administrative officers of the state.
12. ———. The amount of public waters to which an appropriator is entitled is to be measured at the point of diversion from the natural channel of the stream from which the appropriation was made.
13. ———. Under the provisions of section 6, art. XV of the Constitution, the right to divert unappropriated waters to a bene-

ficial use is a constitutional right, and the first in time is the first in right, without reference to the particular use.

14. ———. But when the waters of any natural stream are not sufficient for the use of all desiring to use the same, those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes. Const. art. XV, sec. 6.

15. **Eminent Domain.** Under this section of the Constitution, waters previously appropriated for power purposes may be taken and appropriated for irrigation purposes, upon due and fair compensation therefor, and, inversely, they cannot be appropriated arbitrarily for irrigation purposes without just compensation.

16. **Waters.** A petition to determine relative rights to waters flowing in a public stream in this state, wherein the facts alleged show that plaintiff appropriated such water and applied the same to a beneficial use prior in time to the alleged diversion by the defendant, states a cause of action entitling plaintiff to an injunction restraining further wrongful diversions by the defendant.

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

Neighbors & Danielson, for appellant.

Sorensen & Kyle, Guy Laverty, Walter R. Johnson, Attorney General, and *John L. Riddell, contra.*

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

CARTER, J.

This suit was commenced by the Loup River Public Power District against the North Loup River Public Power and Irrigation District and certain executive and administrative officers charged with the administration of the public waters of the state, to secure a decree establishing the relative rights of the parties to the waters of the Loup river and its tributaries and to enjoin the North Loup River Public Power and Irrigation District from diverting, and the executive and administrative officers of the state from permitting diversions of, water in violation of the rights of the Loup River Public Power District. The trial court sustained a general demurrer to the petition and, plaintiffs having elect-

ed to stand thereon, dismissed the action. From this order plaintiff appeals.

For convenience, the Loup River Public Power District will be referred to herein as the plaintiff district, the North Loup River Public Power and Irrigation District will be referred to as the defendant district, and the executive and administrative officers will be referred to as the defendant state officers.

Plaintiff's petition alleges that on February 24, 1934, it procured from the department of roads and irrigation an appropriation of water from the Loup river for power purposes, said appropriation being 3,500 cubic feet of water per second of time with a head of 118 feet and a priority date as of September 15, 1932. Immediately thereafter plaintiff paid all amounts due the state for the lease of the water, commenced the construction of its works for the generation and distribution of electric power, and since the completion thereof has been engaged in the generation and distribution of electric power. On September 15, 1936, defendant district was granted an appropriation of water from the North Loup river for irrigation purposes in the amount of 260 second-feet, with a priority date of March 28, 1933, and limited to the use of one acre-foot of water for each acre of land to which water is usefully applied prior to October 1, 1944. Due to the fact that its irrigation works were not constructed to water all the lands described in its application, defendant district's appropriation was subsequently reduced to 238 second-feet. Plaintiff district alleges that at no time has the defendant district irrigated more than 18,000 acres of land.

Plaintiff district alleges that from April 1, 1940, to November 1, 1940, it was unable to obtain its appropriation of 3,500 cubic feet of water per second, excepting two days in May, seven days in June and three days in October, and that the water available for appropriation by the plaintiff district at all other times was materially reduced by diversions up river in counties other than Platte county by the defendant district in excess of its appropriative rights. This suit

was commenced in Platte county to enjoin the defendant district from making these unlawful diversions of water and to restrain the defendant state officers from permitting such unlawful diversions.

The petition discloses that plaintiff district maintains its office and principal place of business, including its hydroelectric plant, in the city of Columbus, Platte county, Nebraska. It appears from the showing made in support of defendant district's special appearance that the principal place of business of defendant district is in the city of Ord, Valley county, Nebraska, and that the district is located within Valley, Loup and Garfield counties, and no other. Process was served on the defendant district by the delivery of a summons to its president in Valley county. Service of summons was had on the defendant state officers in the counties of their legal residence, none of which was within Platte county.

The statute upon which we are asked to sustain the jurisdiction of the court provides in part as follows: "Actions for the following causes must be brought in the county where the cause or some part thereof arose: * * * Second. An action against a public officer, for an act done by him in virtue of or under color of his office, or for any neglect of his official duty." Comp. St. 1929, sec. 20-404.

In *State v. Cochran,* 138 Neb. 163, 292 N. W. 239, a case similar in principle, this court said: "An action for mandamus against the administrative officers of the state to compel the proper enforcement of the irrigation laws, and thereby prevent unlawful diversions of water by junior appropriators, is properly maintainable in the county where the resulting damages occur." Defendant state officers attack the correctness of this rule and urge that this court depart therefrom.

A text-writer states the applicable rule in the following language: "If however, a tortious act, committed in one county, occasions damage to land or any other local subject, situate in another; an action for the injury thus occasioned, may be laid in either of the two counties, at the choice of the

party injured. (n) Thus, if by the diversion or obstruction of a watercourse, in the county of A., damage is done to lands, mills or other real property in the county of B., the party injured may lay his action in either of those two counties." Gould's Pleadings (5th ed.), p. 105.

In *Bulwer's Case,* the court said: "When one matter in one county is depending upon the matter in another county, there the plaintiff may choose in which county he will bring his action. * * * In all cases where the action is founded upon two things done in several counties, and both are material or traversable, and the one without the other doth not maintain the action, there the plaintiff may choose to bring his action in which of the counties he will. * * * If a man doth not repair a wall in Essex, which he ought to repair, whereby my land in Middlesex is drowned, I may bring my action in Essex, for there is the default, as is adjudged in 7 H. 4. 8. or I may bring it in Middlesex, for there I have the damage." 4 Coke's Reports, pt. 7, p. 1.

And in *Barden v. Crocker,* 10 Pick. (Mass.) 383, it was said: "And the second point is equally clear for the plaintiff. He may unquestionably maintain his action in either county; in Bristol, where the obstruction was raised, as well as in Plymouth where the injury was sustained."

In *Deseret Irrigation Co. v. McIntyre,* 16 Utah, 398, 52 Pac. 628, the court in a similar case applied the following line of reasoning: "As has been observed, an action is 'the lawful demand of one's rights,' and such lawful demand is made because of a wrong done and an injury suffered. The wrong and the injury are both necessary elements, and the absence of either one of them would be fatal to a suit. The two elements must therefore exist and unite in order to form a good cause of action. The plaintiffs herein claim that the defendants constructed dams and ditches in Sanpete county, and by means thereof wrongfully diverted water from the Sevier river, and that, as a sequence, the plaintiffs were deprived of the water which of right belonged to them, and with which they were entitled to fill their dams and ditches in Millard county, to distribute it to their stock-

holders' lands in that county. The right of plaintiffs to have that portion of the river, to which they were entitled, flow in the natural watercourse to the heads of their ditches, is an incorporeal hereditament appurtenant to the watercourse. The complaint shows that this right was invaded by a wrongful diversion in Sanpete county, by the defendants, and that damage or injury resulted to the plaintiffs in Millard county. The facts concerning the wrongful diversion and consequent injury are all essential to the plaintiffs' right of action. Neither the facts relating to the diversion alone, nor those relating to the injury alone, are sufficient to constitute a cause of action against the defendants. This is so, because the mere construction of dams and ditches in Sanpete county, or even the diversion of the water from the river, gave the plaintiffs no right to complain, so long as the water, to which they were entitled, was not diverted thereby. Likewise, as to the injury, unless it were shown that it was caused by the wrongful acts of the defendants. Thus it is plain that some of the material facts arose in Sanpete county and some in Millard county, and the cause of action may properly be said to have arisen in each county. Therefore the plaintiffs had the right to elect in which they would bring their action, and, having chosen to bring it in Millard county, where a part of that which is essential to their right to recover took place, the venue was properly laid." See, also, *Lower Kings River Water Ditch Co. v. Kings River & Fresno Canal Co.*, 60 Cal. 408.

In *Miller & Lux v. Rickey*, 127 Fed. 573, the rule was stated as follows: "The general principle is that, where a wrong has been committed by some person, and another person has been injured thereby, the injured person has a lawful right to recover from the wrong-doer; the wrong and the injury are both necessary elements, and the absence of either one of them would be fatal to a suit. The two elements must therefore exist and unite in order to form a good cause of action. The direct purpose of all judicial acts is relief to a litigant, which cannot be given by a judgment or decree alone, but must be given, if at all, through the enforcement

of the one or the other by appropriate process; and it has often been said that the highest test of the jurisdiction of a court in a given case is found in the answer to an inquiry whether it has lawful power thus to enforce its judgment or decree. The general doctrine at common law is that actions for injury to real estate in the nature of a trespass or in case of nuisances—and other cases might be cited—is local, and must be brought in the county in which the land lies; but, where the act which caused the injury to the land was committed in another county or district, suit may be brought in either at the election of plaintiff." See, also, *Vermont Valley R. v. Connecticut River Power Co.*, 99 Vt. 397, 133 Atl. 367.

In *Willey v. Decker*, 11 Wyo. 496, 73 Pac. 210, the court made this pertinent statement: "It may be conceded, for the purposes of this decision, that the court would not assume jurisdiction unless it were found, in the class of cases referred to, that either the wrongful act or the injury occurred in this state."

And in *Lakeside Irrigation Co. v. Markham Irrigation Co.*, 116 Tex. 65, 285 S. W. 593, the court, largely on the authority of *Deseret Irrigation Co. v. McIntyre, supra*, said: "It seems clear to us that 'in cases of this kind where the wrongful act is begun in one county and consummated in another, the suit may be prescribed in either county at the election of the plaintiff.' "

Plaintiff's cause of action is based upon two essential elements—a wrong committed in Valley, Loup and Garfield counties, and a damage resulting in Platte county. The cause of action being founded on two essential elements done in different jurisdictions, both being material and traversable, and the one without the other not giving rise to an action, has a dual origin and the action may be brought in either jurisdiction. We think the rule announced in *State v. Cochran, supra*, is correct and we adhere to and reaffirm that decision.

We necessarily come to the conclusion that the action was properly brought in Platte county and that service of sum-

mons could be had upon the state officers, the cause of action having arisen there within the meaning of section 20-404, Comp. St. 1929.

Defendant district contends, however, that, except where the action pertains to realty, an action against a municipal corporation or political subdivision of the state is inherently local, and any action against such a public corporation must be brought in the county of its domicile, or where it is situated, without regard to where the cause of action arose. An irrigation district is a public corporation and not a municipal corporation, and is not confined to the strict and narrow limits of a municipal corporation. Where a court has jurisdiction of the subject-matter of an action, and obtains service of summons upon a defendant properly amenable to service in that county and having a substantial interest in the subject of the suit adverse to plaintiff, a summons may properly issue to a defendant public corporation domiciled in another county under the provisions of section 20-504, Comp. St. 1929. Consequently, the defendant district was properly served with summons in Valley county and jurisdiction thereby obtained over it in Platte county.

An appropriation of public waters for power purposes, together with the necessary dams, ditches and other works used therewith, are appurtenant to the power plant and the real estate upon which such plant was constructed. 2 Kinney, Irrigation and Water Rights (2d ed.) sec. 1013. And, consequently, any wrongful act which reduces the quantum of water necessary for plaintiff district's needs, within the limits of its appropriation, constitutes a damage to its appropriative and other property rights in Platte county.

It is alleged in plaintiff district's petition, and it must be accepted as true in determining the correctness of the court's ruling in sustaining the general demurrer to it, that plaintiff district's appropriation for power purposes was in the amount of 3,500 second-feet with a head of 118 feet and a priority date as of September 15, 1932. Defendant district has an appropriation for irrigation purposes in the amount of 238 second-feet with a priority date of March 28,

1933, with the quantum of annual delivery limited to one acre-foot for each acre of land to which water is usefully applied. The rate of diversion was restricted to one second-foot for each 150 acres of land actually irrigated. Plaintiff district's appropriation was further limited in that it must not be exercised so as to curtail diversion of water by the defendant district in the amount of one acre-foot for each acre of land actually irrigated, but not exceeding the maximum amount of 38,000 acre-feet annually. The petition alleges that only 18,000 acres of land were irrigated by defendant district and consequently its maximum annual diversion is only 18,000 acre-feet at a maximum diversion rate of 120 second-feet. Plaintiff district alleged that in 1940 defendant district diverted 69,342 acre-feet at a time when plaintiff district was in need of and unable to get the amount of its appropriation for power purposes.

It must be conceded that the limitations on plaintiff district's appropriative right restrict the plaintiff district only and does not amount to a grant to the defendant district. Defendant district must derive its rights from its grant and not from the limitations placed in plaintiff district's grant.

It is urged by defendant district that the one acre-foot of water for each acre actually irrigated to which its appropriation is limited is directory only. With this we cannot agree. The quasi judicial powers conferred upon the department of roads and irrigation have application only to the granting and cancelation of appropriation rights and priorities. *State v. Cochran, supra.* Under the provisions of section 81-6317, Comp. St. 1929, the department may approve the application for an appropriation of public waters in an amount less than that applied for. If the applicant be dissatisfied, the remedy is by appeal to the supreme court, and if he fails to appeal, the appropriation as made is final. The contention of defendant district that the restriction of its appropriation to one acre-foot of water to each acre of land actually irrigated is directory and invalid is without merit.

It is next urged that the diversions of water under defend-

ant district's appropriation are to be measured at the land and not at the point of diversion from the river. We think that an examination of the irrigation statutes of this state reveals a legislative intent that appropriated waters shall be measured at the point of diversion. See sections 81-6316 and 81-6326, Comp. St. 1929. For instance, section 81-6326 requires an appropriator to construct and maintain a headgate at the point of diversion and to install at that place a device for measuring the water diverted. The correct rule was announced in *Stickney v. Hanrahan*, 7 Idaho, 424, 63 Pac. 189, wherein the court said: "Under the law, water of all claimants must be measured at the point where such water is diverted from the natural channel of the stream from which it is taken. This is a matter of necessity, demanded by public policy. It is the policy of the law to prevent the wasting of water." Any other rule would permit uncertainty and confusion to enter into the determination of appropriative rights. A satisfactory administration of the waters of the stream can be had only by computing the amounts to which an appropriator is entitled at the point of diversion. The quantum of water which the defendant district can divert from the river is that amount to which defendant district is entitled under its own appropriation, without reference to limitations contained in plaintiff district's appropriation, measured at the point of diversion at the river. It is true that defendant district's divertable amount may increase up to October 1, 1944, but not in any event exceeding 38,000 second-feet, dependent upon the number of additional acres of land in the district to which a usable quantity of water has been applied. The amount of water to which defendant district is entitled is therefore dependent upon the number of acres to which water has been beneficially applied at the time the determination is to be made.

Defendant district contends that as an irrigation district it has the right to take water in excess of its appropriation as against an appropriator for power purposes as long as it can be put to a beneficial use in the irrigation of farm lands.

This raises a point of first impression in this state.

The Constitution provides: "The necessity of water for domestic use and for irrigation purposes in the state of Nebraska is hereby declared to be a natural want." Const. art. XV, sec. 4.

Section 6, art. XV of the Constitution also provides: "The right to divert unappropriated waters of every natural stream for beneficial use shall never be denied except when such denial is demanded by the public interest. Priority of appropriation shall give the better right as between those using the water for the same purpose, but when the waters of any natural stream are not sufficient for the use of all those desiring to use the same, those using the water for domestic purposes shall have preference over those claiming it for any other purpose, and those using the water for agricultural purposes shall have the preference over those using the same for manufacturing purposes. Provided, no inferior right to the use of the waters of this state shall be acquired by a superior right without just compensation therefor to the inferior user."

It was clearly the intention of the framers of our Constitution to provide that water previously appropriated for power purposes may be taken and appropriated for irrigation use upon the payment of just compensation therefor. It never was the intention of the framers of the Constitution to provide that water appropriated for power purposes could thereafter arbitrarily be appropriated for irrigation without the payment of compensation. Historically the purpose for which an appropriation was obtained had no bearing upon its priority. Until the advent of constitutional provision and statutory law, priority of appropriation conferred superiority of right without regard to the character of the use. The maxim, "He who is first in time is first in right," thus became fundamental doctrine in determining the priorities of appropriators, irrespective of use. A right of appropriation, under our Constitution, whether for irrigation or for power purposes, is a property right which is entitled to the same protection as any other property right. The

right of property therein cannot be violated with impunity any more than that in any other type of property. This is so fundamental that citations of authority are unnecessary.

Section 6 of article XV of the Constitution, fixing a priority of uses for which public waters may be appropriated, is a self-executing provision and the courts, in the absence of a statutory method, would be obliged to provide the means for enforcing its provisions. To hold otherwise, and to permit junior appropriators of water for a superior use to divert it with impunity, would invite uncertainty and chaos into the irrigation laws of this state. For many years no legislative action was taken to provide a special method for effectuating the provisions of this section of the Constitution. In 1941, however, the legislature enacted chapter 138, Laws 1941, providing a special method for the condemnation of the rights of a senior appropriator having an appropriation of water for an inferior use. Defendant district argues that this law did not become operative until after the filing of plaintiff district's last amended petition. It is not necessary for us to determine the rights of the parties growing out of this situation. Either it affords a means for the condemnation of plaintiff district's power appropriation by a junior appropriator for irrigation purposes in the present case, or defendant district is relegated to the remedies existing prior to its enactment.

The fact that defendant district may desire the water lawfully appropriated to plaintiff district and to which it has a vested right is unimportant until plaintiff district's right thereto has been lawfully divested and compensation paid. Until plaintiff district's vested rights have been divested by due process of law, its appropriation must be considered as prior to that of the defendant district. Other jurisdictions have passed upon this and similar questions and they uniformly support this conclusion.

In *Montrose Canal Co. v. Loutsenhizer Ditch Co.*, 23 Colo. 233, 48 Pac. 532, the court in passing on a like question said:

"It is, however, insisted that the complaint is sufficient to entitle the consumers under the plaintiff ditch to fifty cubic

feet of water per second of time for domestic use, regardless of the priority of defendant ditch to the use of water for irrigation; that the use of water for domestic purposes is recognized by the Constitution as paramount to all other uses; and the mere averment that water is required for domestic purposes, and an attempt to deprive another of such use by diverting the water to any other purpose, is a sufficient statement of a cause of action.

"We think this claim is untenable. While it is true that section 6 of article 16 of the Constitution recognizes a preference in those using water for domestic purposes over those using it for any other purpose, it is not intended thereby to authorize a diversion of water for domestic use from the public streams of the state, by means of large canals, as attempted in this case. The use protected by the Constitution is such use as the riparian owner has at common law to take water for himself, his family or his stock, and the like. And if the term 'domestic use' is to be given a different or greater meaning than this, then as between such enlarged use and those having prior rights for agricultural and manufacturing purposes, it is subject to that other constitutional provision requiring just compensation to those whose rights are affected thereby. *Strickler v. Colorado Springs*, 16 Colo. 61; *Armstrong v. Larimer County Ditch Co.*, 1 Colo. App. 49.

"In the *Strickler* case, this court, in construing the constitutional provision referred to as applied to water rights antedating its adoption, said:

" 'Our conclusion, therefore, is that the constitutional provisions relied upon were not intended to affect, and do not affect, prior vested rights, but that all owners of such rights are entitled to compensation therefor before the same can be taken or injuriously affected.' " See, also, *Town of Sterling v. Pawnee Ditch Extension Co.*, 42 Colo. 421, 94 Pac. 339; *Nevius v. Smith*, 86 Colo. 178, 279 Pac. 44; *People v. Hinderlider*, 98 Colo. 505, 57 Pac. (2d) 894.

In *Montpelier Milling Co. v. City of Montpelier*, 19 Idaho, 212, 113 Pac. 741, it was urged by defendant that a constitutional provision similar to that in our Constitution made

an appropriation of water for domestic uses superior to an appropriation of water for manufacturing uses, without regard to priority, and that an appropriation for manufacturing purposes could be destroyed by a subsequent appropriation for domestic purposes. On this point the court said:

"We do not think that the language thus used in the Constitution was ever intended to have this effect, for it is clearly and explicitly provided in said section that the right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses shall never be denied; that priority of appropriation shall give the better right as between those using the water. This clearly declares that the appropriation of water to a beneficial use is a constitutional right, and that the first in time is the first in right, without reference to the use, but recognizes the right of appropriations for domestic purposes as superior to appropriations for other purposes, when the waters of any natural stream are not sufficient for the service of all those desiring the same. This section clearly recognizes that the right to use water for a beneficial purpose is a property right, subject to such provisions of law regulating the taking of private property for public and private use as referred to in section 14, art. 1 of the Constitution.

"It clearly was the intention of the framers of the Constitution to provide that water previously appropriated for manufacturing purposes may be taken and appropriated for domestic use, upon due and fair compensation therefor. It certainly could not have been the intention of the framers of the Constitution to provide that water appropriated for manufacturing purposes could thereafter arbitrarily and without compensation be appropriated for domestic purposes. This would manifestly be unjust, and clearly in contravention of the provisions of this section, which declare that the right to divert and appropriate the unappropriated waters of any natural stream for beneficial use shall never be denied, and that priority of appropriation shall give the better right." See, also, *Basinger v. Taylor*, 30 Idaho, 289, 164 Pac. 522.

We necessarily come to the conclusion that a senior appropriative right for power purposes may not be destroyed by a superior user except by the employment of formal condemnation proceedings and the tender of compensation prior to interference.

Assuming, as we must in this case, that the allegations of plaintiff district's petition are true, plaintiff district is entitled to have its appropriative rights protected against the wrongful diversions of the defendant district. The defendant state officers are duty bound to enforce all appropriations in accordance with their priorities as to time, unless such appropriations or priorities be divested in the manner provided by law. The petition states facts which, if established, call for the application of the rules of law herein discussed. In our opinion, it states a cause of action, and the trial court was in error in sustaining a general demurrer thereto.

REVERSED.

PAINE, J., dissents.

LOUP RIVER PUBLIC POWER DISTRICT, APPELLANT, V. MIDDLE LOUP PUBLIC POWER AND IRRIGATION DISTRICT ET AL., APPELLEES.

5 N. W. (2d) 249

FILED AUGUST 7, 1942. No. 31411.

Reversed on authority of *Loup River Public Power District v. North Loup River Public Power and Irrigation District*, *ante*, p. 141, 5 N. W. (2d) 240.

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

Neighbors & Danielson, for appellant.

Sorensen & Kyle, Walter R. Johnson, Attorney General, and *John L. Riddell, contra.*

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

CARTER, J.

This is a companion case to *Loup River Public Power District v. North Loup River Public Power and Irrigation District, ante,* p. 141, 5 N. W. (2d) 240, released herewith. The Loup River Public Power District is plaintiff in each case. The Middle Loup Public Power and Irrigation District is a public corporation, similar in all respects to the North Loup River Public Power and Irrigation District. The defendant state officers are the same in both suits. Identical questions of law are raised in each case, the only difference in the two cases being in acreages and amounts involved in the appropriative rights of the two defendant districts.

The law applicable to the one is applicable to the other. For the reasons stated in *Loup River Public Power District v. North Loup River Public Power and Irrigation District, supra,* the judgment of the district court is reversed and the cause remanded.

REVERSED.

PAINE, J., dissents.

E. H. LUIKART, RECEIVER, APPELLANT, V. INA B. BOSSE ET AL., APPELLEES.
5 N. W. (2d) 128

FILED AUGUST 7, 1942. No. 31242.

1. **Fraudulent Conveyances.** "A conveyance is declared to be fraudulent when its object or effect is to defraud another, or the intent with which it is made is to avoid some duty or debt due by or incumbent upon the party making the transfer." 27 C. J. 415.
2. ———. "A conveyance from a husband to his wife is presumptively fraudulent as to an existing creditor, and in litigation between the creditor and grantee on that issue, the burden is on the latter to establish the good faith of the transaction by a preponderance of the evidence. *Christensen v. Smith,* 123 Neb. 388, 243

N. W. 118." *Butke v. Nachschoen*, 133 Neb. 366, 275 N. W. 318.

3. ———. "Where the testimony relied upon to show good faith is given by interested relatives, the reasonableness or unreasonableness of their evidence bears considerable weight in arriving at a just conclusion." *Hilton v. Clements*, 137 Neb. 791, 291 N. W. 483.
4. **Fraud.** The question of fraudulent intent is one of fact and not of law.
5. **Fraudulent Conveyances.** Record examined, and evidence *held* insufficient to sustain the burden of proof to show by a preponderance thereof the *bona fides* of the conveyances.

APPEAL from the district court for Madison county: CHARLES H. STEWART, JUDGE. *Reversed, with directions.*

M. S. McDuffee and *F. C. Radke*, for appellant.

Frederick M. Deutsch, contra.

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

MESSMORE, J.

This is a suit in equity in the nature of a creditor's bill, to vacate the conveyance of 240 acres of land in Madison county, Nebraska, made by the debtor, William H. Bosse, to his wife, Ina B. Bosse. The court found for the defendants and entered a decree accordingly. Plaintiff's motion for a new trial was overruled; hence, this appeal.

The petition alleges that a judgment for stockholder's double liability was obtained against William H. Bosse and details the facts relating to the conveyances of real estate made by him to his wife for the purpose of hindering, delaying and defrauding creditors and especially the plaintiff. The answer is, in effect, a general denial and sets forth in detail evidentiary matter in explanation of the entire transaction. The reply is, in effect, a general denial. All of the evidentiary matter, as disclosed by the pleadings, material to a determination of this case will appear in a review of the evidence.

The record discloses: William H. Bosse and Ina B. Uehling were married at Bloomfield, Nebraska, July 1, 1904,

where they resided until 1910, when they removed to Meadow Grove, where Mr. Bosse engaged in the banking business until November 1, 1928. Since 1921, when he purchased sufficient stock of the Security Bank of Meadow Grove to give him control, he has been the president and sole managing officer thereof. The bank was taken over in suspension October 31, 1928, by the department of banking, reorganized and restored to its officers and stockholders on December 11, 1928, without the services of Bosse, until the fall of 1929. Bosse had 126 shares of the bank's stock before the reorganization and 14 shares thereafter. The bank was permanently closed September 7, 1929. The plaintiff was appointed receiver, brought an action against Bosse and others to collect their superadded stock liability, and obtained a judgment against Bosse on September 28, 1939, in the amount of $2,005.59. Execution was issued on the judgment January 29, 1940, and returned unsatisfied.

The land constituting the subject of the conveyances consists of a mile-long quarter-section, commonly known as bottom and swamp land, with the south end in the Elkhorn valley. The north part is raised and includes a gravel pit which was operated commercially in a small way by those who desired to patronize it. Later a pump was installed, and on June 18, 1929, Mrs. Bosse sold 20 acres, comprising the gravel pit, for $11,000 to a purchaser who had a road contract with the state. Bosse testified that in the fall of 1928 this quarter-section was worth $20,000, encumbered by a 12,000-dollar mortgage to the Commonwealth Life Insurance Company, leaving an equity of $8,000; that the 80 acres were rolling, consisted of Valentine sandy soil, with 25 acres under cultivation, and encumbered in the amount of $2,500. Ina B. Bosse was negotiating to turn this land in for the loan.

On October 22, 1928, Bosse and his wife conveyed to J. F. Uehling, a brother of Mrs. Bosse, for a consideration of $17,000, subject to a 12,000-dollar encumbrance, the quarter-section, and on the same day a similar deed to the 80 acres to F. J. Uehling for a consideration of $3,500, subject to a

2,500-dollar mortgage. The initials of the grantee in the first deed were transposed, and F. J. Uehling is the proper grantee. These deeds were placed on record November 1, 1928. The above conveyances were made pursuant to an agreement between Mr. and Mrs. Bosse and F. J. Uehling, whereby the latter, an insurance executive and promoter, was endeavoring to procure a small insurance company in Texas by trading the equities in such real estate for the company; the stock obtained therein, in the amount of such equities, was to be taken in the name of Ina B. Bosse, to evidence indebtedness from her husband to her, and Bosse was to have employment in the company, as they had a desire to leave the sand-hills. These deeds would show the equity to be $6,000 in the two farms. When Bosse conveyed the land to Uehling, the only property he had left was a house, in which they lived, mortgaged for $4,000 (since lost through foreclosure instituted by Home Owners Loan Corporation), the bank stock and an automobile. The agreement provided that, upon failure of Uehling to consummate the deal, the land should be deeded to Ina B. Bosse in payment of indebtedness owing her by her husband. This agreement does not appear in the record. There is some testimony that a memorandum of it was made in writing. F. J. Uehling failed to consummate the deal, and on December 28, 1928, he reconveyed the real estate to Ina B. Bosse in the same form and manner as the deeds from Bosse and his wife to Uehling were made. The conveyance of the 160 acres was filed of record June 19, 1929. and of the 80 acres December 20, 1934.

The claimed indebtedness of Bosse to his wife has its origin in the estate of her father, Fred Uehling, who died testate in Knox county, Nebraska, in March, 1914. He was a banker, grain, stock, hardware and lumber dealer, and a farmer, and a man of considerable wealth. His will provided that Mrs. Bosse, as well as his other children, would receive a 1,000-dollar bequest each, and that all the rest, residue and remainder of his real and personal property would go to his wife, Marie Uehling, the latter being nominated his executrix, and at her death, after certain provisions of the

will were complied with, he devised and bequeathed to his sons and daughters, share and share alike, the remainder.

In 1919, by concurrence of the mother and children, a large part of the real estate holdings of Fred Uehling's estate was sold, and Marie Uehling took the funds received from the sale in her possession as a life tenant. In addition to the real estate holdings, Fred Uehling left his widow life insurance in the amount of $6,000 or $7,000, and a block of stock in the Commonwealth Life Insurance Company, of Omaha, carried in the name of the son, F. J. Uehling, president of the company. Instead of investing this money in loans to strangers, Mrs. Uehling from time to time advanced funds she held in trust as life tenant to her several children as remaindermen, and to evidence such indebtedness took their notes. The money so received by Ina B. Bosse was loaned to her husband, and in this respect the record reflects the following: Note dated May 1, 1919, $4,000, signed by W. H. and Ina B. Bosse; note dated November 25, 1922, $3,500, signed by Ina B. Bosse; note dated January 2, 1923, $2,000, signed by Ina B. Bosse; and a note dated May 1, 1923, $1,500, signed by W. H. and Ina B. Bosse, making a total of $11,000. The first note was payable five years after date; the other three payable on demand, and all with no interest stated.

Mrs. Bosse testified that this money was given to her husband, and he testified he used it for business purposes and placed it to his credit in the bank, and gave his wife notes evidencing his indebtedness to her. The only notes appearing in the record are: One dated December 1, 1925, in the amount of $11,410.59, and one dated January 1, 1928, in the amount of $12,337.49. Both notes bore interest at 6 per cent., and the interest was added each time a new note was given. There is controversy in the evidence to the effect that the plaintiff was satisfied that this money was shown to the credit of Bosse, with the exception of a 2,000-dollar item. This is denied in part, and the bank records do not accurately reflect the amounts received from Ina B. Bosse or the dates on which such amounts were placed to Bosse's credit,

but, in fact, the amounts were different in proportion, and from different members of the family, *i. e.* Marie Uehling and F. J. Uehling; also from the Commonwealth Life Insurance Company, and remittances of $3,000 from Mrs. Bosse. Bosse contended that there were three accounts, viz., his own, one known as the Bosse-Harding account, and the W. H. Smith account. The two latter accounts do not appear in the record. It is obvious that the bank accounts, under such arrangement, would not convey the exact status of the money to Bosse's credit. It is apparent that appellees rely upon the positive testimony of Mr. and Mrs. Bosse that the loans were made and were corroborated by the notes as heretofore stated. There are other items reflected by the record, one known as the 8,000-dollar loan from Marie Uehling, which apparently was managed by Emil Uehling (a brother of Mrs. Bosse), who brought the money to Bosse, to be used for investment purposes. This was in 1926.

There is some evidence that the Ruegge land was required to be taken out of the bank, and to accomplish this at least $8,000 was used, together with other moneys, and a sale to one Warrick. It is needless to trace the ramifications of this deal. The sum total is that it resulted in two houses being deeded to Mrs. Bosse in the amount of $11,600, one of which was sold on terms for $2,400, and one upon which a Home Owners Loan was obtained, later foreclosed, with the net result that there was still owing Marie Uehling approximately $3,100 at the time of her death December 20, 1929. Uehling received the deed to the Ruegge land from the bank after foreclosure by the bank, which held a subordinate 15,000-dollar mortgage, approximately 10 days after the sheriff's deed was made to the bank. The 8,000-dollar loan is reflected by a 4,000-dollar mortgage upon five acres of the Ruegge land upon which buildings were situated, and a 4,000-dollar mortgage upon the Bosse home. On August 1, 1928, W. H. and Ina B. Bosse conveyed the Ruegge land to F. W. Warrick for a consideration of $41,600. Bosse testified that the $8,000 was loaned to him; other testimony was that it was loaned to Ina B. Bosse. In any event, she agreed to bind

her separate estate and to have any amount owing on the loan deducted from her distributive share of her mother's estate. The two houses were taken in her name because the family required it, and notes signed by W. H. and Ina B. Bosse appear in the record, evidencing indebtedness to the heirs.

The claimed indebtedness to Ina B. Bosse of $11,410.59, owing since 1925, is not reflected by tax returns showing the same. At the time of the conveyance of the land in question by Bosse to Uehling and subsequently by Uehling to Ina B. Bosse, Bosse managed the farms, collected the rents, paid the taxes, and paid taxes during the years 1934, 1935, 1936 and 1937. Ina B. Bosse testified that her husband attended to all of the business. Bosse testified that the bank was closed suddenly; that he telephoned the department on October 10, 1928, that several checks had come in which they could not handle. No record of the Bosse-Harding account is found, and the Smith account was Bosse's own account and pertained to investments in which Harding had no interest and items which Bosse wanted to separate so that they would not be in his personal account. No record of this account appears. Bosse further testified that, when one Otradovec was employed in the bank, an account was opened called "B & O" account. Marie Uehling credited interest on the back of notes received from her children, whether she actually received such interest or not, to avoid dissatisfaction among them, and in some instances, when she wanted or needed something and they provided it, she noted a payment of interest on their indebtedness. Bosse, in handling money he desired to invest, had a habit of making cashier's checks when he was going to use the money soon.

Section 36-401, Comp. St. 1929, provides in part: "Every conveyance * * * in writing * * * of any real estate or interest in lands, * * * made with the intent to hinder, delay or defraud creditors * * * of their lawful rights, * * * debts or demands, * * * shall be void."

"A conveyance is declared to be fraudulent when its object or effect is to defraud another, or the intent with which

it is made is to avoid some duty or debt due by or incumbent upon the party making the transfer." 27 C. J. 415.

"A conveyance from a husband to his wife is presumptively fraudulent as to an existing creditor, and in litigation between the creditor and grantee on that issue, the burden is on the latter to establish the good faith of the transaction by a preponderance of the evidence. *Christensen v. Smith*, 123 Neb. 388, 243 N. W. 118." *Butke v. Nachschoen*, 133 Neb. 366, 275 N. W. 318.

With the foregoing authorities in mind, the appellant contends that the trial court erred in that its decree is contrary to and not supported by the evidence, and is contrary to law. We have heretofore set forth a brief synopsis of the evidence. We now analyze such evidence and further facts disclosed by the record to determine whether or not the conveyances made were fraudulent.

On November 25, 1925, the Meadow Grove State Bank, competitor of Bosse's bank, was taken over by the guaranty fund commission. Six days thereafter, on December 1, 1925, Bosse gave to his wife his note for $11,410.59. On July 24, 1928, the Security Bank of Meadow Grove was examined by the department of banking. This examination showed: Overdrafts, $1,844.27; $3,300 of rediscounts on which the bank was liable, with net earnings from December 31, 1928, to July 24, 1929, of $36.98; the total charge-off in the same period, $2,184.19, and recovery from previous charge-off items, the sum of $2,435.79; slow paper, $125,795.52; doubtful paper, $25,466.65; probable loss estimated, $8,750, with $36,301.05 held by the Omaha National Bank as collateral for $25,000 borrowed from the same bank. The examiner stated that the solvency of the bank was doubtful, and under general remarks: "They should have an assessment to take out long standing doubtful paper." However, the examiner expressed the thought that to levy such assessment would be worse than if it were not levied, due to the existing conditions in the community. A detailed report was required of the bank, to be furnished by August 30, 1928. It was compiled October 10, 1928. In this

statement the cash reserve was 10 per cent. and had been for two years, while the law required 15 per cent. It is apparent that the closing of the bank on October 31, 1928, was not sudden, but, on the contrary, Bosse evidently knew the condition of the bank.

With reference to the debt due the bank from L. C. Ruegge, wherein it was claimed the bank received the benefit of certain notes signed by Bosse, Beach, Crook and others, these notes are not in evidence. The record does not show that the Ruegge land was carried as other real estate, or that any request was made to take this land out of the bank. No correspondence between the bank and the department with reference to this land appears in the record, nor is there evidence to show that the department knew of the deed or demanded that the land be taken out of the bank. The sheriff's deed to the bank is dated April 1, 1925, and the deed of the bank to Bosse is dated April 17, 1925, or 16 days later.

In the case at bar the deeds made to F. J. Uehling were voluntary; in fact, he gave nothing and promised nothing more or less than that he would endeavor to make the deal, as heretofore indicated. Ina B. Bosse would not be in any better situation than was her brother, F. J. Uehling, in this respect. He would have no defense to this action. Nothing ever came to Bosse from Uehling. The insurance company mentioned is not named in the record, nor its location, nor any information with reference to it. There is no correspondence between F. J. Uehling, or his sister, and Bosse with reference to it, and the alleged agreement is not shown in the record. The deeds from Bosse to F. J. Uehling were made October 22, 1928. July 12, 1928, Ina B. Bosse received the two houses in Meadow Grove from her husband through the J. W. Warrick transaction. The Security Bank suspended operation at the close of business October 31, 1928. The deeds to Uehling were filed November 1, 1928, the day the department took possession of the bank, and shortly after the lands were deeded to Mrs. Bosse by F. J. Uehling. She sold 20 acres constituting the gravel pit for $11,000. The transactions between Mr. and Mrs. Bosse, as disclosed by

the evidence, are so closely related in time to the events leading to the closing of the Security Bank and Bosse's liability connected therewith that they did not just happen in the ordinary course of events. The reason for the conveyances is apparent.

In *Hilton v. Clements*, 137 Neb. 791, 291 N. W. 483, this court held: "Where the testimony relied upon to show good faith is given by interested relatives, the reasonableness or unreasonableness of their evidence bears considerable weight in arriving at a just conclusion." In that case the court held that the "question of fraudulent intent is a question of fact and not of law."

We conclude from an analysis of all the evidence and the authorities cited that the conveyances in question were fraudulent as to the judgment creditor.

Some contention is raised with reference to the liability of Bosse in that, "Where it is alleged that conveyances of real estate were made to defraud existing creditors and the proofs show such conveyances were executed and delivered prior to the incurring of the indebtedness, the petition under the proofs will not sustain a decree in favor of the plaintiff." *Ayers v. Wolcott*, 66 Neb. 712, 92 N. W. 1036.

We are unable to agree that the above case is in point with the situation in the instant case. The petition here does not present a question with reference to future conveyances. It was alleged and proved that on October 22, 1928, William H. Bosse owned the land in question and deeded it to his wife's brother, F. J. Uehling, on the same day; that the Security Bank of Meadow Grove suspended business October 31, 1928; that the deeds to Uehling were filed for record November 1, 1928; that the Security Bank was restored to the stockholders December 11, 1928; that Uehling deeded the land to Ina B. Bosse December 28, 1928; that on October 22, 1928, Bosse was the owner of 126 shares of the capital stock of the Security Bank; that on December 11, when the bank was restored to the stockholders, he was the owner of 14 shares. The deeds to Ina B. Bosse were made 17 days after Bosse became the owner of the 14 shares and after he ac-

quired the stock; she did not become the owner of the property until after the 14 shares were issued. Ina B. Bosse did not have title to the real estate until December 28, 1928. Under such circumstances, the case of *Ayers v. Wolcott, supra,* is not applicable.

Record examined, and the evidence in the instant case is found insufficient to sustain the burden of proof to show by a preponderance thereof the *bona fides* of the conveyances.

The judgment of the trial court is reversed and the cause remanded, with directions to enter judgment in favor of the plaintiff and against the defendants as prayed in plaintiff's petition.

REVERSED.

IN RE ESTATE OF BEN F. VETTER.
DELLA CRAIG VETTER, APPELLANT, V. W. A. STEWART, JR., EXECUTOR, ET AL., APPELLEES.
5 N. W. (2d) 215

FILED AUGUST 7, 1942. No. 31407.

1. Appeal. In an appeal to this court from the action of the district court wherein the district court reviewed an order of the county court, it is the order of the county court that must be examined to ascertain whether or not there is the finality which will permit appeal.
2. Judgment. A judgment on the facts in a former suit is a bar to a second action involving the same facts between the same parties and those in privity with them.
3. ———. A judgment on facts affecting a party not in interest has no binding force and effect in and upon parties in interest who were not parties to the action in which the judgment was rendered.

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

Frank M. Johnson, for appellant.

Allen, Requartte & Wood, contra.

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

YEAGER, J.

This is an appeal growing out of the probate of the estate of Ben F. Vetter, deceased, in the county court of Dawson county, Nebraska, who died testate on May 9, 1939, leaving as heirs his widow and his brothers and sister, there being no children by this or a former marriage. William A. Stewart, Jr., is executor of the will.

After examination of the record we find that this case presents the single question of whether or not a judgment of the county court of Dawson county, Nebraska, appealed to the district court for that county where such judgment became final, holding that Della Craig Vetter, widow of Ben F. Vetter, deceased, is entitled to repudiate an antenuptial agreement and elect to take under the statute, is *res adjudicata* as to objections by heirs of the deceased, the judgment having been based upon objection to the election by the executor of the will of Ben F. Vetter.

The entire matter was presented in a confusingly complicated manner in the county court, in the district court and again in this court.

The will, which gave the widow the income from a trust fund of $15,000 and the use of the home for life, was duly admitted to probate, whereupon the widow elected to take under the statute. Objections to the election were regularly filed by the executor, which objections were overruled by the county court. Appeal was taken by the executor to the district court where the action of the couny court was sustained. Appeal was then taken to this court by the executor, which appeal was dismissed for the reason that the executor had failed to give the bond required by statute. *In re Estate of Vetter,* 139 Neb. 307, 297 N. W. 554. Following receipt of mandate from this court, an order was entered by the district court declaring the finality of the previous judgment on the objections of the executor to the election by the widow, which order was transmitted to the county court of Dawson county.

Thereafter the widow filed in the county court a petition for an accounting and distribution of the assets of the estate, an unusual proceeding nowhere described or contemplated by statute.

Following the filing of the petition for accounting and distribution, Frank Vetter and Fred Vetter, brothers of the deceased, filed objections in their own behalf as heirs to the widow's election.

Hearing was had on the petition and these objections. No order was made on the petition for accounting and distribution, but the county court decreed that the judgment on the objection of the executor to the election of the widow was *res adjudicata* as to the heirs of the deceased, and overruled the objections. From this finding and decree of the county court appeal was taken to the district court by these objectors.

On hearing in the district court the decree of the county court was reversed, and it was there held that the judgment on the objections of the executor to the widow's election was not *res adjudicata* as to the objecting heirs, and that they had the right to set up and have determined their objections and directed a hearing thereon in the county court.

It is this order that presents the basis for the appeal now before us, which appeal was taken by Della Craig Vetter, the widow.

There is also presented a motion by the objectors or appellees for dismissal of the appeal on the ground that the order of the district court appealed from is not a final order.

On the question presented by the motion, it must be held that the order being considered has the finality required by law to make it the basis of an appeal. The order which is the basis of the appeal is not the order of the district court, but the order of the county court overruling and dismissing the objections of Frank Vetter to the election of the widow to repudiate the antenuptial agreement and to take under the statute. The action in the district court was a review of a final order in the county court. Within the meaning of the decisions of this court we hold that this was a final order.

Parmele v. Schroeder, 59 Neb. 553, 81 N. W. 506; *Parmele v. Schroeder*, 61 Neb. 553, 85 N. W. 562.

Coming now to the question of whether or not the judgment on the objections of the executor to the election by the widow is *res adjudicata* as to the objectors now before the court, the opinion in *In re Estate of Vetter, supra*, contains a conclusive answer. There it was stated:

"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."

It is the law that a judgment on the facts in a former suit is a bar to a second action involving the same facts between the same parties and those in privity with them. *Wilch v. Phelps*, 16 Neb. 515, 20 N. W. 840; *Morgan v. Mitchell*, 52 Neb. 667, 72 N. W. 1055; *Wittenberg v. Mollyneaux*, 60 Neb. 583, 83 N. W. 842; *State v. Savage*, 64 Neb. 684, 702, 90 N. W. 898, 91 N. W. 557; *Battle Creek Valley Bank v. Collins*, 3 Neb. (Unof.) 38, 90 N. W. 921; *Schlemme v. Omaha Gas Mfg. Co.*, 4 Neb. (Unof.) 817, 96 N. W. 644; *Shepard v. City of Friend*, 141 Neb. 866, 5 N. W. (2d) 108.

There is nothing, however, in the rule or in any of the decisions holding, or from which it may be inferred, that a party not in interest is in privity with parties in interest, or that a judgment appearing to affect a party not in interest has binding force and effect upon parties in interest.

An examination of the record discloses that the first objections by parties in interest to the election of the widow to repudiate the antenuptial contract and to take under the statute were by the objectors here.

Clearly the objectors here have the right to have their objections to distribution on the basis of the widow's election heard and determined in a proceeding in the county court of Dawson county, Nebraska, and they are not barred by the judgment on the action prosecuted by the executor.

The judgment of the district court is affirmed.

AFFIRMED.

AUGUST W. WELCH ET AL., APPELLEES, V. ANNETTE C. REEVES ET AL., APPELLANTS.
5 N. W. (2d) 275

FILED AUGUST 14, 1942. No. 31450.

1. Fraud. "It is a general rule of law that, in order to obtain redress or relief from the injurious consequences of deceit, it is necessary for the complaining party to prove that his adversary has made a false representation of material facts; that the complaining party was ignorant of its falsity, and believed it to be true; that it was made with intent that it should be acted upon; and that it was acted upon by the complaining party to his damage." *Omaha Electric Light & Power Co. v. Union Fuel Co.*, 88 Neb. 423, 129 N. W. 989.
2. ———. "In cases where there has not been a rescission, the remedy is damages for the fraud; the burden in such cases is on the person alleging fraud to prove both the fraud and the amount of his damages, and the measure thereof is the difference between the article or thing if it had been as represented and its actual value." *Rankin v. Bigger*, 128 Neb. 800, 260 N. W. 202.
3. Appeal. When a certain theory as to the measure of damages is relied upon by the parties in the trial court as the proper one, it will be adhered to on appeal whether it is correct or not.
4. ———. Here plaintiffs did not plead interest as an element of their damages; the trial court did not include interest as an element of damages in his instructions to the jury; the plaintiffs made no objection to the instructions by motion for a new trial and have not cross-appealed on that matter to this court. Under such circumstances, this court cannot consider interest as an element of damages in determining the correctness of a remittitur order.

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

A. A. Rezac, for appellants.

Arthur C. Pancoast, contra.

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER and YEAGER, JJ., and ELLIS, District Judge.

SIMMONS, C. J.

In this action plaintiffs sought to recover damages based

on misrepresentations as to the construction of a house which plaintiffs purchased from defendants. Defendants appeal from a judgment against them.

The plaintiffs in their amended petition alleged that the defendants were the owners of the property consisting of a parcel of ground and a brick veneer house with finished attic; that the plaintiffs negotiated for the purchase of the property between October 6, 1940, and the date of the purchase on November 19, 1940; that they paid $9,000 therefor; that the defendants as an inducement to the plaintiffs to purchase the property represented (1) that the house was entirely and completely insulated including ceiling and side walls; (2) that the house was completely weather stripped; (3) that the floors in the downstairs rooms were in first class condition; (4) that the joists under the first floor were 12-inch joists of select lumber and in first class condition; (5) that the heating plant was adequate to heat the whole house at a cost of about $100 a year; that each of said representations was false and made as a positive statement of known facts; that the falsity of the representations was not discovered until after the plaintiffs purchased and entered into possession; that they were representations of material facts which were not apparent but concealed; that plaintiffs believed said representations to be true, relied thereon and purchased the property, and would not have purchased the property had they known its true condition; that plaintiffs suffered damages as follows: $590 necessarily expended in order to insulate said house, $107 which it will be necessary to expend for weather stripping of doors and windows, $300 to refinish and make the floors as represented by the defendants, $35 for repairs to heating plant, and $1,000 for replacing joists and subfloors, which had been damaged as a result of a fire in the basement of the premises and which damage had been concealed by a permanent ceiling placed over the same; "that the total cost of putting said property in the condition it was represented to be is the sum of $2,032," for which amount plaintiffs prayed judgment.

Defendants by answer admitted the ownership and sale of the premises to the plaintiffs. By specific reference defendants denied each allegation of plaintiffs' petition, denied false statements or representations and denied concealing any conditions or latent defects in the property; denied specifically each allegation of specific damage or "any other sum" and finally denied generally.

The case went to trial and at the conclusion the court submitted to the jury the contentions of the parties as to two elements of damage claimed, to wit, damage because the house was not insulated as represented and because of the burned and defective condition of the floor joists.

As to the measure of damages the court instructed the jury: "If you find for the plaintiffs the measure of their recovery will be such sum as will fairly and reasonably compensate them for any loss they have suffered on account of false representations being made to them by the defendants, or either of them, concerning insulation of the house or the condition of the joists under the floor of the first story." The jury returned a verdict for $1,500. Upon motion for a new trial, the court required a remittitur of $200, which the plaintiffs made, and the motion was overruled.

Plaintiffs do not cross-appeal as to the refusal of the trial court to submit the rejected items to the jury. Accordingly the evidence will be stated only as to the two items submitted to the jury by the trial court.

Plaintiffs offered evidence that when they inspected the basement prior to purchase they found the ceiling all covered, and that Mr. Welch said to Mr. Reeves, "I would like to see the joists * * * what those joists are, and what the condition of them is," and that Mr. Reeves replied they had put on the covering to keep the dirt from going up from the basement and that "they were twelve-inch joists of select lumber * * * all in very good condition;" that after they had gone into possession they had occasion, in doing some wiring, to remove a section of the basement ceiling, and found the original floor joists badly charred; that new joists had been set beside the old and nailed to them; that they were

2 inch by 10 inch and not 2 inch by 12 inch material; that the subfloor was badly charred and in some places completely burned away; that the subfloor was not nailed to the new joists and that there was a space between the top of the new joists and the charred floor; that because of the ceiling covering this condition could not be seen when they inspected the house; that a contractor inspected the property and estimated the costs of putting the joists and subfloor in proper condition and that the estimated cost was $758. This fire had occurred before the defendants purchased the house and the repairs had been made by the former owner.

About the insulation, Mr. Welch testified that Mrs. Reeves told him that the ceiling of the attic was all insulated; that he looked into one of the storage closets off the second floor room and noticed "a blanket insulation" between the second floor joists; that there was no way to see whether the side walls were insulated; that later Mr. Reeves told them the house was completely insulated, side walls and all; that he ascertained after purchase that there was no insulation on the ceiling nor side walls; that later plaintiffs had this insulating work done at a cost of $590 which had been paid. The testimony of the men who insulated the house was that the only insulating they found was on the floor joists of the second floor.

Plaintiffs both testified that they believed these representations to be true, relied upon them and would not have purchased the property had they known they were false.

Defendants' testimony was to the effect that they did not know of the fire or the charred condition of the floor; that they did not know the dimensions of the joists and said nothing about that and were not asked about it; that they told plaintiffs that when they (defendants) purchased the property they were told that the house was insulated and that they made no representation regarding insulation, floors or joists to the plaintiffs.

Defendants first contend that plaintiffs' evidence does not sustain a judgment against them. "It is a general rule of law that, in order to obtain redress or relief from the in-

jurious consequences of deceit, it is necessary for the complaining party to prove that his adversary has made a false representation of material facts; that the complaining party was ignorant of its falsity, and believed it to be true; that it was made with intent that it should be acted upon; and that it was acted upon by the complaining party to his damage." *Omaha Electric Light & Power Co. v. Union Fuel Co.*, 88 Neb. 423, 129 N. W. 989; *Bowen v. Johnson*, 129 Neb. 868, 263 N. W. 215.

Considering the jury's verdict, in the light of disputed questions of fact, it must be held that under the above rule plaintiffs have established a cause of action and a right to recover damages in some amount.

Defendants next argue that the evidence does not sustain a judgment for the sum of $1,300 and that the measure of damages is the difference between the amount paid for the property and the value of the property conveyed. Such is not the measure of damages in this state. The rule long followed is: "In cases where there has not been a rescission, the remedy is damages for the fraud; the burden in such cases is on the person alleging fraud to prove both the fraud and the amount of his damages, and the measure thereof is the difference between the article or thing if it had been as represented and its actual value." *Rankin v. Bigger*, 128 Neb. 800, 260 N. W. 202.

Did plaintiffs' evidence sustain the damages recovered? The only evidence indicating the value of the property is the purchase price. There is no evidence fixing the actual value of the property at the time of the conveyance. That it had a material value is certain. Neither is there evidence as to its value had it been as represented. However, it must be noted that plaintiffs pleaded their case on the theory that their damages were the amount of the cost of placing the property in the condition in which it was represented to be. Defendants did not challenge the sufficiency of the petition by demurrer, but rather joined issue with the plaintiffs on that theory of arriving at the damages. The evidence that the cost of the insulation was $590 was admitted without ob-

jection and was not in any wise contested. The evidence that the estimated cost of restoring the burned joists and floor to a proper condition was $758 was likewise admitted without objection and was not in any wise contested. Defendants did not by motion for an instructed verdict test the sufficiency of this evidence to sustain a judgment, at the close of either plaintiffs' case or the entire cause. The defendants did elect to submit the cause to the jury upon their denial of the deceit and misrepresentation. Defendants did not in their motion for a new trial challenge the correctness of any of the instructions given by the trial court nor did they tender different instructions. They did, in their motion for a new trial, contend that the damages allowed by the jury were "Excessive damages, appearing to have been given under the influence of passion or prejudice; that the verdict is excessive and rendered by the jury for more than the amount claimed due by the plaintiffs. That the record in this case does not sustain the verdict in amount. * * * Error in the assessment of the amount of recovery, which is too large, and which assessment is in excess of the amount claimed and testified to be due the plaintiffs." The trial court recognized this contention and required the plaintiffs to remit a part of the verdict and to reduce it to an amount less than that contended for and testified to by the plaintiffs' witnesses. This was in accord with defendants' motion. Summarizing: The defendants and plaintiffs accepted a common theory of the means by which plaintiffs' damage, if any, was to be determined; they tried the case on that theory; they submitted it to the trial court on that theory down to and including the motion for a new trial. Under these circumstances, we are of the opinion that the evidence, received without objection and not controverted, is sufficient to sustain the judgment. It has long been the rule of this court that, when a certain theory as to the measure of damages is relied upon by the parties in the trial court as the proper one, it will be adhered to on appeal whether it is correct or not. *Behle v. Loup River Public Power District*, 138 Neb. 566, 293 N. W. 413; *U. S. Tire Dealers Mutual Corporation v. Laune*, 139 Neb. 26, 296 N. W. 333.

Finally, defendants contend that ordinary prudence on the part of plaintiffs would have prevented the deception and that an action for the fraud perpetrated will not lie, citing *Osborne v. Missouri P. R. Co.*, 71 Neb. 180, 98 N. W. 685, and *Dyck v. Snygg*, 138 Neb. 121, 292 N. W. 119. The rule has no applicability to the two elements of damage which the trial court submitted to the jury. These defects were latent. The fact that the side walls and ceiling above the second floor room had not been insulated and that the floor joists and subfloor had been burned could only be determined, as it was subsequently determined, by removing a part of the permanent structure of the house. A prospective purchaser is not bound to require a prospective vendor to tear down parts of a house in order to determine whether or not representations as to the structure are correct.

Section 20-1929, Comp. St. 1929, provides: "That whenever the court shall direct a remittitur in any action, and the same is made, and the party for whose benefit it is made shall appeal said action, then the party remitting shall not be barred from maintaining that said remittitur should not have been required either in whole or in part."

Plaintiffs, claiming the benefit of this provision, contend that the trial court erred in requiring them to file a remittitur. This claim is based on the proposition that they were entitled to interest not only on their judgment, but on their claims before judgment, to be included in determining their damages, and that the jury had the right to consider the difference in value between 2 inch by 10 inch joists and 2 inch by 12 inch joists and the effect of making the repairs on the premises. This latter contention may be dismissed by the statement that there is no evidence in the record as to that difference in value or the effect of the repairs if made on the premises.

As to the first item, *i. e.*, interest, the record shows that the $590 was paid before the date of the trial. We find no evidence as to when it was paid. The second item was not paid at the date of the trial. Hence, the only basis for this contention must be that, in an action of this kind, interest

should be calculated on the claims from the date of the payment of the purchase price to the date of the trial. A sufficient answer to this contention is that plaintiffs did not pray for interest as an element of their damages, and the trial court did not include interest as an element of damages in its instructions to the jury. The plaintiffs made no objection to the instructions by motion for a new trial and have not cross-appealed on that matter to this court. The matter therefore was not before the trial court, is not before this court and cannot properly be considered as an element of damages in determining whether or not the remittitur should have been ordered. Plaintiffs do not otherwise question the correctness of the remittitur order.

The judgment of the trial court is affirmed.

AFFIRMED.

LYDIA BANCROFT, APPELLEE, V. WILLIAM KITE, APPELLANT.
5 N. W. (2d) 196

FILED AUGUST 14, 1942. No. 31421.

1. **Automobiles.** The rule that a motorist having the right of way in a public street is not required to anticipate pedestrians crossing the street between intersections in violation of a city ordinance does not apply to a motorist approaching a crosswalk on the wrong side of the street.
2. **Trial.** Instructions should be considered together and when, as an entire charge, they properly submit the issues to the jury, the verdict will not be set aside on appeal for harmless error in one of them.
3. **Automobiles.** In an action against the owner of a motor truck, which collided with a pedestrian on a crosswalk at the intersection of public streets, to recover damages for personal injuries, the evidence reviewed in the opinion *held* sufficient to sustain a verdict in favor of plaintiff on the issues of negligence and proximate cause.

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

L. R. Doyle, for appellant.

Lloyd E. Chapman, contra.

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE and YEAGER, JJ., and ELLIS, District Judge.

ROSE, J.

This is an action by Lydia Bancroft, plaintiff, to recover from William Kite, doing business as Keep-U-Neat Cleaners and Laundry, defendant, to recover $10,000 in damages for personal injuries. About 8:50 in the morning, December 14, 1940, a motor truck owned by defendant, and operated for him in his business by Vaughn McVey, struck plaintiff as she was attempting to cross Thirteenth street near O street in the city of Lincoln, knocked her down and caused the personal injuries for which she claims damages.

Plaintiff in her petition alleged in substance that she was in the exercise of due care and free from negligence when she was struck by the truck of defendant and that the proximate cause of her injuries was the negligence of the truck driver, for which defendant is liable. The time, place, circumstances, acts of negligence and pertinent traffic regulations are pleaded in detail.

Defendant denied the negligence imputed to him and to the driver of his motor truck and alleged in substance that the proximate cause of the injuries pleaded by plaintiff was her own negligence in attempting to cross Thirteenth street between intersections in violation of a city ordinance and in stepping suddenly in front of defendant's moving truck when no degree of care on the part of the driver could prevent the accident. Different items of defense were pleaded in full.

The reply to the answer contained a general denial and a plea that the driver of the truck could have prevented the collision by the exercise of ordinary care after discovering plaintiff's peril.

Upon a trial of the cause the jury rendered a verdict in favor of plaintiff for $2,000. From judgment therefor defendant appealed to the supreme court.

Counsel for defendant introduces his argument for a reversal of the judgment below by criticizing an instruction herein as a violation of the rule announced in a former case. The instruction is as follows:

"You are instructed that it is the duty of one driving an automobile upon a public street to look ahead and see anything in the line of his vision which will affect the use of the street and, in case of accident in connection with his driving, he is presumed to have seen what he should and could have seen in the proper performance of that duty. You are further instructed that such driver has no right to assume that the street is clear, but under all circumstances and at all times he must be vigilant and anticipate the presence of others. The fact that the driver of a motor vehicle did not know that any one was on the street is no excuse for conduct which would have amounted to negligence or recklessness if he had known that another person was on the street. You should consider all of the surrounding facts and conditions in determining whether or not the defendant was negligent through the acts of his driver McVey."

The following is quoted to show error in the foregoing instruction:

"The driver of an automobile having the right of way between street intersections is not required to anticipate that pedestrians will violate an ordinance prohibiting them from crossing a street at a point other than a crosswalk." *Doan v. Hoppe,* 133 Neb. 767, 277 N. W. 64.

This *Doan-Hoppe* case is not in point. Doan crossed the street between intersections and that fact was not in controversy. In the case at bar plaintiff alleged and testified she was in the sidewalk lane which crosses Thirteenth street when struck by defendant's truck—an issue of fact. According to testimony of both plaintiff and the truck driver, a portion of the truck was on the wrong side of the center line of Thirteenth street before the collision occurred and at the time of the impact. The driver, therefore, under the circumstances, was required to anticipate the presence of others in his path as stated in the instruction, which, though

erroneous in part, is not prejudicial to defendant. The instructions, considered together as they should be, fairly submitted the case to the jury. The rights of defendant were fully protected by the trial court, one of the instructions reading thus:

"On the other hand, if you find from the evidence that plaintiff was guilty of negligence herself which caused the accident or contributed thereto, and that such negligence on her part was more than slight, then and in such case your verdict should be for the defendant and you should find against the plaintiff upon her petition; and, of course, if defendant's driver was guilty of no negligence in the premises, your verdict should be in defendant's favor."

The line on which plaintiff started to walk across Thirteenth street was an issue of fact for the jury. A material inquiry on appeal is the sufficiency of the evidence to sustain the verdict that she was on the crosswalk where she had a right to be and that she was in the exercise of ordinary care when knocked down by defendant's truck. The following facts are shown by uncontradicted evidence: Thirteenth street runs north and south and crosses O street at right angles. The intersection, with an automatic signal light at each corner to direct the movement of all kinds of traffic, is a congested area in the city of Lincoln. Both streets are paved. On the south side of O street, which runs east and west, there is a pedestrian lane or walk 23½ feet wide across Thirteenth street. The north and south boundaries of the crosswalk are indicated by white lines on the pavement. The southern boundary of the crosswalk is in line with the traffic signals on the south side of O street. There are four lanes for vehicular traffic on Thirteenth street, two east of the center line and two west of the center line, all marked by white lines on the pavement. The two lanes east of the center line of Thirteenth street are for north-bound traffic and the two lanes west of the center line of Thirteenth street are for south-bound traffic. The truck that struck plaintiff was owned by defendant and, at the time, was operated for him in his business by Vaughn Mc-

Vey. At the time of the impact the pavements were covered with slippery ice and there was some snow on the surface. Plaintiff was on her way to work in the department store of Miller & Paine at the southwest corner of Thirteenth and O streets. The foregoing facts are clearly established by the evidence and are uncontradicted.

Alex Hill, a witness for plaintiff, testified in substance and effect: He is owner and licensed operator of a Checker Cab. He is a brother of plaintiff. He picked her up at her home on the morning of December 14, 1940, and took her downtown in his cab. He drove north on Thirteenth street in the east vehicular lane. Approaching O street, he stopped his cab at the crosswalk on a red light signal. Plaintiff got out of the cab on the right side, walked north beside it to the crosswalk, turned west thereon and passed in front of his cab. The driver of a car headed north just west of the cab in the adjoining lane of traffic motioned to plaintiff to proceed west. The signal for the traffic on the east side of Thirteenth street changed from red to green and Hill, the witness, proceeded north in his cab.

Plaintiff testified in her own behalf in substance and effect as follows: On the morning of December 14, 1940, her brother took her in his cab from her home to Thirteenth and O streets. Going north on Thirteenth street the automatic signal turned red at O street. He stopped his cab with the front end at the crosswalk for pedestrians crossing Thirteenth street on the south side of O street. There she got out of the cab, went north around the front end of it and started to cross Thirteenth street, going west. While on the crosswalk, after she passed the front end of her brother's cab, the signal light she was approaching turned from green to red. She then looked at the driver of a car headed north, standing west of her brother's, and he motioned for her to pass in front of him and she did so. She then looked north and west for cars going south across her path and, looking to the south, she saw the truck of defendant on the wrong side of the street bearing down on her and she had only time to partially turn her back before it struck her. The front

end of the truck hit her on her back, left arm, hip and legs, threw her a short distance to the north and knocked her down and she slid on the ice. When she came to rest she was west of the center line of Thirteenth street and her feet were almost at the north side of the pedestrian crosswalk on the south side of O street. She saw the truck skidding before it came to a stop. The driver of the truck did not blow a horn or give any other warning before it struck her. After the impact the truck skidded on the ice and the driver did not seem to have control of it. The truck driver helped her up, brushed the snow from her clothes and picked up her hat. They walked toward the truck. It was standing on the west side of Thirteenth street about three or four feet south of the crosswalk and pointing in a southwesterly direction. The rear end of the truck was about three or four feet south of the crosswalk and the front end 10 or 12 feet south of the crosswalk. The truck struck plaintiff when she was in the crosswalk west of the center line of Thirteenth street, skidded on the ice, turned part way around and came to rest south of the crosswalk.

Plaintiff's account of her injuries is thus indicated by the foregoing extracts from her testimony in connection with facts established by uncontradicted evidence.

The truck driver, however, testified to a different version of the facts. He testified in substance: As he approached O street on Thirteenth street, there was a long line of cars in the east or right lane for north-bound traffic. He took the lane next to the center line of Thirteenth street. There was one car ahead of him in the same lane and it was still moving forward as he came up behind it. A woman stepped from between two cars into his path. She was not on the crosswalk. She was then 30 to 35 feet south of the crosswalk. The traffic light was red as he came up behind the car in front of him. When he first saw her she was five or six feet away, going west. He was going 10 miles an hour. He applied his brakes and turned his truck west to avoid hitting her. The right front part of the truck collided with her. She was then close to the center line of Thirteenth

street. He stopped practically at the time of the impact. Plaintiff was then within two or three feet of the truck. It was 30 feet south of the crosswalk when it stopped. Plaintiff was 30 or 35 feet south of the crosswalk at the time of the collision.

The testimony thus summarized and other evidence in support of the defense indicate that the negligence of plaintiff caused the collision, as the record is viewed from the standpoint of defendant, but there is no physical fact or overwhelming evidence or circumstance to make the testimony of plaintiff or the evidence adduced by her unbelievable or insufficient to support the verdict in her favor. On conflicting evidence the jury found that plaintiff was not at fault and that the negligence of the truck driver was the proximate cause of the collision and of resulting injuries. On the issue of damages, prejudicial error has not been found in the record.

AFFIRMED.

FRIEDA R. HESS, APPELLANT, V. CHARLES W. TAYLOR, STATE SUPERINTENDENT OF PUBLIC INSTRUCTION, APPELLEE.
5 N. W. (2d) 346

FILED AUGUST 14, 1942. No. 31428.

1. **Mandamus.** A public-school teacher who did not comply with the statutory prerequisites for a life certificate until after the legislature amended the law to take from the state superintendent of public instruction the power to issue it, *held* not entitled to a peremptory writ of mandamus commanding him to do so.
2. ———. A peremptory writ of mandamus should be issued only where the legal right to it is clearly shown.

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

T. R. P. Stocker and *Bruce Fullerton*, for appellant.

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

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER and YEAGER, JJ., and ELLIS, District Judge.

ROSE, J.

In this case there was an application to the district court for Lancaster county by Frieda R. Hess, relatrix, a public-school teacher, for a peremptory writ of mandamus commanding respondent, Charles W. Taylor, state superintendent of public instruction, to issue to her, as an official duty, a Nebraska permanent elementary school certificate or life certificate in compliance with the provisions of sections 79-1302 and 79-1303, Comp. St. 1929, authorizing him to do so.

Respondent had issued to relatrix July 1, 1935, a Nebraska first grade elementary school certificate valid until July 1, 1938, which authorized her to teach school during that period of time. She alleged in her petition that, by teaching and by additional education, she had qualified herself under the statutes cited for a life certificate which respondent upon demand, and in disregard of his official duty, refused to issue.

The trial court granted an alternative writ of mandamus directing respondent to issue the certificate demanded by relatrix or show cause for failing to do so.

The substance of the answer to the alternative writ, in addition to a general denial of unadmitted allegations in the petition, is that relatrix did not make the statutory application for a life certificate or tender the statutory fee of one dollar for the issuance thereof until after the legislature so amended the law as to take from respondent the power to issue the life certificate demanded by her.

Upon a trial of the cause the district court took respondent's view of the law and the facts, declined to issue a peremptory writ of mandamus and dismissed the action. Relatrix appealed to the supreme court.

In support of assigned errors in the proceedings and judgment of the district court, counsel for relatrix argue that she qualified for the life certificate demanded under her three-year first grade elementary school certificate and un-

der sections 79-1302 and 79-1303, Comp. St. 1929, by teaching three years and by further educational requirements thereof and consequently is entitled to a life certificate under the statutes cited. Is her position tenable under the law and the facts? Among other enactments, section 79-1302, Comp. St. 1929, provides:

"All certificates shall be issued by the state superintendent of public instruction upon application forms to be prescribed by the state superintendent and upon the payment by applicant of a fee of One Dollar ($1.00) to the state superintendent for each certificate. All certificates shall be valid for a period of three years from date of issuance thereof except permanent certificates which are valid for life unless permitted to lapse as hereinafter provided."

Section 79-1303, Comp. St. 1929, provides in part:

"The Nebraska permanent elementary school certificate shall be valid in kindergarten to eighth grade inclusive in any school in the state. The requirements for this certificate shall be a Nebraska third grade elementary school certificate or certificate of equal or higher rank and two years (sixty (60) semester hours) of college work including fifteen (15) hours in education and three years of teaching experience. It shall be valid for life unless permitted to lapse by three consecutive years of nonuse. It shall be revived by earning twelve (12) semester hours of college work including three hours in education since the issuance of such certificate."

Relatrix did not apply for a life certificate upon an application form to be prescribed by respondent or pay or tender the one-dollar fee for issuance thereof until after the legislature so amended the law as to raise the standards of qualification for teachers and to make no provision for the issuance of the life certificate demanded by relatrix. Laws 1937, ch. 184, secs. 2, 3. This act of 1937 is not retroactive but, by specific provision, it went into effect September 1, 1938. Laws 1937 (p. 741) sec. 26. Relatrix, therefore, had until September 1, 1938, under the old law, to apply for a life certificate upon an application form to be prescribed by

respondent, to pay the one-dollar fee for issuance thereof and to show she had taught for three years and had otherwise qualified. She did not meet all these requirements while the old law was in force.

Her counsel insist nevertheless that she is entitled to a life certificate because she had to her credit all the statutory requirements therefor while the old law was in force, in view of advice given to her by respondent before the new law went into effect. In this view of the law and the facts there was an offer to pay the fee of one dollar for issuance of the life certificate. Relatrix testified that in the spring or summer of 1938 she called personally on respondent at his office and asked him what she should do to make her first grade elementary school certificate permanent. Referring to her three-year certificate, she testified further: "I gave it to superintendent Taylor. I asked him what steps I should take under this law that was going into effect, if it had anything to do with my certificate, if it included me in that law. He looked at the certificate and said that after three years' teaching experience your certificate automatically becomes life, permanent certificate, and you are just over the fence. There isn't anything you need to worry about."

The proper inferences from the record are that, at the time of this conference, relatrix had not yet completed "three years of teaching experience" and that respondent was not then authorized to issue to her a life certificate. He did not tell her that an application and a fee were unnecessary. The statutory provisions for an application and a fee needed no interpretation. The statute provided that "all certificates shall be issued by the state superintendent of public instruction upon application forms to be prescribed" by him and required a fee. It would be imputing too little knowledge to relatrix, a school-teacher, to imply she did not know that a formal certificate, bearing the signature of the state superintendent of public instruction and his seal of office, was the evidence of her privilege to teach school or that she could have a life certificate without such

evidence; but, even if relatrix interpreted the advice of respondent correctly, the advice so given did not take the place of power to issue a permanent or life certificate after authority to do so had been taken from him by the legislature.

Relatrix has not lost the privileges of her profession. Respondent issued to her under the new law a certificate authorizing her to teach public school in the grades for which she has qualified.

A peremptory writ of mandamus should be issued only where the legal right to it is clearly shown. *State v. Weston*, 67 Neb. 175, 93 N. W. 182; *Gutschow v. Ramser*, 87 Neb. 591, 127 N. W. 881. Under this rule the unanimous opinion is that relatrix has not made a case for the relief demanded by her.

AFFIRMED.

IN RE ESTATE OF JOHN JURGENSMEIER. JOHN JURGENSMEIER, JR., ET AL., APPELLANTS, V. HENRY JURGENSMEIER, EXECUTOR, APPELLEE.

5 N. W. (2d) 233

FILED AUGUST 14, 1942. No. 31369.

1. **Courts.** A district court acquires jurisdiction of an appeal from an order in a probate proceeding if within 40 days from the date of the order a transcript thereof and of the proceedings relative to it is filed with the district court clerk, and if within 30 days from the date of such order the bond upon appeal, required by statute, has been executed and filed.
2. **Executors and Administrators.** "An executor's sale of real estate, made pursuant to a power conferred by the will of the decedent, at which the executor is, either directly or indirectly, the purchaser, is voidable." *Johnson v. Erickson*, 110 Neb. 511, 194 N. W. 670.
3. ———. "Where, at an executor's sale pursuant to a power contained in the will, the executor is, either directly or indirectly, the purchaser, it is immaterial that he paid full value for the land, and that no actual fraud was intended. The law forbids

such a sale, and it may be avoided in a suit by the interested parties." *Johnson v. Erickson, supra.*

4. ———. "The exclusion of the wife as a purchaser, where the husband sells as a trustee, is not so much for the reason that he may subsequently become entitled to some interest in her lands, as on account of the unity which exists between them in the marriage relation. The case falls clearly within the spirit of the principle which excludes the husband himself." *Bassett v. Shoemaker*, 46 N. J. Eq. 538, 20 Atl. 52.
5. ———. Evidence examined, and *held* to establish that Jurgensmeier, the executor, was not only interested in the purchase of this real estate so sold by him as executor, but that he acted in participation with his wife indirectly to purchase the same.
6. ———. "In this connection it has been held that each of the persons interested has an individual election, and a ratification by some of the heirs or devisees will not preclude a repudiation by the others." 24 C. J. 637.
7. ———. Evidence examined, and objectors *held* not to have ratified the executor's sale in suit.
8. ———. An executor who, in the exercise of a testamentary power and pursuant to a testamentary direction to sell lands for the purpose of division thereof between the legatees named in the will, unlawfully sells the same to his wife for a price that is manifestly less than their true value should, on exceptions to his account in the probate court, be charged with the difference between such inadequate price and the true value of the lands so sold.

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

Lee Kelligar and *Dwight Griffiths*, for appellants.

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

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

EBERLY, J.

This is an appeal from the judgment of the district court for Nemaha county affirming the decree of the county court overruling certain exceptions to, and approving and allowing, the final account of Henry Jurgensmeier, executor of the last will and testament of John Jurgensmeier, deceased.

John Jurgensmeier, Jr., and Anna Schlosser, a son and daughter of the deceased, and devisees under his will, together with Dwight Griffiths, the duly appointed guardian *ad litem* of Joseph Jurgensmeier, an incompetent son of the testator, separately appeal from the judgment of the district court.

John Jurgensmeier, a widower, died testate on February 4, 1938, leaving an estate consisting of both real and personal property. Of this real estate the following was situated in Nemaha county, Nebraska: The west half of the northeast quarter and the east half of the northwest quarter of section 19, township 5, range 14, consisting of 160 acres, estimated by the executor on June 28, 1938, in his inventory filed, to be of the value of $16,000; the southeast quarter of section 28, township 5, range 14, likewise estimated by the executor on the date last mentioned to be of the value of $16,000; and 258 and 84/100 acres of land owned by the deceased of the value of $1,500 is also inventoried as situated in Aurora county, South Dakota. In addition, personal property of the estimated value of $2,897.45, of which $1,420.72 was cash on deposit in banks, was made a part of the executor's inventory. Claims allowed against this estate aggregated but $1,390.

In his will the deceased bequeathed the sum of $200 to his parish priest, and gave and bequeathed to his three daughters in equal portions all of his household goods and the automobile he owned at the time of his death.

The will further provided: "Fourth: After the payments, I give, devise and bequeath the whole of my estate then remaining, real and personal, in equal portions, share and share alike, to my children, Mary Henderson, Alice Jurgensmeier, Joseph Jurgensmeier, Henry Jurgensmeier, Bernard Jurgensmeier, John Jurgensmeier and Anna Jurgensmeier, or their issue, by right of representation, the real estate herein mentioned being subject to sale by my executor for purposes of distribution prior to final settlement of my estate as in paragraph First above set forth."

The will was duly admitted to probate and Henry Jur-

gensmeier, nominated therein as executor, was so appointed by the county court and duly qualified as such.

The first paragraph of the will is as follows: "First: I hereby authorize and direct my executor to pay all of my just debts, funeral expenses, and expenses of administration, out of my estate as soon after my decease as same can conveniently be done, same to be paid out of my personal estate, not herein specifically bequeathed, if same be sufficient for such purpose, but if same is not sufficient, then I hereby authorize and empower my executor to sell so much and such of my real estate as to him seems best for such purpose, and, also for the purpose of the proper distribution of my estate as hereinafter set forth, I hereby authorize and empower my executor to sell any or all of my real estate, if same to him seems best, and to make, execute and deliver good and sufficient deeds of conveyance thereof, all without the aid or intervention of any court therefor."

Under this provision the executor first sold the "north" farm consisting of 160 acres for $100 an acre. The validity of this sale is unquestioned. Later, on March 6, 1939, at a time when no sale was necessary to secure funds for payment of the debts of the deceased or the costs of administering his estate, the "home" or "south" farm was sold by the executor at public sale for the sum of $60.50 an acre to Clara Jurgensmeier, wife of the executor. In the executor's deed conveying these premises to this purchaser, it is recited, "having elected that it seems best for me to sell said real estate for the purpose of a proper distribution of said estate of said deceased, pursuant to the power conferred upon me as such executor by the will of the said John Jurgensmeier, deceased," I do execute the conveyance to such purchaser. The executor filed his final report and petition for final settlement on August 27, 1940. Due notice of the pendency thereof was given by publication in the Nemaha County Herald, a newspaper of general circulation in such county, for three consecutive weeks. Upon the filing of the executor's final report, objections thereto were filed by two of the devisees and legatees already named. Prior to the hearing

upon these objections, Dwight Griffiths, an attorney at law, was appointed guardian *ad litem* for Joseph Jurgensmeier, a mental incompetent, who is interested in said estate as one of the devisees and legatees. The guardian *ad litem* thereupon, in behalf of his ward, filed objections to the report similar to those presented by the objectors last above mentioned. Upon hearing in the county court all objections to the final account as filed were overruled, excepting only that the executor was required to reimburse the estate to the extent of $40 overpayment made by him. Appeal was thereupon lodged in the district court for Nemaha county, where, upon hearing, the order of the county court approving the executor's final report was in all respects affirmed. The two objectors and the guardian *ad litem* prosecute appeals from the judgment of the district court to this tribunal.

The first matter presented is the challenge to the jurisdiction of the district court based on the contention, presented by a special appearance on behalf of the executor, that the transcript of the appeal from the county court was not filed in the district court "within the statutory time of within ten days after perfecting such appeal."

The chronology of events comprising the matters challenged are as follows: November 28, 1940, order of county court approving final report of executor made and entered; December 10, 1940, notice of appeal given and bond of appeal in behalf of John Jurgensmeier and Anna Jurgensmeier Schlosser given and approved; December 12, 1940, notice of appeal and request for transmission of transcript to district court given by the guardian *ad litem;* December 21, 1940, transcript of county court proceeding filed in district court.

Two sufficient reasons require us to sustain the action of the district court: First, the district court journal recording the action on this special appearance recites that "hearing is had, evidence taken." This evidence not being perpetuated and incorporated in the bill of exceptions allowed in this case, we are compelled to assume that the judgment en-

tered by the district court was in accord with the proof. Second, the record discloses that a good and sufficient appeal bond was given by the two objectors and approved by the county court on the twelfth day after the entry of the final order appealed from. The transcript was filed in the district court on the twenty-third day after the order appealed from was entered in the county court. This court has never construed promptness of appellants in filing bonds of appeal in probate cases as operating as a penalty by restricting the 40 days allowed litigants for completing their appeals. Without reference to the date of filing of appeal bond, a transcript on appeal filed on the twenty-third day after entry of order appealed from in this case is in time.

" 'A district court does not acquire jurisdiction of an appeal from an order in a probate proceeding unless within forty days from the date of the order a transcript thereof and of the proceedings relative to it is filed with the district court clerk, nor unless within thirty days from the date of such order the bond upon appeal, required by the statute, has been executed and filed.' *Jones v. Piggott*, 68 Neb. 140." *In re Estate of Nelson*, 108 Neb. 296, 187 N. W. 916. See, also, *In re Estate of Runyon*, 111 Neb. 635, 197 N. W. 417; *Jones v. Piggott*, 68 Neb. 140, 93 N. W. 1000; *In re Estate of McShane*, 84 Neb. 70, 120 N. W. 1018.

As to the challenge to jurisdiction to entertain the appeal generally, as made in the special appearance, it is answered by the following: "Upon appeal to the district court from an order of the county court adjusting or correcting the accounts of an administrator, the district court has jurisdiction of the matters tried in the county court from which the appeal is taken." *In re Estate of Wilson*, 97 Neb. 780, 151 N. W. 316.

The contention of appellants here presented is that the district and county courts erred in approving and allowing the final account of the executor, Henry Jurgensmeier, without requiring him to account for the reasonable value of the "home farm," described as the southeast quarter of section 28, township 5, range 14, Nemaha county, Nebraska, at its

established reasonable value of $100 an acre, or $16,000, and in permitting him to account for that real estate on a valuation of $60.50 an acre, or $9,680, the price for which such real estate was purchased at public sale in the name of the executor's wife, Clara Jurgensmeier.

Our statute relating to this subject is as follows: "The executor or administrator making the sale and the guardian of any minor heir of the deceased shall not directly or indirectly purchase, or be interested in the purchase of any part of the real estate so sold; and all sales made contrary to the provisions of this section shall be void; but this section shall not prohibit any such purchase by a guardian for the benefit of his ward." Comp. St. 1929, sec. 30-1118.

In consideration of this statute and its applicability to a case then before this court, in *Johnson v. Erickson,* 110 Neb. 511, 194 N. W. 670, Good, J., in delivering the opinion of the court upon issues in part quite similar to those here presented, stated the applicable rules as follows:

"Defendants urge that the sale to Hulquist by the executors was not a judicial sale, because it was made pursuant to a power conferred by the will, and that it is, therefore, not governed by the provisions of section 1408, Comp. St. 1922, which declares that an executor's sale of a decedent's real estate shall be void if the executor is the purchaser, or is interested in the purchase, of the land. It may be conceded that said section refers only to judicial sales made pursuant to an order of the district court, but plaintiff's right to maintain the action is not dependent upon this statute. Under the rule at common law, an executor could not purchase, either directly or indirectly, at a sale of his decedent's lands under a power in the will. *O'Dell v. Rogers,* 44 Wis. 136. The reason for the rule would be the same in either case. It is but a general application of the rule against the purchase by the trustee of property belonging to the trust estate. It is founded upon the unfairness that is likely to follow upon a sale in which the same person is both vendor and purchaser.

"Defendants further urge that the sale is not subject to

attack, because the land was sold for its full value and no one was defrauded. The rule, however, is that actual fraud is not necessary to invalidate such a sale. 'And it matters not if he pays all the property is worth, nor if the sale is advantageous to the *cestui que trust.* It is a matter, of course, for courts of equity to set the sale aside upon the application of the *cestui que trust.* The object of the rule is to afford the *cestui que trust* the most ample protection against fraud and injustice, and to remove out of the way of the trustee all inducements and temptations to speculate upon the trust property, or to manage and manipulate the same for his own benefit.' *Terwilliger v. Brown,* 44 N. Y. 237. And in *Miller v. Rich,* 204 Ill. 444, it is said: 'It makes no difference, in such case, that the intentions of the administrator are honest, and that there is no fraud in fact. The sale will be set aside upon the general ground that trustees, and others occupying fiduciary relations, cannot purchase on their own account the property entrusted to their management.' A full collection of the authorities upon this question may be found in the note to *Haymond v. Hyer,* L. R. A. 1918B, 1" See, also, *Veeder v. McKinley-Lanning Loan & Trust Co.,* 61 Neb. 892, 86 N. W. 982; *Meade v. Vande Voorde,* 139 Neb. 827, 299 N. W. 175; 24 C. J. 174.

Neither the principles here involved nor their application to the instant case are novel. They have long been established as the law of the land.

In *Bassett v. Shoemaker,* 46 N. J. Eq. 538, 20 Atl. 52, a case where the wife of an executor sought to purchase at her husband's sale through the intervention of an agent employed by her, and wherein the court below set aside the sale, even refusing to permit Mrs. Bassett to produce evidence to show that the sale was a fair one and for the best price that could be obtained, the supreme court of New Jersey sustained the action of the trial court, and in its discussion the New Jersey court employed the following language:

"The leading case of *Davoue v. Fanning,* 2 Johns. Ch. 251, presents facts substantially like the case before us. Chancellor Kent held that other parties interested were entitled

to come in and set aside the sale to the wife as a matter of course. He says: 'However innocent the purchase may be in the given case, it is poisonous in its consequences. The *cestui que trust* is not bound to prove, nor is the court bound to judge, that the trustee has made a bargain advantageous to himself. The fact may be so, and yet the party not have it in his power distinctly and clearly to show it. There may be fraud, as Lord Hardwicke observed, and the party not be able to prove it. It is to guard against this uncertainty and hazard of abuse, and to remove the trustee from temptation, that the rule does and will permit the *cestui que trust* to come, at his own option, and without showing actual injury, and insist upon having the experiment of another sale. This is a remedy which goes deep and touches the very root of the evil.'

"This rule has been fully adopted into the law of this state. The incapacity of the trustee to become a purchaser at his own sale, rests upon the ground of public policy. It is wholly immaterial whether the property brings it full value. *Culver v. Culver*, 3 Stock. 215; *Mulford v. Bowen*, 1 Stock. 797.

"The exclusion of the wife as a purchaser, where the husband sells as a trustee, is not so much for the reason that he may subsequently become entitled to some interest in her lands, as on account of the unity which exists between them in the marriage relation. The case falls clearly within the spirit of the principle which excludes the husband himself."

Romaine v. Hendrickson's Executors, 12 C. E. Gr. 162, affirmed in 1 Stew. Eq. 275, was also cited to support the conclusion stated in the *Bassett* case.

But the facts in the instant case clearly disclose that the mischief that both the statutory provision quoted and the rule at common law heretofore quoted and discussed were intended to prevent was present in the instant case. The *cestui que trustents* did not receive the equal and undivided allegiance of this executor in either the sale or the events that led up to the same. Throughout the entire course of this sale the executor's wife consulted and conferred with

him about her bids and obtained his recommendation and advice. There is no evidence in the record that the executor extended similar help and encouragement to the other bidders at this sale. After the land had been sold to the executor's wife, she gave a check for the down payment in the amount of $1,462, and subsequently a check of $8,218 in payment of the balance of the purchase price. The bank account on which these checks were drawn was one kept by the executor for his own personal use, on which his wife was permitted to draw checks. The form of this deposit on which the checks were drawn is not definitely shown. The inference sought to be established by the executor is that it was a joint account. There is evidence in the record that Henry Jurgensmeier and his wife own two farms jointly, in addition to the one purchased at this sale. There is no evidence that any profits from these two farms so owned, in which Clara Jurgensmeier had an actual interest, formed any part of this bank deposit. The evidence is that the sole income of the latter was limited to the proceeds derived from cream and eggs which was mostly applied to household expenses. It affirmatively appears, however, that this bank account upon which the checks under consideration were drawn was made up of money which the executor had obtained through his farming activities and through speculation, and, in addition, was the account in which was deposited the moneys derived from his inheritance in his father's estate.

Under the circumstances of this case, it cannot be denied that the executor's personal funds were employed in making the down payment and that he contributed in addition thereto approximately $2,000 that was used for the payment of the purchase price of this land so sold by this executor. As to the other $6,000 necessary to complete the payment of this purchase price, it was ultimately obtained by mortgaging the real property purchased from the Jurgensmeier estate upon a note and mortgage executed by Henry Jurgensmeier, not merely as husband of the mortgagor, but as principal on both instruments. They were executed by "Henry

Jurgensmeier and Clara Jurgensmeier, husband and wife," the former being an express party to all of the covenants and agreements thereof. It thus clearly appears from all of the evidence that Henry Jurgensmeier was not only "interested in the purchase" of this real estate so sold by him as executor, but that he acted in participation with his wife "indirectly" to purchase the same. It follows that the transaction was clearly proscribed by the authorities already discussed.

We do not overlook the contention that the heirs have ratified the executor's sale under consideration. Undoubtedly certain of them have. Considering the record as an entirety, and giving due weight to all of the facts and circumstances involved, we are satisfied that the appellants herein, John Jurgensmeier and Anna Schlosser, are not subject to the charge of ratification, and are not affected by the action of their brothers and sisters, and neither are they estopped to prosecute the instant proceeding. In this class of cases, the rule appears to be: "In this connection it has been held that each of the persons interested has an individual election, and a ratification by some of the heirs or devisees will not preclude a repudiation by the others." 24 C. J. 637.

This principle has long been recognized in our jurisprudence. Thus, in an early case involving a situation similar to that here presented, it was said: "The heirs are the *cestui que trusts.* * * * The heirs, therefore, or their assignees, have an election to avoid or confirm the sale. And in doing this, they are not bound to act jointly. Each one has an individual election. If the affirmance of the sale by some, and the avoidance of it by others, will produce a great inconvenience in the final settlement of the estate, it will fall, where it ought, upon the administrator, who has violated his trust and by his wrongful act caused the embarrassment. *Houghton v. Hapgood,* 13 Pick. 154; *Grout v. Hapgood,* 13 Pick. 159; *Jennison v. Hapgood,* 14 Pick. 345." *Litchfield v. Cudworth,* 15 Pick. (Mass.) 23, 31.

As to the situation of Joseph Jurgensmeier, the incompetent, and his guardian *ad litem,* the unquestioned rule ap-

plicable is that neither the incompetent ward nor the guardian of such incompetent possesses the power to consent that the executor of an estate, in which the ward has an interest, may purchase property of the estate, either directly or indirectly; and where the executor does so purchase the property, the guardian cannot ratify the sale so as to bind the incompetent. *Moore v. Carey,* 116 Ga. 28, 42 S. E. 258; 21 Am. Jur. 734, sec. 629.

It is obvious that the appellants are entitled to the relief at the hands of this court which their respective situations may justify.

By the terms of the Constitution, county courts are constituted "courts of record, and shall have original jurisdiction in all matters of probate, settlement of estates of deceased persons," etc. Const. art. V, sec. 16. See *Weeke v. Wortmann,* 77 Neb. 407, 109 N. W. 503; *State v. O'Connor,* 102 Neb. 187, 166 N. W. 556; *Genau v. Roderick,* 4 Neb. (Unof.) 436, 94 N. W. 523.

Under this constitutional provision we are committed to the view: "Under the Constitution (art. V, sec. 16) and statutes of Nebraska (Comp. St. 1929, sec. 27-503) the county court has exclusive original jurisdiction of all matters relating to the settlement of the estates of deceased persons." *Starr v. Fidelity & Deposit Co.,* 134 Neb. 240, 278 N. W. 478.

By statute it is further provided: "The county court shall have power: * * * Fifth. To require executors, administrators and guardians to exhibit and settle their accounts, and account for the estates and property that have come into their possession as such." Comp. St. 1929, sec. 27-504.

In carrying out this statutory authorization, it is to be remembered that county courts are without general equity jurisdiction, but, in exercising exclusive original jurisdiction over estates, may apply equitable principles to matters within probate jurisdiction. *In re Estate of Frerichs,* 120 Neb. 462, 233 N. W. 456; *In re Estate of Wilson,* 97 Neb. 780, 151 N. W. 316.

We are also committed to the doctrine: "Under Const.

Neb. art. VI, sec. 16, giving county courts probate jurisdiction, but denying them jurisdiction in actions in which title to real estate may be drawn in question, * * * the probate court, when acting in discharge of powers granted to it, has the incidental right to construe a will disposing of real property for the purpose of appropriately discharging its duty, notwithstanding the apparent constitutional limitation." *Logue v. Ferris,* 280 Fed. 286.

In connection with the foregoing the principle is also established that, "When a county court acquires jurisdiction of the subject-matter and of the parties in a proceeding to settle the estate of decedent, its final judgment therein as to the amount due the estate from the administrator is not reviewable except on direct appeal and is not open to collateral attack except for fraud." *Starr v. Fidelity & Deposit Co.,* 134 Neb. 240, 278 N. W. 478.

It would seem that the above and foregoing provisions of Constitution and statute evidence the vesting in the county court of ample and sufficient power to determine the questions involved in this litigation.

Under authority conferred and directions contained in paragraph "First" of the last will of John Jurgensmeier, deceased, in connection with the following words contained in the "Fourth" paragraph thereof, "the real estate herein mentioned being subject to sale by my executor for purposes of distribution prior to final settlement of my estate as in paragraph First above set forth," there ensued an equitable conversion of the real estate mentioned therein to personal property for the purpose of the provisions of this will. For, in the construction of wills and of other instruments, when lands are thereby or therein directed to be sold and turned into money courts of equity in dealing with the subject will ordinarily consider it personalty. 13 C. J. 859; 18 C. J. S. 58, sec. 17; *Stalder v. Stalder,* 105 Neb. 367, 180 N. W. 566; *Chick v. Ives,* 2 Neb. (Unof.) 879, 90 N. W. 751; *In re Estate of Kulp,* 122 Neb. 157, 239 N. W. 636; *Maxwell v. Maxwell,* 106 Neb. 689, 184 N. W. 227.

Whether the equitable conversion of the real estate to per-

sonal property in the instant case was effected at the death of the testator, or on the declaration of the election of the executor as evidenced by his deed of conveyance, or at the date of the executor's sale of the lands in suit, it was the duty of the executor to account to the legatees named in his final report for such real estate as for personalty in his possession for distribution. He was liable to each of the legatees named in his decedent's will on that basis. And in the instant case, it appearing that the sale by the executor was unlawfully made, that he in fact secured an interest in the property sold by him, and was an indirect purchaser thereof, he is chargeable with, and at the election of the beneficiaries must in his final report account for, the actual value of the property involved which is established by the evidence herein as the sum of $16,000, and not merely with the amount realized at the sale. 24 C. J. 176; *Brown v. Reed,* 56 Ohio St. 264, 46 N. E. 982; *Estate of McClear v. Root,* 147 Wis. 60, 132 N. W. 539; *Froneberger v. Lewis,* 70 N. Car. 456; *Stilly v. Rice,* 67 N. Car. 178; *Estate of Scheidt,* 2 Woodw. Dec. (Pa.) 355; *Moore v. Hilton,* 12 Leigh (Va.) 1; *Morrison v. Garrott,* 15 Ky. Law Rep. 305, 22 S. W. 320; *Tayloe v. Tayloe,* 108 N. Car. 69, 12 S. E. 836; *Daly v. Brown,* 39 Can. S. Ct. 122.

In the instant case, due to the unlawful and fraudulent acts of the executor, the legatees of the will have sustained a loss and impairment of their rights in the decedent's estate through his official acts. It is obvious that the executor should be compelled to report the existence and value of the decedent's property which his unlawful acts deprived the beneficiaries of; that the probate court in the exercise of its original jurisdiction should have determined on the hearing of the executor's final report in this estate the amount and value of decedent's property including the actual value of the real estate herein unlawfully sold by such executor, and should have required him to account for the same on the basis of its actual value; and should have charged him with the difference between the price paid by his wife, Clara Jurgensmeier, and the actual value of the premises sold.

It is, therefore, ordered that the decree of the district court be affirmed in so far as it requires the executor to reimburse the estate of John Jurgensmeier, deceased, in the amount of $40 for the payment to himself of executor's fees in excess of the amount specified. In all other respects the decree of the district court is reversed, with directions to require the executor to account for the real estate described as the southeast quarter of section 28, township 5, range 14, on the basis of its reasonable value of $16,000, taxing the costs of this appeal in this court to the executor.

REVERSED.

FEDERAL FARM MORTGAGE CORPORATION, APPELLEE, V. RALPH E. ADAMS ET AL., APPELLANTS.
5 N. W. (2d) 384

FILED AUGUST 14, 1942. No. 31405.

1. Statutes. " 'Statutes should be so construed as to give effect to the intention of the legislature, and if a statute is plain and unambiguous, there is no room for construction or interpretation.' *Shellenberger v. Ransom*, 41 Neb. 631, 59 N. W. 935." *Federal Farm Mtg. Corporation v. Thiele*, 137 Neb. 626, 290 N. W. 471.
2. Mortgages. Sections 20-2144 and 20-2145, Comp. St. 1929, "are for the protection of the debtor and to prevent the probability of two judgments being rendered against him for the same debt. In none of these provisions, however, is the mortgage security released. In one of them, where a judgment has been obtained, it is necessary that the judgment creditor exhaust his legal remedy by execution before proceeding to foreclose the mortgage." *Quesner v. Novotny*, 116 Neb. 84, 215 N. W. 796.
3. ———. "To entitle a mortgagee, who has taken a judgment, to foreclose, it is only necessary that the judgment and a return of execution as required by section 851, Code of Civil Procedure (now section 20-2145, Comp. St. 1929), be set out. It is not necessary in the petition to state the nonexistence of other proceedings to enforce the judgment." *Montpelier Savings Bank & Trust Co. v. Follett*, 68 Neb. 416, 94 N. W. 635.
4. ———. Competent evidence to establish the facts alleged entitle the plaintiff to a foreclosure of its mortgage.

5. Bills and Notes. "Where an instrument containing the words, 'I promise to pay' is signed by two or more persons, they are deemed to be jointly and severally liable thereon." Comp. St. 1929, sec. 62-117.
6. ———. "If the obligation be joint and several, the plaintiff may treat the contract as joint and join all of the obligors, or he may treat it as a several obligation and bring his action against each separately, even though their interest be joint." 11 Standard Ency. of Procedure, 979.
7. Evidence in the record examined, and *held* to sustain the decree entered by the trial court.

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

Ralph E. Adams, for appellants.

Butler, James & McCarl, Franklin L. Pierce and *Philip M. Wellman, contra.*

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER and YEAGER, JJ., and ELLIS, District Judge.

EBERLY, J.

This is an appeal from a final order of the district court for Furnas county finding generally in favor of plaintiff and decreeing the foreclosure of a real estate mortgage and the sale of the premises therein described to satisfy the amount adjudged due thereon, and finding against the defendants Ralph E. Adams et al. It appears without dispute that on and prior to the 11th day of October, 1934, the fee simple title of the premises here in litigation was vested in George W. Space alone. Elizabeth M. Space was then, and thereafter remained, his wife. So far as the record discloses, she possessed no interest in the premises referred to save and except what was acquired by her by reason of her marital relations with George W. Space. On or about October 11, 1934, George W. Space and Elizabeth M. Space, made and delivered to the Land Bank Commissioner their promissory note in writing payable to him, in the sum of $6,000. On the same day the parties last named, to secure the payment of such obligation, executed and delivered to the Land Bank

Commissioner their mortgage deed containing the usual and customary conditions, which was on the 19th day of October, 1934, duly recorded in the office of the county clerk of Furnas county as required by law, and thereby mortgaged to the Land Bank Commissioner the property described in such mortgage deed. The money evidenced by the foregoing obligation was duly paid over to and received by George W. Space, who personally executed the "Remittance Statement" as "borrower," and acknowledged the "receipt of the proceeds of the loan as set forth therein." Certain bankruptcy proceedings were entered into by George W. Space, which are not of importance in the present proceeding. He and his wife, Elizabeth M. Space, conveyed the mortgaged premises here in suit to Ralph E. Adams by warranty deed executed October 2, 1939, and duly recorded in Furnas county on October 7, 1939. George W. Space departed this life on February 23, 1941, and neither he nor his wife is a party to this appeal.

The default in the payments stipulated for in the note and mortgage and the breach of the mortgage conditions is not denied by the defendants.

It is alleged in the petition filed in this cause that upon the default in the terms and conditions of the mortgage by George W. Space, plaintiff elected to and did declare the whole of the balance of the principal of such indebtedness represented by such note and mortgage to be due and payable as of December 27, 1938, and instituted an action on such note against George W. Space in the district court for Kearney county, Nebraska. Due service of summons was had upon such defendant, and upon appearance duly made by such defendant, a judgment was duly and regularly entered in favor of the plaintiff and against such George W. Space in the sum of $6,621.70, with interest at 6 per cent. per annum from the 5th day of February, 1940. The petition further alleges that on the 27th day of December, 1940, execution in due form was duly issued out of the district court for Kearney county, Nebraska, "and on the same day the sheriff of Kearney county, Nebraska, made his return

on said writ of execution showing that after diligent search he was unable to find goods or chattels, lands or tenements of the said George W. Space in Kearney county, Nebraska, on which to levy, and said sheriff returned said writ to the court wholly unsatisfied."

In the discussion of appellants' contentions it must be remembered that appellant Adams is not the debtor or mortgagor in any sense of the word. He acquired title to the mortgaged premises without assuming the mortgage indebtedness, and prior to the entry of judgment in appellee's action against the maker of the note involved in these proceedings. He appears throughout this litigation as attorney at law representing Space, and is thereby chargeable with notice of all proceedings had.

Taking up appellants' contentions in reverse order, we are wholly unable to agree with their statement that because of the terms of section 20-2145, Comp. St. 1929, "the bringing of an action on the note alone and the obtaining of a judgment (at law) thereon, is a waiver of right to foreclose," and "is bar to foreclosure." Such are not the words, nor the legal effect, of the statute cited in support of this proposition, nor do the interpretations thereof made by this court furnish any support for appellants' contention. At most, the existence of this judgment at law operates in favor of the judgment debtor as a temporary suspension of the right to contemporaneously maintain an equitable action to enforce the mortgage securing the same, until the prescribed execution has been issued and duly returned by the officer receiving the same as unsatisfied, in whole or in part, and that the defendant has no property whereof to satisfy such execution, etc. Compliance with these statutory terms operates as a termination of the suspension as to the mortgage debtor.

" 'Statutes should be so construed as to give effect to the intention of the legislature, and if a statute is plain and unambiguous, there is no room for construction or interpretation.' *Shellenberger v. Ransom*, 41 Neb. 631, 59 N. W. 935." *Federal Farm Mtg. Corporation v. Thiele*, 137 Neb. 626,

290 N. W. 471. See, also, *Zug v. Forgan*, 3 Neb. (Unof.) 149, 90 N. W. 1129; *Montpelier Savings Bank & Trust Co. v. Follett*, 68 Neb. 416, 94 N. W. 635.

But we are not here concerned with a mortgage debtor, but one who is a total stranger to the original consideration upon which the transaction rests, and who is plainly in no manner bound for the repayment thereof.

In the early case of *Simmons Hardware Co. v. Brokaw*, 7 Neb. 405, Maxwell, C. J., in the delivery of the opinion by this court, employs the following language: "In the case at bar, however, the contest is entirely between lien-holders. The prior mortgagee files a petition to foreclose its mortgage, making the senior mortgagee a defendant, and alleging that the maker of the notes is insolvent, and that the senior mortgagee has obtained a judgment at law on his note, and upon that ground alone seeks to divest him of his lien. * * * The failure of the defendant in error to issue an execution on his judgment did not divest him of his lien, and the plaintiff in error, in its petition, by alleging insolvency of the debtor, shows that nothing could have been collected even if an execution had been issued."

In the *Brokaw* case this court sustained a judgment of foreclosure and sale in favor of this senior mortgagee who had not had an execution issued and returned on his judgment in the mortgage suit.

The case of *Chaffee v. Sehestedt*, 4 Neb. (Unof.) 740, 96 N. W. 161, was a suit in equity to foreclose a mechanic's lien. Mortgagors and mortgagee were made parties thereto. The mortgagee by cross-petition set up its mortgage and asked for a foreclosure thereof which was granted by the terms of the decree entered. The lien-holders appealed and challenged the mortgagee's recovery because no evidence was introduced on part of mortgagee to show that no action at law had been commenced to recover the mortgage debt. The mortgagors did not challenge the recovery. In this case the doctrine was reiterated, "that the provisions requiring the return of an execution unsatisfied before proceedings to foreclosure could be maintained were enacted for the benefit

of the debtor," and in effect decided that under the facts in that case the mortgagors only could complain, and the decree of foreclosure and sale entered was affirmed.

Likewise, in *Quesner v. Novotny,* 116 Neb. 84, 215 N. W. 796, this court speaking through Day, J., said: "It will be observed that these several provisions of the statute (Comp. St. 1929, secs. 20-2144, 20-2145) are for the protection of the debtor and to prevent the probability of two judgments being rendered against him for the same debt. In none of these provisions, however, is the mortgage security released. In one of them, where a judgment has been obtained, it is necessary that the judgment creditor exhaust his legal remedy by execution before proceeding to foreclose the mortgage." See, also, *Montpelier Savings Bank & Trust Co. v. Follett,* 68 Neb. 416, 94 N. W. 635.

It may be said that the return of the officer showing a substantial compliance with sections 20-2144 and 20-2145, Comp. St. 1929, is in evidence and is not disputed.

A consideration of the authorities cited, in view of the facts shown by the record, disclosing that the full protection of the rights of the mortgagor as covered by section 20-2145, Comp. St. 1929, has been substantially accorded, it follows that the decree of foreclosure and sale entered in this case is not subject to challenge by appellants because of alleged failure of the appellee to comply with the sections of the statute discussed.

"To entitle a mortgagee, who has taken a judgment, to foreclose, it is only necessary that the judgment and a return of execution as required by section 851, Code of Civil Procedure, be set out. It is not necessary in the petition to state the nonexistence of other proceedings to enforce the judgment." *Montpelier Savings Bank & Trust Co. v. Follett, supra.* See, also, *Zug v. Forgan,* 3 Neb. (Unof.) 149, 90 N. W. 1129.

Nor can we accept appellants' contention that the suit upon the mortgage note against George W. Space alone, and entry of judgment at law thereon, operated to release the makers of the mortgage note and to satisfy or release the

real estate mortgage securing the same. While it is true that the language employed in the mortgage note embraced the following: "For value received I promise to pay to the order of the Land Commissioner," etc., which was signed by "George W. Space and Elizabeth M. Space," they are not thereby constituted "joint makers" thereof, as appellants contend.

Section 62-117, Comp. St. 1929, provides: " * * * Seventh. Where an instrument containing the words, 'I promise to pay' is signed by two or more persons, they are deemed to be jointly and severally liable thereon."

The rule applicable to this class of negotiable paper is: "If the obligation be joint and several, the plaintiff may treat the contract as joint and join all of the obligors, or he may treat it as a several obligation and bring his action against each separately, even though their interest be joint." 11 Standard Ency. of Procedure, 979. See, also, cases cited in notes 98 and 99, 11 Standard Ency. of Procedure, 979, 980.

In view of the facts relating to this transaction disclosed by the record, including the ownership of the legal title by George W. Space, the receipt of the entire proceeds of the mortgage loan by him, the marital relations of the parties, and the entire absence of any evidence tending to prove an intent on the part of Elizabeth M. Space to charge her separate estate with the payment of the mortgage indebtedness, whether she could, in view of the entire situation, be considered as a joint maker of the note in suit, Query.

At all events, we are satisfied that the judgment and decree of foreclosure entered by the district court in this case are supported by proper proof, and such judgment is affirmed.

AFFIRMED.

ELMER S. SLAFTER, APPELLEE, V. NEW BRUNSWICK FIRE INSURANCE COMPANY, APPELLANT.
5 N. W. (2d) 217

FILED AUGUST 14, 1942. No. 31386.

1. Insurance. When a fire insurance policy provides that "Any other or additional insurance on the property covered by this Policy, whether valid or not, is prohibited, unless written consent by this Company is indorsed hereon, and this Company shall not be liable for any loss occurring while there is any other insurance, whether valid or not, covering the property insured, or any part thereof, not consented to by this Company by indorsement on this Policy," the procuring of such additional prohibited insurance does not render the policy void, but rather voidable at the election of the first insurer.
2. ———. The Nebraska statute (Comp. St. 1929, sec 44-322) provides that the breach of a condition in an insurance policy shall not avoid the policy, nor avail the insurer to avoid liability, unless such breach shall exist at the time of the loss *and contribute to the loss.*

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

Rosewater, Mecham, Shackelford & Stoehr, for appellant.

Floyd E. Wright and *Jack E. Lyman, contra.*

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

PAINE, J.

This is a law action on a fire insurance policy of $3,000 on plaintiff's farm residence, which was entirely destroyed by fire April 18, 1940. Jury returned a verdict for $2,995, with interest from March 15, 1941, and the court, in entering judgment on the verdict, added $300 as an attorney fee. Insurance company appeals.

To understand the issues in the case, we will set out a summary of the pleadings. The petition, filed February 4, 1941, states that on July 11, 1938, defendant, New Brunswick Fire Insurance Company, executed and delivered to plaintiff, Elmer S. Slafter, a three-year policy, insuring

against loss or damage by fire on a dwelling-house in the amount of $3,000, and on garage, granary and barn in the amount of $1,000; that due notice of fire, which resulted in total loss of the dwelling-house insured, was given on April 19, 1940; that proof of loss statements were furnished by plaintiff to defendant on June 18, 1940, including all information requested by the policy, although defendant company and its agents requested plaintiff not to furnish said proofs of loss; that demand has been made upon defendant to pay the amount due on said fire insurance policy, but defendant has refused and neglected to make payment.

Plaintiff further alleges that defendant was notified on or about February 5, 1940, that concurrent insurance had been written on said dwelling-house in the amount of $3,000, and request for defendant to forward written waiver for the concurrent insurance was made at the time of the notice that concurrent insurance had been written. Plaintiff prayed for judgment against defendant for $2,995, with interest from March 15, 1941, and for costs of suit and attorney's fee.

On March 8, 1941, defendant moved the court to order that George L. Vogler, of Scottsbluff, be made an additional party defendant, said Vogler having been agent for the defendant prior to April 18, 1940, when his agency was canceled for the reason that he failed and refused to carry out instructions given him by the company to cancel the policy as an undesirable risk. It is alleged that, if defendant is forced to pay any sum to Elmer S. Slafter, defendant will have a cause of action against George L. Vogler for his failure, refusal and neglect to cancel said policy and comply with the agency agreement. Defendant alleges that George L. Vogler is a necessary party defendant in this case, and that if he is made a party defendant a multiplicity of suits may be avoided.

On March 15, 1941, the court found that defendant, having failed to answer, demur or plead to plaintiff's petition, thereby admits the facts stated in the petition are true, and entered default judgment in favor of plaintiff in the sum of $2,995, together with costs and attorney's fee.

On March 21, 1941, defendant moved the court to set aside and vacate default judgment for the reasons: (1) That defendant had filed a proper pleading on or before answer day, and said pleading had not been ruled upon at the time default was entered, and that it was necessary that said pleading be disposed of and ruled upon by the court before defendant could be required to answer; (2) no notice of default or default judgment was served upon defendant or its attorneys; (3) because said default and judgment was improperly entered, without notice to the defendant or its attorneys, when there was a pleading on file on behalf of defendant, and which had not been ruled upon by the court; (4) that defendant has a meritorious defense to plaintiff's petition, and if said default judgment is not set aside and defendant be permitted to answer, said defendant will be deprived of its right to defend this case and will be materially prejudiced thereby.

On April 18, 1941, the court after argument sustained motion of defendant to set aside the default judgment and overruled motion to make George L. Vogler a party defendant.

On April 24, 1941, defendant filed answer, admitting the execution and delivery of the policy to plaintiff, and denying every other allegation in the petition not specifically admitted. Defendant alleges that, as one of the conditions for the issuance of its policy, there is a provision therein reading as follows: "In case there shall be any other insurance, consented to by this Company, whether valid or not, on the property covered by this Policy, the insured shall recover of this Company only such proportion of any loss as the sum hereby insured shall bear to the whole amount of insurance thereon. Any other or additional insurance on the property covered by this Policy, whether valid or not, is prohibited, unless written consent by this Company is indorsed hereon, and this Company shall not be liable for any loss occurring while there is any other insurance, whether valid or not, covering the property insured, or any part thereof, not consented to by this Company by indorsement on this Policy."

Defendant alleges that no written consent was ever obtained for additional insurance on said property insured by its policy, and that plaintiff has violated the provision of the insurance policy hereinbefore set forth, and defendant was deceived thereby, and that by reason of such violation defendant is not liable for loss to the plaintiff occurring on or about April 19, 1940; that, had there been any written consent by defendant indorsed on said policy, plaintiff would be limited in his recovery to such proportion of any loss as the sum insured against in said policy should bear to the whole amount of the insurance thereon, and defendant prays that plaintiff's petition be dismissed.

On August 20, 1941, plaintiff filed reply, admitting that on February 22, 1940, he had procured additional insurance upon the premises in the National Fire Insurance Company of Hartford, and that notice of said additional insurance was at said time given to defendant, with a request that defendant waive the provisions in its policy against other insurance; that defendant made no objection to said additional insurance, and failed to cancel its policy and return to plaintiff the unearned premium, but continued its policy in full force and effect, and that it is now estopped to deny liability under its policy by reason of such additional insurance.

Trial was had on October 23, 1941, and the jury returned a verdict in favor of plaintiff in the sum of $2,995, with interest from March 15, 1941, costs of suit and reasonable attorney fees, upon which verdict the court entered judgment.

The defendant sets out 13 errors relied upon for reversal, which included the overruling of the defendant's motion for a directed verdict, and that the verdict was contrary to the evidence and to the law, and sets out as error the giving of certain instructions and the refusal to give instructions Nos. 5 and 6 offered by the defendant.

The defendant insists that the procurement of the additional fire insurance in this case avoids its policy, and the mere failure of its agent to take up said policy and cancel same does not constitute an election to continue the policy in force.

As nearly all the facts are set out in some 21 exhibits, mostly letters of the defendant between its agent and various offices, there is very little dispute in the evidence in this case. The plaintiff bought this policy of fire insurance for three years from defendant on July 11, 1938, covering $3,000 on his residence and $1,000 on his garage, granary and barn, located just 5/8 of a mile straight north of the city of Scottsbluff. This policy was purchased of George L. Vogler, agent of the defendant; plaintiff ordered the insurance, gave Vogler a check for $74, and as he was leaving the next day he told him to hand the policy to his attorney. The policy contained a provision that it was "valid only when signed by George L. Vogler, agent at Scottsbluff, Nebraska."

In the winter of 1939-1940 plaintiff rebuilt the house, making it nearly twice as large, and expending, it was claimed, between $7,500 and $8,000 additional, changing the roof, putting on a sun porch, new floors, three fireplaces, French doors, with a full basement. Soon after its completion he asked George L. Vogler to write him some additional insurance on the house, and also on a lot of new furniture, and after it had run along for some time and he had not heard from Vogler, he purchased an additional policy of $3,000 fire insurance on the house from the Sams-McCaffree Insurance Agency.

While the plaintiff was in Omaha for four or five days, the residence was entirely destroyed by fire on the night of April 18, 1940. Bob McCaffree, the agent from whom he purchased the additional insurance, told plaintiff that if the defendant company objected to the additional insurance they would notify him. Plaintiff had read the provisions of the policy relative to additional insurance, but as no one had objected up to the date of the fire he did not think there was any question about that matter.

These are briefly the facts, so far as the plaintiff is concerned, and show that at the time of the fire he had never been notified by any one that there was any objection to the additional insurance. However, unknown to the plaintiff, a rather spirited correspondence had been taking place be-

tween the agent of the defendant company, George L. Vogler, of Scottsbluff, and the defendant company, his letters being directed to the Omaha representative of the defendant company, The Cavanaugh Company, general agents, at Omaha.

George L. Vogler testified that the plaintiff asked him for this additional insurance, and he at once wrote The Cavanaugh Company which was state agent for the defendant company, under date of January 24, 1940 (defendant's exhibit 5), and told them plaintiff desired $2,000 additional insurance, mentioned the new improvements, and asked the amount of additional premium he was to collect. Defendant's exhibit 16 is a letter from "Farm Department" of defendant company, being located at 309 West Jackson boulevard, Chicago, saying: "Dwelling, no doubt, is an exceptionally nice building * * *. We would feel much better about it if you would have one of your special agents inspect this risk before assuming additional liability."

On February 2, 1940, The Cavanaugh Company replied (defendant's exhibit 7) that the farm department of defendant company had asked to have an inspection made of the property, and that special agent Fred Mammen would make an inspection, and quoting the premium on the unexpired term for insurance on household goods. On February 10, 1940, The Cavanaugh Company wrote Vogler (defendant's exhibit 8) and inclosed indorsement, increasing the liability under the above policy in accordance with his request, said indorsement to be attached to the original policy, and copy to be kept in his office.

On February 22, 1940 (plaintiff's exhibit 3), Vogler wrote that he was returning the riders which they had sent covering additional insurance in connection with plaintiff's policy, for, on account of not having heard promptly, the plaintiff had placed the additional insurance with the Columbia Fire Insurance Company, through the Sams-McCaffree Insurance Agency at Scottsbluff, for $3,000 on the dwelling and $2,500 on the household effects.

On February 26, 1940, The Cavanaugh Company replied

(plaintiff's exhibit 4) acknowledging receipt of the return of the indorsement increasing the insurance on the plaintiff's policy, and saying that they believed that the new insurance in the Columbia Fire Insurance Company made entirely too much insurance, and they would prefer to be relieved of liability, and asked to have the original policy returned for cancelation.

On March 8 they made a second request (defendant's exhibit 9) to have the policy returned. On March 19 they made a third request (exhibit No. 10) to have the original policy returned for cancelation.

On March 21, 1940, George L. Vogler wrote them (defendant's exhibit No. 11) and said that he had been delaying until he had received an appraisement upon the dwelling, that the lowest appraisement was $6,800 and the highest $7,500, stating that it was a fine home, modern in every respect, and the Carr-Neff Lumber Company, which furnished most of the material, placed a value in excess of $7,000. The letter further states that the plaintiff is a man of means, owns his farms clear, and he would very much dislike to have to cancel the policy, and inclosed an indorsement for their signature to approve the additional insurance. On March 28, 1940, The Cavanaugh Company wrote Mr. Vogler (exhibit No. 12) saying that the farm department of defendant company "have their teeth set," and the only thing they want is to have the policy taken up for cancelation. On April 16, 1940, Mr. Vogler wrote exhibit No. 14, in which he says he cannot understand why they want the insurance canceled; that the property is not overinsured; that he had been given the first opportunity to write this additional insurance, and he closes the letter with this statement: "If the Company still insists on canceling out you may have Mr. Mammen take up your supplies the next time he is thru here. If the policy is demanded for cancelation advise by return mail and it will be sent you promptly. Frankly I do not by any means like this."

On April 18, 1940, The Cavanaugh Company wrote letter, exhibit No. 15, being the same day on which fire destroyed

the property. They said they were very sorry, that the farm department insisted on cancelation of the policy, and they were asking special agent Mammen to call upon Vogler at his early convenience and take up the supplies; that they regretted this action, but had no other choice in the matter.

It thus clearly appears from the evidence that, up to the date of the fire on April 18, 1940, the plaintiff had never been notified by any one that there was any objection whatever to the additional insurance he had secured.

In examining the law in reference to this case, there appear to be several Nebraska cases very closely in point. One case is referred to in both briefs. It is *Hughes v. Ins. Co. of North America*, 40 Neb. 626, 59 N. W. 112. The provision in the policy read: "That the having of other insurance thereon (the insured property), or any part thereof, valid or invalid, prior or subsequent, not made known to this company, and consented to hereon, will render this policy void." It was held: "(1) That the violation of this provision by the assured in procuring additional insurance on the property without the knowledge or consent of the first insurer did not render the policy issued by it void, but voidable at the election of said first insurer; (2) that the provision was a reasonable one, not unconscionable, illegal, nor contrary to public policy; (3) that it was inserted in the insurance contract for the benefit of, and might be waived by, the insurer."

In this case a verdict was directed for the defendant and was affirmed by this court. Therefore, an examination of the facts will be necessary. It appears that there was secured another policy in another company upon the same property, also in the amount of $800, and the defendant company never knew anything about it; moreover, the insured never knew about it either, for it was taken out by a creditor of his in the name of the insured, who settled the second policy for $400 after the fire. It was held that, when additional insurance is so procured, then the first policy is voidable at the election of the insured.

In Nebraska we have a law covering the point in question, and it is section 44-322, Comp. St. 1929, which provides:

"The breach of a warranty or condition in any contract or policy of insurance shall not avoid the policy nor avail the insurer to avoid liability unless such breach shall exist at the time of the loss and contribute to the loss, anything in the policy or contract of insurance to the contrary notwithstanding."

Judge Landis, in writing the opinion for the court in *Newman v. National Union Fire Ins. Co.*, 122 Neb. 94, 239 N. W. 464, stated that breach of conditions of fire policy respecting procurement of other insurance without insurer's consent, in the absence of evidence that the breach in any manner contributed to the loss, did not preclude recovery under this section of our statute.

In discussing this section of our statute (Comp. St. 1929, sec. 44-322), Judge Rose used this language: "These provisions are parts of the insurance contract which is not a device to procure and retain a premium and escape liability in the event of an honest loss." *Ware v. Home Mutual Ins. Ass'n*, 135 Neb. 329, 281 N. W. 617. See, also, *McCleneghan v. London Guarantee & Accident Co.*, 132 Neb. 131, 271 N. W. 276; *Carpenter v. Sun Indemnity Co.*, 138 Neb. 552, 293 N. W. 400.

It has been held that the violation of a condition in a fire insurance policy by mortgaging of insured chattels does not invalidate the insurance unless the breach of contract contributes to the loss. *Calnon v. Fidelity-Phenix Fire Ins. Co.*, 114 Neb. 194, 206 N. W. 765; *Roth v. Employers Fire Ins. Co.*, 123 Neb. 300, 242 N. W. 612.

We have examined the errors in regard to the giving and refusal to give instructions, but find nothing prejudicially erroneous. The vital point in this case may be set out that, when an insurance policy contains this provision, as in the case at bar, "Any other or additional insurance on the property covered by this Policy, whether valid or not, is prohibited, unless written consent by this Company is indorsed hereon, and this Company shall not be liable for any loss occurring while there is any other insurance, whether valid or not, covering the property insured, or any part thereof, not

consented to by this Company by indorsement on this Policy," it may be admitted that many decisions can be cited in which recovery has been denied.

But, ordinarily, the taking out of additional insurance does not render the first policy absolutely void, but voidable only at the option of the insurer, since that provision is placed in the policy for the benefit of the insurer and is one which it may waive. See *Slobodisky v. Phenix Ins. Co.*, 52 Neb. 395, 72 N. W. 483.

But where the insurance company, with full knowledge of the facts, continues to treat the policy as of binding force, the forfeiture will be considered as waived until knowledge of its demand is known to the insured.

It has been said that knowledge on the part of the agent of an insurance company authorized to issue its policies of facts which render the contract voidable at the insurer's option is knowledge of the company. See *Eagle Fire Co. v. Globe Loan & Trust Co.*, 44 Neb. 380, 62 N. W. 895.

Commissioner Ragan, in the case of *Home Fire Ins. Co. v. Hammang*, 44 Neb. 566, 62 N. W. 883, quoted from the case of *Kitchen v. Hartford Fire Ins. Co.*, 23 N. W. 616 (57 Mich. 135), as follows: "An insurance company is bound by the acts or conduct of an agent who has power to solicit insurance, make examination and survey of the premises, take applications and forward them to the home or branch office, deliver policies, and collect premiums; and when a party insured notifies such agent of his intention to take additional insurance, and when he has obtained such insurance requests him to inform his company of that fact, the company cannot, after a loss, hold the policy issued by it void because its written consent to the taking of such additional insurance was not indorsed on the policy, as provided therein."

When an insurance company, upon being informed that there have been substantial additions added to a house, and the insured desires to take out additional insurance with the company to cover these improvements, and such company has a new examination made, and finally decides to grant additional insurance thereon, and sends its local agent a

rider to add to the policy to cover such additional insurance, and then discovers that, because of its excessive deliberation in deciding whether to write such additional insurance, the insured has grown tired of waiting, and has finally secured such additional insurance from another company, promptly giving notice thereof, it appears to this court that such insurance company cannot avoid payment of its policy after a loss has occurred, when no notice of any kind was ever given to the insured of the company's desire to avail itself of this provision and to cancel its outstanding policy upon the usual terms. The judgment of the district court is hereby affirmed, and an attorney's fee of $300 allowed for services in this court.

AFFIRMED.

CARRIE HARMS, APPELLANT, V. CITY OF BEATRICE, APPELLEE.
5 N. W. (2d) 287

FILED AUGUST 14, 1942. No. 31216.

1. **Municipal Corporations.** In operating a water-works system, a city acts in its proprietary capacity, and is liable for negligence to the same extent as a private corporation engaged in the same business.
2. ———. A service line from a water main to the property of a consumer, including a meter box constructed in a public street, is a part of the water-works system of the city which it must construct and maintain in a reasonably safe condition for the protection of the public.
3. ———. The fact that the consumer pays for the labor and materials used in constructing a service line is not a conclusive factor in determining the liability of the city in failing to keep such meter box in repair.
4. ———. A city cannot delegate its duty to maintain its water-works system in a reasonably safe condition and thus escape liability for failure to make repairs.

APPEAL from the district court for Gage county: CLOYDE B. ELLIS, JUDGE. *Reversed.*

Jack & Vette, for appellant.

Vasey & Mattoon, contra.

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

CARTER, J.

Plaintiff brought this action to recover for injuries sustained when she stepped on a defective meter box alleged to have been negligently maintained by the city of Beatrice. The trial court sustained a general demurrer to plaintiff's second amended petition and, the plaintiff having elected to stand thereon, entered a judgment of dismissal. Plaintiff appeals.

The petition alleges that the defendant city owned and maintained a system of water-works for the purpose of furnishing water at commercial rates to the inhabitants of the city. As a part of the water-works system the city maintained a meter box on the west side of Fifth street at a point approximately seven feet east of the west line of Fifth street. The meter box was located on a service line connecting the water system with private property and was between the sidewalk and the lot line, a part of the area occupied as a street. The ordinances of the city provided that meters not installed within buildings should be installed on the lot line, that the materials for constructing the meter box and service line would be furnished and installed by the city and paid for at cost by the property owner.

The petition further avers that the meter box was constructed with a metal cover which had, on December 13, 1938, and for several weeks prior thereto, been permitted to get out of repair, all of which was known or should have been known by the city.

On December 13, 1938, at about 6 o'clock in the evening and at a time when darkness concealed the dangerous condition of the meter box located a few inches from the sidewalk, plaintiff accidentally stepped upon it with her left foot, causing the defective covering to give way and causing the injuries, to recover for which this action was brought.

The only question for determination is whether the peti-

tion states a cause of action against the defendant city.

Municipalities are invested with two distinct classes of powers, those of governmental or public character having certain attributes of sovereignty, and those which relate to private or proprietary functions.

It is the duty of the city in the exercise of its governmental functions to keep its streets in a reasonably safe condition for public use. The liability of the city for failing to perform this duty is limited by the following statute: "No city shall be liable for damages arising from defective streets, alleys, sidewalks, public parks or other public places within such city, unless actual notice in writing of the accident or injury complained of with the statement of the nature and extent thereof, and of the time when and the place where the same occurred shall be proved to have been given to the mayor or city clerk thirty days after the occurrence of such accident or injury." Comp. St. 1929, sec. 16-723.

The petition does not allege the giving of the statutory notice of plaintiff's injuries and claim for damages, and consequently the facts pleaded do not state a cause of action against the city for failing to perform its duty in its governmental capacity.

In its proprietary capacity, however, a city is liable to the same extent as a private corporation for negligence resulting in injuries to the public. *Henry v. City of Lincoln*, 93 Neb. 331, 140 N. W. 664; *Cook v. City of Beatrice*, 114 Neb. 305, 207 N. W. 518. Was the city of Beatrice liable in its proprietary capacity in failing to keep the meter box in repair and permitting it to remain in a dangerous condition for weeks prior to the happening of the accident giving rise to the present suit?

There is nothing alleged in the petition which indicates that the meter box was not properly installed with materials and accessories of good quality. The meter box, with its ring and cover, was, however, purchased by the city and furnished the consumer at cost. The ordinances of the city are silent as to the ownership of the service line, all inferences as to ownership by the consumer being drawn from

the fact that he must pay the cost of materials and installation. The question is whether the duty is cast upon the city to keep the meter box in repair, and, if so, the city's liability for failure to do so.

The petition cites no statute or ordinance imposing upon the city the duty to maintain the meter box. An examination of the authorities indicates a hopeless conflict in the decisions of other courts. We will therefore examine the cases in the hope that the reasoning therein contained will point the way to the better rule.

In some of the cited cases the city is relieved of liability on the theory that, the consumer having paid for the service line, it was the property of the consumer and no part of the city's water-works system. As an example, the court in *Jackson v. City of Ellendale*, 4 N. Dak. 478, 61 N. W. 1030, said: "When the city has kept its main pipe in order, and has brought its water to the mouth of the connecting service pipe, and has started that water flowing in that pipe towards the premises of the one who has made such a connection, it has discharged its duty. It is under no obligation to keep in repair a pipe which is not a part of its system, and which it does not own."

And in *Fisher v. St. Joseph Water Co.*, 151 Mo. App. 530, 132 S. W. 288, a leading case on the subject, the city is absolved from liability on the theory that the customer may be required to install the service pipe and curb box, and, having done so, they become appurtenances to the realty and, "as between him and the water company, the burden was his to maintain it in repair."

We do not think that the question of liability in this case can be determined from the nature of the contract between the city and the water consumer. The plaintiff was a member of the traveling public to whom a duty was owed by some one to maintain the water-works system in a reasonably safe condition. We are of the opinion that that duty rests upon the city, irrespective of the terms of its contract with the consumer.

A city acts in its proprietary capacity when it engages in the operation of a water-works system and it is liable for negligence to the same extent as a private corporation engaged in the same business. The operation of a water-works system requires not only a pumping plant and a series of water mains, but it requires service lines to the property of the consumer as well. They all go to make up the distribution system. To say that the pumping plant and water mains alone make up the water-works system is but to fly into the face of fact. Water is not delivered to the consumer when it arrives in the main in front of the consumer's property. It is delivered when it is made available for use.

The fact that the consumer may be required to pay the cost of labor and materials in the installation of the service line does not seem to us to be controlling. Whether this be the means of fixing the connection charge or whether the consumer actually becomes the owner, the fact remains that it is a part of the water-works system which the city is duty bound to maintain in a reasonably safe condition for the protection of the public, irrespective of its contract with the adjoining property owner. While there may be a question whether liability of the consumer to the city exists by virtue of agreements among themselves, a question on which we express no opinion, it seems clear that the city cannot delegate the duty it owes the public to maintain the water-works system in a safe condition.

The situation from a practical standpoint calls for the same conclusion. It is the city which reads the meters and obtains first-hand knowledge of the condition of the service line. The consumer, with little knowledge of the business, relies upon the city in its capacity as operator of the utility to see that water is available for use. This is a duty the city assumes when it undertakes to render the service.

There can be no question that the facts pleaded show that the meter box was in a dangerous condition due to failure to repair. The petition pleads that it was in that condition for several weeks prior to the accident and that the city

ought to have known its condition. Plaintiff had a right to walk where she did, this court having determined that question in *Gates v. City of North Platte,* 126 Neb. 785, 254 N. W. 418, wherein we said: "A city is required to take cognizance of the fact that pedestrians have occasion to walk over the parking strip along a street, and although the pedestrian must expect to find such fixed objects as electric light poles, fire hydrants and meter boxes, and must be contented with a grassy surface instead of a smooth walk, the city must exercise due care to have such area in a reasonably safe condition." We conclude that the petition states a cause of action against the city, a conclusion sustained by the following authorities:

In *Nord v. Butte Water Co.,* 96 Mont. 311, 30 Pac. (2d) 809, the court very aptly said: "The curb-box is clearly a part of the company's 'system of water-works'—its means of controlling the use of water by its customer and the payment of rent therefor. Under its franchise the duty of maintaining this instrumentality in repair for the protection of the traveling public was cast upon the company and by it assumed, and that duty was not affected by the circumstance that the cost of labor and materials used in the construction of the connecting box was paid by the occupant or owner of the property."

In *Washington Gas Light Co. v. District of Columbia,* 161 U. S. 316, 16 S. Ct. 564, the court said: "We conclude, therefore, that the duty was imposed upon the Gas Company to supervise and keep the gas box in repair. This duty not only does not conflict with the charter of the company, but on the contrary is sanctioned by its tenor, and is imposed as an inevitable accessory of the powers which the charter confers. Nor do we think that this duty was affected by the circumstances that the cost of the labor and materials used in the construction of the connection and gas box was paid by an occupant or owner of property who desired to be furnished with gas. As the service pipe and stop cock was a part of the apparatus of the company and was used for the purpose of its business, it is entirely immaterial who paid

the cost, or might in law, on the cessation of the use of the service pipe and gas box by the company, be regarded as the owner of the mere materials. Certainly, it would not be claimed that if the box and its connections became so defective or out of repair that gas escaped therefrom and caused injury, that the company could legally assert that it was under no obligation to take care of the apparatus, because of the circumstance that it had been compensated by others for its outlay in the construction of the receptacles from which the gas had escaped."

And in *City of Des Moines v. Des Moines Water Co.*, 188 Ia. 24, 175 N. W. 821, the court said: "It is unnecessary, therefore, to attempt any very exact definition of the mutual rights and obligations of the company and the customer or property owner whom it serves. The company, by its franchise or its contract with the city, is granted a license to use the streets for the construction of its system. Of necessity, this implies the right, under proper regulation, to lay its mains and pipes beneath the surface, and at many points to extend them under and across the course of public travel; and, as a matter of law, it must be held to be an implied condition of such license that these instrumentalities by which it distributes its water supply to its patrons shall be constructed and maintained with reasonable care for the safety of those who are lawfully exercising the primary right of the public to use the streets for the purposes of travel."

As has been said, the liability of a city in conducting a utility in its proprietary capacity is the same as that of a private corporation engaged in the same business. Notice is not required as a condition precedent to liability. The foregoing cases, in our opinion, announce the better rule, and in applying it to the case at bar, the petition states a cause of action. The judgment of the district court is therefore reversed and the cause remanded for further proceedings.

REVERSED.

ROBERT RICHTARIK, APPELLEE, V. JAMES BORS ET AL., APPELLANTS.
5 N. W. (2d) 199

FILED AUGUST 14, 1942. No. 31402.

1. **Workmen's Compensation.** For an injury to be compensable under the workmen's compensation law, there must be a causal connection between the employment and the injury.
2. ———. Under the provisions of the act, a workman not engaged in, on, or about the premises where his duties are to be performed, or where his service requires his presence as a part of such service at the time of the injury, is not covered by the act.
3. ———. An injury to an employee caused by slipping on ice while employee was on way home after work does not arise out of or in the course of employment, whether such employee works regular hours or is subject to call by the employer.

APPEAL from the district court for Saline county: STANLEY BARTOS, JUDGE. *Reversed and dismissed.*

Baylor, Tou Velle & Healey, for appellants.

J. J. Grimm, Claude S. Wilson, Roy F. Gilkeson and *Hymen Rosenberg, contra.*

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER and YEAGER, JJ., and ELLIS, District Judge.

CARTER, J.

This is an action under the workmen's compensation laws of Nebraska. The action is by Robert Richtarik, plaintiff and appellee, against James Bors, employer of Richtarik, and Hardware Mutual Casualty Company, insurance carrier for Bors, defendants and appellants.

The action was originally tried by a single judge of the compensation court, who held in favor of defendants. Appeal was taken to the full compensation court, which awarded benefits to the plaintiff. Appeal was taken to the district court, where the action of the compensation court was sustained. From the action of the district court the case has been appealed here.

There is no material dispute, either as to the facts or as to the controlling principles of law. The dispute hinges

rather upon the application of the facts to well-settled interpretations of the workmen's compensation act.

On Sunday, January 26, 1941, and for about four years prior thereto, plaintiff was an employee of the defendant Bors at Wilber, Nebraska, where the said defendant operated a garage and automobile sales agency. Plaintiff was a licensed automobile salesman and in his employment he did about everything connected with the business, including bookkeeping, making sales of cars and parts, and at the time of the accident he had supervision of service. During the times when Bors was out of town he had charge of the garage. Part of his duties was to demonstrate automobiles. His salary was $60 a month.

On January 26, 1941, Bors was away from Wilber, and plaintiff was in charge of the garage. In the forenoon of this day plaintiff went to the garage in the performance of service there, and drove a car to a prospective buyer's home. He then returned to his home. Again in the afternoon he went to the garage to perform service in connection with his employment, and again returned home, where he remained until about 9:00 p. m., when a prospective purchaser returned with a car. He got into the car, drove the customer to the customer's place of business and then drove to the garage, where he left the car, locked the door to the garage and started home on foot. He left by an alleyway, and when he had gone about 44 feet he slipped on icy pavement and fell, fracturing his right arm at the wrist. Plaintiff stated that it had been his intention to stay at his home the rest of the evening, after having returned the car to the garage.

The appellants contend that the district court was in error in holding that the injury sustained by plaintiff was compensable under the workmen's compensation laws. They insist that the following exclusionary provisions of section 48-152, Comp. St. Supp. 1941, preclude a recovery:

"(c) Without otherwise affecting either the meaning or the interpretation of the abridged clause, 'Personal injuries arising out of and in the course of employment,' it is here-

by declared: Not to cover workmen except while engaged in, on or about the premises where their duties are being performed, or where their service requires their presence as a part of such service at the time of the injury, and during the hours of service as such workmen, and not to cover workmen who on their own initiative leave their line of duty or hours of employment for purposes of their own."

This court has held, and it is the general rule, that if an employee is injured while going to or from his work and his home, the injury does not arise out of nor in the course of the employment. *Siedlik v. Swift & Co.*, 122 Neb. 99, 239 N. W. 466; *McDonald v. Richardson County*, 135 Neb. 150, 280 N. W. 456; *Wilbur v. Adams Lumber Co.*, 140 Neb. 48, 299 N. W. 268. Appellee contends, however, that as he had no regular hours and was subject to call at any time, he is brought within a recognized exception to the general rule. With this we cannot agree.

It appears to us that appellee's trip from the garage to his home was no more incidental to the employment than if it had been made at the close of regular hours of work. The injury was not received while appellee was engaged in, on, or about the premises where his duties were to be performed, or where his services required his presence as a part of such service at the time of the injury. The injury was entirely independent of the relation of master and servant. He was upon no mission of the employer. No act of the employer, imputed or otherwise, contributed to the injury. He was no longer performing any service for the employer. The power of direction and control had ceased to exist; the appellee was on his own. It is clear that under the statute, section 48-152, Comp. St. Supp. 1941, the injury is not compensable.

When an employee has finished his work and is on his way home, a mission of his own, and is injured at a place where he is not required to be by his employment, he is not within the provisions of the compensation law. And in this respect it makes no difference whether he works regular hours or is subject to call by the employer.

While the facts in this case vary to some extent from those in cases heretofore decided by this court, we think it is controlled by the principles announced in *De Porte v. State Furniture Co.*, 129 Neb. 282, 261 N. W. 419; *Siedlik v. Swift & Co., supra; Pappas v. Yant Construction Co.*, 121 Neb. 766, 238 N. W. 531; *McDonald v. Richardson County, supra; Wilbur v. Adams Lumber Co., supra.*

The accident did not arise out of or in the course of the employment and, consequently, appellee has no cause of action.

REVERSED AND DISMISSED.

YEAGER, J., dissenting.

For the purpose of this dissent, the statement of the case as set forth in the majority opinion is fully accepted, but I cannot agree with the conclusion reached. It appears to me that under the facts the plaintiff is entitled to be compensated under the workmen's compensation law.

It is the established policy of this court to give a liberal construction to the workmen's compensation law in order that its beneficent purposes may not be thwarted by technical refinement of interpretation. *Maryland Casualty Co. v. Geary*, 123 Neb. 851, 244 N. W. 797; *Wilson v. Brown-McDonald Co.*, 134 Neb. 211, 278 N. W. 254; *Moise v. Fruit Dispatch Co.*, 135 Neb. 684, 283 N. W. 495; *Kral v. Lincoln Steel Works*, 136 Neb. 31, 284 N. W. 761.

This is not a rule of evidence. It does not contain within its context or implications any criteria for the acceptance or rejection of evidence, or the weight to be given to testimony on controverted questions of fact. It applies rather to the proper legal resultant flowing from facts demonstrated by evidence, or presumption acceptable in the place of evidence. It does not relieve against any rule bearing upon proof of an issue of fact. It is a statement of legal principle requiring that the court, on accepted ultimate facts, shall not adopt a technical viewpoint or a technical refinement in application of the workmen's compensation law, the effect of which would defeat a recovery when a liberal but reasonable one would allow recovery.

In the light of the facts and the foregoing rule, we are required to interpret and apply the exclusionary provisions of section 48-152, Comp. St. Supp. 1941.

That the plaintiff, within the meaning of these provisions, was not "engaged in, on or about the premises" where his duties as an employee were performed cannot well be questioned, but whether or not he was where his service required his presence and that the accident occurred during his hours of service is a question not so easy to determine.

If all service and all prospective service for the day contemplated by the character of employment in which he was engaged were ended, and he was off the premises and on his way home, then clearly under the decisions of this court a recovery cannot be sustained. *Pappas v. Yant Construction Co.*, 121 Neb. 766, 238 N. W. 531; *Siedlik v. Swift & Co.*, 122 Neb. 99, 239 N. W. 466; *De Porte v. State Furniture Co.*, 129 Neb. 282, 261 N. W. 419; *Sheets v. Glenwood Telephone Co.*, 135 Neb. 56, 280 N. W. 238; *Weideman v. Milburn & Scott Co.*, 138 Neb. 205, 292 N. W. 594; *Wilbur v. Adams Lumber Co.*, 140 Neb. 48, 299 N. W. 268.

On the other hand, if plaintiff was at the time of the accident, though off the premises of his employer, where his services reasonably required his presence during his hours of service, he is entitled to recover. *Coster v. Thompson Hotel Co.*, 102 Neb. 585, 168 N. W. 191; *City of Fremont v. Lea*, 115 Neb. 565, 213 N. W. 820; *Speas v. Boone County*, 119 Neb. 58, 227 N. W. 87; *Ridenour v. Lewis*, 121 Neb. 823, 238 N. W. 745; *Good v. City of Omaha*, 125 Neb. 307, 250 N. W. 61; *Struve v. City of Fremont*, 125 Neb. 463, 250 N. W. 663; *Kirkpatrick v. Chocolate Sales Corporation*, 127 Neb. 604, 256 N. W. 89; *Miller v. Reisch Co.*, 132 Neb. 338, 271 N. W. 853.

The theory on which plaintiff rests his contention that the accident occurred during his hours of service, and that he was at a place required of him by his service, is that when his employer was away he was in charge of the business and he was subject at any time to respond to calls from his home to the place of business of his employer, and that such

calls required him to go to and fro between the two points.

That he was subject to call at any time finds no substantial denial in the record. In fact, on the Sunday in question the requirements of his position necessitated three appearances at the garage. He infers that he would still have been subject to call had he not sustained the accident and injuries in question, and in the bill of exceptions no evidence appears to refute this inference.

As against this the defendants urge that the testimony of plaintiff, wherein he stated that on his return home after putting away the car and closing the garage he intended to stay at home, places him in the same class as those who have finished the duties of the day and are on their way home.

On the basis of the unrefuted inference that plaintiff was subject to call at any time and in that sense was on duty, which I think, on the record, was a proper one, and in the light of the rule requiring liberal construction of the workmen's compensation law in order that its beneficent purposes may not be thwarted, I am of the opinion that the award and judgment of the district court should be sustained.

EBERLY, J., concurs in the dissent.

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

5 N. W. (2d) 348

FILED AUGUST 14, 1942. No. 31464.

1. **Pleading.** A general demurrer admits the truth of all facts well pleaded as well as the intendments and inferences that may reasonably be drawn from the pleaded facts.
2. **Contracts.** Where correspondence by letter and telegram is the basis of a cause of action, it is the duty of the court to give to the words used in the correspondence their ordinary and popularly accepted meaning in the absence of explanation or qualification.
3. ———. A valid contract in writing may be made by corre-

spondence, and it is not necessary that there shall be a single paper signed by the parties containing all of the conditions of the contract.

4. ———. A written contract is sufficiently made if all of the elements of a valid and binding contract are contained in correspondence passing between the parties.

5. **Specific Performance.** *Held*, that the petition states a cause of action for specific performance of a written contract.

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

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

Loyal L. Smith and *John H. Kuns, contra.*

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER and YEAGER, JJ., and ELLIS, District Judge.

YEAGER, J.

This is an action instituted by Edward L. O'Shea, plaintiff and appellant, against Loyal L. Smith, Durland Trust Company, Durland Trust Company, trustee, and Gus Rieseberg and Emma Rieseberg, husband and wife, defendants and appellees, the purpose of which is to obtain specific performance of a contract for the sale of real estate claimed to have been entered into between the plaintiff and the defendant Loyal L. Smith.

The appeal is from the action of the district court in sustaining the general demurrer to plaintiff's petition and the judgment dismissing the action. The demurrer was sustained on the ground that the petition did not state a cause of action.

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

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

The petition further sets forth that the offer of the defendant Smith was withdrawn by him after acceptance by the plaintiff.

From an examination of the petition and the exhibits it appears that negotiations began in January, 1940. On February 8, 1940, Smith made a general offer to sell the land for $1,000, with assumption of delinquent taxes by the purchaser. On July 19, 1941, plaintiff offered to purchase for $800 less the then unpaid taxes. This offer was declined July 21, 1941. By telegram on July 22, 1941, plaintiff offered $1,000 for the real estate and the assignment of lease. In response Smith stated that sale would have to be subject to existing taxes. Plaintiff replied that the sale would be satisfactory subject to 1940 and later taxes. The next direct negotiation with reference to conditions of sale was on July 31, 1941, when Smith informed plaintiff that the 1941 rents and conservation payments belonged to him, and that he would not consent that they should pass to the purchaser. He also stated that the title was such that the deal could not go through. The next communication is a protest on the part of plaintiff.

On August 4, 1941, Smith wrote plaintiff the following letter, which appears as exhibit 16 attached to and made a part of the petition:

"Yours of the 1st inst. If you will not insist on the 1941 rents nor conservation payments, the deal may go through. The Durland Trust claims a prior right of sale, but I will settle with it and give you a good title."

On the same day he sent the following communication, exhibit 17, on a post card:

"If the deal goes through, to whom do you want the deed made?"

In response to these two communications the plaintiff, on August 7, 1941, wrote the following letter which is exhibit 18:

"In this deal I would like to have the name of the grantee and the consideration left blank if you have no objection. If you feel that it is important to have the deed complete, however, you may enter the name of Edward O'Shea as grantee and make the consideration one dollar and other valuable consideration.

"Send the deed and abstract to this bank with instructions to deliver to me upon payment, subject to examination of title, of one thousand dollars less cost of bringing abstract down to date if that has not been done. It is understood that you are to retain 1941 rents and conservation payments."

Smith replied on August 9, 1941 (exhibit 19), as follows:

"I have written to Durland Trust Company to have abstract brought down and make a deed proceeding in accord with your letter to me the 7th inst. The lease of the land is and has been each year."

On August 11, 1941, Smith wrote the following:

"Good title cannot be given. Please call the deal off."

Plaintiff protested the cancelation of the transaction and in response to the protests Smith, on September 6, 1941, wrote the following letter:

"Yours of the 2d inst. received. The title to this land is of record and has been for a number of years and is notice to all as to how it is held and I cannot even get a deed satisfactory to me."

The foregoing is an outline of the essential details of the negotiations relative to the sale of the real estate in question as pleaded in the petition.

For the purposes of our consideration of this case, we begin with the proposition that the demurrer admits the truth of all facts well pleaded as well as the intendments and inferences that may reasonably be drawn from the pleaded

facts. *American Water-Works Co. v. State,* 46 Neb. 194, 64 N. W. 711; *Van Horn v. Lincoln Sales Outlet Co.,* 127 Neb. 301, 255 N. W. 36.

Also for the purpose of our consideration of this case, it being the sufficiency of the language of the petition to state a cause of action that is in question, it is the duty of this court to give to the words used in the correspondence their ordinary and popularly accepted meaning in the absence of explanation or qualification. *White v. Leyden,* 112 Neb. 774, 201 N. W. 637. There is nothing of an explanatory or qualifying character appearing in the petition or the exhibits.

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

This contention of the plaintiff must be sustained. A valid contract in writing may be made by correspondence, and it is not necessary that there shall be a single paper signed by the parties containing all of the conditions of the contract. It is sufficient if all of the elements of a valid and binding contract are contained in correspondence passing between the parties. *Bradley & Co. v. Bower,* 5 Neb. (Unof.) 542, 99 N. W. 490; *Holliday v. McWilliams,* 76 Neb. 324, 107 N. W. 578; *Pottratz v. Piper,* 95 Neb. 145, 145 N. W. 265; *Shoff v. Ash,* 95 Neb. 255, 145 N. W. 271.

In the light of these rules, has the plaintiff pleaded a contract? In line with the presentation of the case the important question is as to whether or not there was a definite offer of sale containing certainty as to conditions, and an acceptance of the offer with its conditions before the offer was withdrawn.

A perusal of the correspondence shows that on July 22, 1941, plaintiff offered to purchase the real estate with assignment of lease for $1,000. From that date on the parties were in accord in their negotiations on the price of $1,000 subject to conditions not necessary to be stated here.

On August 4, 1941, Smith, by exhibit 16 quoted herein, made an offer to the plaintiff. By fair inference from all of the correspondence this was an offer to sell for $1,000, subject to the 1940 and later taxes, with a reservation to Smith of the 1941 rents and the conservation payments. The words of exhibit 17 further indicate that exhibit 16 was intended as an offer.

The wording of exhibit 18, hereinbefore quoted, carries a clear indication of acceptance by plaintiff.

The wording of exhibit 19, hereinbefore quoted, clearly appears to be a confirmation of a meeting of the minds of the parties, and a conclusion of negotiations relating to the sale of the real estate in question with nothing remaining except the mechanics of transfer.

In the further correspondence Smith did not make objection to any condition and neither did he seek to impose further conditions. He simply asked the plaintiff to "Please call the deal off" because, as he said, good title could not be given. Plaintiff steadfastly insisted upon performance of the claimed contract.

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

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

Other questions are discussed, but a decision of them is not necessary in the light of the views expressed.

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

REVERSED.

CHARLES REXFORD MASSEY, EXECUTOR, APPELLEE, V. GUARANTY TRUST COMPANY ET AL., APPELLEES: HARRY BOSTWICK MASSEY ET AL., APPELLANTS.
5 N. W. (2d) 279

FILED AUGUST 14, 1942. No. 31466.

1. Powers. Although it is said that the law favors the early vesting of estates and looks with disfavor on the postponement of the vesting of title, yet if an unfavored estate is created and lawful, the court must uphold it.
2. ———. Powers will be construed in this state according to the principles of the common law.
3. ———. In the construction of powers, the cardinal principle is that the intention of the donor is controlling and such intention is to be ascertained from a liberal interpretation and comprehensive view of all of the provisions of the instrument.
4. ———. The court will endeavor to place itself in the position of the donor, ascertain his intention and enforce it in all its parts, if it be lawful to do so.
5. ———. The donee of a power must keep within its terms, and where the donor prescribes the method of its execution, that method must be strictly followed, so far at least as may be necessary to give effect to the donor's intent and design.
6. ———. Where there is no prohibition or restriction in a power, everything which is legal and within its limits should be supported. But where there is a prohibition, limitation or restriction, such provisions will control and the donee will not be permitted to disregard the same.
7. ———. In the absence of a restriction or prohibition, the power to appoint a fee will be held to authorize appointment of any lesser and legal estate.
8. ———. In the absence of a restriction, where the power is unlimited as to the eligible appointees, it will be construed as authorizing appointment of a fee or any lesser or qualified legal estate.
9. ———. The power involved, being unlimited as to eligible appointees and without restriction as to the character of the estate to be appointed, *held* to authorize appointment in trust.

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

Richard E. Robinson, Gerald Vasak and *Fritz Zeigler*, for appellants.

Crofoot, Fraser, Connolly & Stryker, W. M. McFarland and *Thomas Marshall, contra.*

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER and YEAGER, JJ., and ELLIS, District Judge.

ELLIS, District Judge.

This case is presented as a Case Stated under Rule 10-d of this court.

On February 4, 1920, Henry C. Bostwick, now deceased, created a voluntary trust of which the defendant Guaranty Trust Company of New York afterwards became a substituted trustee. After providing for payment of the income from the trust property during his lifetime to the settlor, who was designated in the trust indenture as the "party of the first part," the indenture provided as follows: "After the death of the party of the first part, to pay to Martha Bostwick Massey during her natural life, in quarterly instalments on the first days of January, April, July and October of each year, the entire net income from said estate, and at her death to pay over and deliver the principal of said trust to whomsoever may be designated by her by Will or other testamentary instrument, but in the event that the said Martha Bostwick Massey fails to dispose of the principal of said trust fund, or any portion thereof, by Will or other testamentary instrument, the trustee shall, upon her death, pay over and deliver to her descendants, all of said principal undisposed of by her Will or other testamentary instrument, and in the event that the said Martha Bostwick Massey leaves no descendants said trustee shall pay over and deliver the principal of said trust to the heirs of said Martha Bostwick Massey."

Martha Bostwick Massey enjoyed the benefits provided for her during her lifetime and upon her death on February 5, 1941, she was survived by her husband, Charles Rexford Massey, Harry Bostwick Massey, a son, and Mildred Massey Hinemon, a daughter. At the time of her death Mrs. Massey was a resident of the District of Columbia. She left a last will and testament which was admitted to

probate there and in which she undertook to dispose of the trust *res* over which she was given power of appointment, as follows: A life estate in favor of her husband, Charles, with unlimited discretion in him to use principal as well as income. Upon the death or remarriage of her husband she bequeathed the property to a trustee and provided for its administration in four separate trusts with her son, Harry, her daughter, Mildred, and two granddaughters as the prime beneficiaries of the several trusts.

Some question having been raised as to the power of Martha Bostwick Massey under the original trust indenture to appoint and the manner in which she had attempted to exercise that power in her will, this action was brought by the executor of her will for the construction of the instruments involved. The defendants are the trust company named as trustee in both instruments and all possible beneficiaries under both of the instruments. The executor of Martha Bostwick Massey's will is her husband, Charles, and in addition to appearing as plaintiff in his representative capacity he is named as one of the defendants.

The answer of the defendant Charles Rexford Massey admits the allegations of fact contained in the petition and joins in the prayer of the petition for a decree in accordance with the facts and the law. The only party not of full age is Gertrude Read Massey. Her guardian *ad litem* answered, admitting all the allegations in the petition except those raising a question as to the validity of the appointments made by Martha Bostwick Massey. This answer further alleged that the power of appointment was general and unlimited and that the manner of its exercise was entirely valid and effective. The prayer was for confirmation of the appointment made and the minor's interests under the appointment.

The son, Harry, and the daughter, Mildred, filed an answer in which they admitted the allegations of the petition and alleged, in substance, that under the original trust indenture Martha Bostwick Massey's power of appointment was limited to appointment of the principal outright; that

her attempted exercise of the power was unauthorized, invalid and void; that the result was, in effect, a failure of exercise of the power and that these defendants were entitled to receive the trust estate outright, *per stirpes*, as the descendants of Martha Bostwick Massey. The prayer is appropriate to the allegations of the answer.

It thus appears that, if the appointment made by Martha Bostwick Massey is found to be valid and is confirmed, the surviving husband will receive a life estate and the beneficial interest in the remainder will vest in those designated in the four trust provisions. On the other hand, if the attempted appointment is found to be invalid and is struck down, the entire estate will vest outright in the son and daughter to the exclusion of all the other parties.

The trial court, after finding jurisdictional facts about which there is no dispute, found that the appointment as made was within the power granted and in all respects valid and entered a decree accordingly.

The son and daughter have appealed and the only other appearance in this court by brief is that of the guardian for the minor defendant.

The Case Stated sets forth the questions involved as follows:

First. Was the appointment of the principal of the Bostwick trust, as provided by the terms of the last will and testament of Martha Bostwick Massey, a valid exercise of the power of appointment conferred on her by the terms of the trust agreement of February 4, 1920?

Second. Was the power of appointment given to Martha Bostwick Massey a limited power to appoint the person or persons to whom the trustee was directed to pay over and deliver the principal of said trust upon her death absolutely?

Third. Does the trust indenture clearly indicate that it was Henry C. Bostwick's intention that the trust should come to an end with the death of Martha Bostwick Massey, and that the principal of the trust estate was thereafter to vest outright and absolutely?

It seems to be agreed that there are no cases in this jurisdiction involving a similar situation or problem and therefore we have no controlling or, for that matter, any very helpful precedent in our cases. Likewise we have no statute dealing with the problem.

The only Nebraska cases cited by the parties are the following:

Loosing v. Loosing, 85 Neb. 66, 122 N. W. 707. This case does not involve a situation at all similar to that before us and can only be said to be helpful in that it appears to hold that powers will be construed in this state according to the principles of the common law. The court did have occasion to make this significant statement: "The testator did not specifically designate in his will the methods to be pursued by his widow in executing the powers vested in her by him, and she therefore is at liberty to indulge her judgment or fancy by executing a deed or a will."

Bunting v. Hromas, 104 Neb. 383, 177 N. W. 190. This case did not involve consideration of a power but rather the construction of a will. "The decisions of the courts are numerous as to the legal and technical meaning of words usually employed in wills, and in some of the states some fine distinctions and refinements have been made. These decisions are of but little value in this state in the construction of wills, as we are now committed to the doctrine that the intention of the testator is to be ascertained from a liberal interpretation and comprehensive view of all of the provisions of the will. * * * The court without much regard to canons of construction or technical language will place itself in the position of the testator, ascertain his will, and enforce it in all its parts, if it be lawful to do so."

To the same effect is the opinion in *DeWitt v. Searles*, 123 Neb. 129, 242 N. W. 370. In this case the court also reiterates the principle that, even though an estate be looked upon with disfavor by the law, yet, if it be lawful and a testator by unambiguous language creates such an estate, the court must uphold it.

We think the principles of these cases are equally appli-

cable to the construction of trust instruments and powers contained therein.

In the first opinion in the case of *Arlington State Bank v. Paulsen*, 57 Neb. 717, 78 N. W. 303, the case was considered as involving questions of who had the legal title to the real estate, the executors or the heirs, and the question of whether power in the executors to sell included the power to mortgage. While this opinion was later set aside on rehearing and the case disposed of on other grounds (59 Neb. 94, 80 N. W. 263), the discussion of the court is not without some value in the case before us. In disposing of the first question, the court said (p. 729): "The question is to be determined by ascertaining from an examination of the entire will of the testator what his intentions were." With reference to the power of the executors, the court said (p. 736): "Whether the executors had power to mortgage the testator's real estate is, of course, to be determined * * * from an examination of the entire will." And (p. 740): "If the executors used the power at all, they were bound to keep within its terms, and any attempt by them to exercise power in excess of that delegated must be held to be simply nugatory. Where the creator of a power defines the method of its execution, that method must be strictly followed, so far, at least, as may be necessary to give effect to his intent and design. This rule is fundamental."

As we go afield in search of cases directly involving powers of appointment and their exercise, we will consider first *Matter of Kennedy*, 279 N. Y. 255, 18 N. E. (2d) 146, which case is urged by appellants as directly in point and controlling in the case before us. In this case the power of the donee is expressed in directions to the trustee as follows: "Upon her death, to pay and divide the principal of said share to and among such of her children and issue of her deceased children as she shall by her last will and testament appoint," and upon nonexercise of the power "the principal of said share shall be transferred to and divided among her child or children, if any, in equal shares, *per stirpes*."

In that case, as in the principal case, all of the income

from the trust was to be paid to the donee of the power during her lifetime, leaving only the principal for disposition upon her death. The donee attempted to exercise the power by creating trusts which gave the income *to her children for life* with the remainder *after* their deaths *to her grandchildren.* At the time of her death all of her children were living and there was no issue of any deceased children.

The New York court held that the power was limited and specific and said: "She had a specific and limited power to allocate the corpus of the trust in such shares as she saw fit *to a specific class described* by the donor" (emphasis supplied), and "It follows that the specific direction of Mr. Kennedy to his trustee to pay and divide the corpus of the trust upon the death of Lady Dunbar required the immediate vesting thereof upon her death."

With reference to the rule (about which more will be said later) that where there is no restriction the power to appoint a fee includes the power to appoint a lesser estate, the court said:

"The assertion that, in the absence of positive and express words of prohibition to the contrary by the donor, the power conferred upon a donee to appoint a fee includes the power to appoint a lesser estate is, at most, only a doctrine of equity limited to particular cases where the circumstances require its application. It is not a rule of universal application. *It has never been laid down as a rule of construction by our court.* (Emphasis supplied.) * * * Reliance upon any such general statement of a rule, even if applicable in a proper case, is unwarranted without consideration of its effect upon the intent and purpose of the testator, the nature of the power whether general, limited or specific and the general circumstances of the case under consideration. * * *

"We neither approve nor consider the validity of the alleged rule, for we find that in no aspect does it have any force under the facts in the case at bar. Here the power was limited and specific * * *.

" 'The intention of the donor of the power is the great

principle that governs in the construction of powers.' 4 Kent's Commentaries, p. 345. Within limitations with which we are not here concerned, a testator may make such disposition as he wishes of his property without interference by the courts or by those who may believe that some other disposition would be more desirable or practicable."

It may be noted that two of the six judges participating in the case dissented.

We are not inclined to agree with the New York court's treatment of the rule mentioned. In 1 Sugden on Powers (3d Am. ed.) 535, sec. 40, the rule is stated thus: "It has since been said, that although the power must not be exceeded, nor its directions evaded, yet where there is no prohibition, everything which is legal, and within the limits of the authority should be supported; and therefore that a power to appoint a fee, but with no prohibition against giving a less estate, ought to be held to authorize any legal limitations within the scope of the power which may be served out of the fee."

In *Butler v. Huestis*, 68 Ill. 594, it was said: "The law seems to be well settled by authority, where a party has the power to appoint a fee, if there are no words of positive restriction a less estate may be appointed. The appointment of a less estate than the donee might have created under the power, is not thereby rendered void. But where an appointment is to be made of a particular estate, or in a certain manner, and in no other way, the negative words must control, and the donee is not permitted to appoint a different estate, or in any other manner." The rule of this case was quoted with approval in *Cheever v. Cheever*, 172 App. Div. 353, 157 N. Y. Supp. 428. In *Maitland v. Baldwin*, 70 Hun, 267, 24 N. Y. Supp. 29, the power was to appoint "in such manner and form" as the donee might "direct, limit and appoint." In *Lehman v. Spicer*, 108 Misc. 721 (affirmed in 188 App. Div. 931, 176 N. Y. Supp. 445) the power was to appoint "in such sums or amounts" as donee desired. In both cases appointment in trust was upheld.

In *Wilmington Trust Co. v. Wilmington Trust Co.*, 15 Atl.

(2d) (Del. Ch.) 153, the Delaware court said: "But where the power is general, as to the quantum of the estate which may be appointed, the donee may appoint a lesser or qualified estate in the property, and it is not necessary to exercise the power in its entirety, or to its full extent. This rule is based on the principle that the lesser right is included in the greater. *Hillen v. Iselin,* 144 N. Y. 365, 39 N. E. 368; *Harker v. Reilly,* 4 Del. Ch. 72; *In re French's Estate,* 119 Misc. 445, 196 N. Y. Supp. 397; 49 C. J. 1266. This principle has been long recognized and applied in this state * * * . If *Matter of Kennedy* (*supra*) * * * and other subsequent New York cases based thereon, *intended to lay down any different rule,* this court is not bound thereby * * * . Moreover a careful reading of the opinion in the *Kennedy* case would seem to lead to the conclusion that the power involved was regarded as special and limited, and in no sense general, as to the quantum of the estate that could be appointed." (Emphasis supplied.) In this case the language of the power was as follows: " * * * shall be paid, transferred, conveyed and delivered to such lawful child or children, or other lawful lineal descendants" and "in such proportions and subject to such lawful conditions as such deceased child shall appoint and designate." Appointment of less than an absolute estate was upheld.

In *In re Comey's Will,* 173 Misc. 377, 17 N. Y. Supp. (2d) 949 (surrogate's opinion), the power was "to such of the descendants * * * in such amounts, shares and proportions and upon such estates." This was held to be a special power because limited to a class, but that it authorized appointment of property in trust.

In *In re Jackson's Estate,* 175 Misc. 882, 25 N. Y. Supp. (2d) 102 (surrogate's opinion), the court said with reference to the *Kennedy* case: "But the decision of the court is made strictly on the basis that the text of the Kennedy will expressly limited the area within which the power could operate. The case is therefore merely a case construing a particular instrument. The actual decision does not set up and does not purport to set up any general standard what-

ever or to establish or repudiate any rule of construction whatever. Aside from the specific holding that the particular will there under construction constrained a particular result the case means only that in the construction of a testamentary power the same singularity of approach exists as in the construction of any other portion of a will; and since no will has a brother the *Kennedy* case is illuminating but not controlling in any other case." This seems to be a rather accurate analysis of the *Kennedy* case.

The *Kennedy* case is again referred to in *Matter of Hart*, 262 App. Div. 190, 28 N. Y. Supp. (2d) 781, which reversed a surrogate's decision, holding the exercise of the power invalid. (172 Misc. 453, 15 N. Y. Supp. (2d) 318.) The power in the Hart will was in the following language: "* * * then to grant, convey, assign and pay over the corpus or principal * * * to such person or persons and in such manner and in such shares as he shall * * * appoint in fee simple absolutely."

"By this authorization the donor manifested complete indifference to the beneficiary or beneficiaries of the donee's exercise of the power. We do not find this indifference qualified by concern about the nature of the estate given to such beneficiary or beneficiaries. The donor authorized disposal 'in such manner' as the donee directed. The phrase, 'in such manner,' has been held to refer to the character of the estate which the donee may appoint, and connotes positive permission to the donee to create trusts. * * *

"We do not read the phrase, 'in fee simple absolutely,' appearing in clause eleventh of the donor's will, as an indication of an intention to restrict, but, on the contrary, as an expression of his intention to broaden and strengthen the unlimited power given to the donee. The donor used the phrase, 'in fee simple absolutely,' a second time in the eleventh clause of his will, and he also used it in article two of the third codicil. In each of these two instances the phrase is used in connection with the verb 'convey.' We are of the opinion that, in using the expression 'in fee simple absolutely,' the donor had reference to the nature of the conveyance rather than to the extent of the appointment. * * *

"The learned surrogate has relied on *Matter of Kennedy* (279 N. Y. 255) as authority for his holding that the donee was limited to an appointment of the property in fee. That case must be confined to the facts there presented. A consideration of the facts in *Matter of Kennedy* justifies a conclusion that by its holding the Court of Appeals did not intend to jettison the well-understood rule that the power to appoint a fee includes the power to appoint a lesser estate. * * *

"This attempted exercise of the power obviously included beneficiaries who were not members of the class at the death of Lady Dunbar and accordingly was void. * * *

"The Court of Appeals has frequently stated that the language used in the opinion, though it may appear general in scope, must always be taken with reference to the particular facts decided. We find nothing in the facts of the *Kennedy* case to justify the conclusion that the old rule of construction has been declared abandoned by the Court of Appeals under all circumstances. The Court of Appeals merely held the rule inapplicable to the particular state of facts then before it.

"*In Matter of Wildenburg* (174 Misc. 503) the surrogate whose decree is now under consideration has apparently modified his interpretation of *Matter of Kennedy* as applied to the case at bar. *Matter of Hart* (172 Misc. 453) is also commented upon in 53 Harvard Law Review (p. 687) and 24 Minnesota Law Review (p. 587). We note, also, that the New York County Surrogate's Court in *Matter of Jackson* (175 Misc. 882) and the Kings County Surrogate's Court in *Matter of Comey* (173 Misc. 377) have both held that *Matter of Kennedy* (*supra*) should be limited and considered as a case construing a particular instrument.

"Ordinarily, a testator's primary concern is as to who is to receive his property. If he is indifferent as to who is to receive it, he would naturally be indifferent as to how they receive it."

In *Geneva Trust Co. v. Sill*, 27 N. Y. Supp. (2d) 289 (supreme court), the court said: "Before the decision in *Mat-*

ter of Kennedy * * * the power to appoint a fee was generally conceded to include the power to appoint a lesser estate in the absence of any restriction in the instrument which was the source of the power," and cites several New York cases. In this case the power was to appoint "to such persons and in such shares, interests and proportions." This was held to be a general and unconfined power.

In *McClellan's Estate,* 221 Pa. St. 261, 70 Atl. 737, the power was "to appoint and vest any or all that remains * * * to and in such persons as he sees fit." An appointment in trust was held to be within the power.

In *Lawrence's Estate,* 136 Pa. St. 354, 20 Atl. 521, the power was "to grant and convey the real estate in fee * * * in such parts or shares." An appointment in trust was held valid and the court said: "The power is wholly unrestricted. The entire discretion is committed to the donee of the power, to grant the fee in such form and to such persons as she chose."

In *Lewis' Estate,* 269 Pa. St. 379, 112 Atl. 454, the power was to appoint "to such person or persons, being my lineal descendants * * * in such shares and amounts as she may choose." An appointment in trust was upheld. With reference to the power the court said: "It was restricted to a class only; but, operating within the class, it was not only general but absolute. Therefore, a use and trust, so imposed, being within the limits of the authority and in the exercise of an absolute right within the class, was not in violation of the original founder's intention, and is moreover sustained by *McClellan's Estate,* 221 Pa. St. 261."

In *Myers v. Safe Deposit & Trust Co.,* 73 Md. 413, 21 Atl. 58, the language was "shall pass to and become the estate and property of such of my children and grandchildren, or either, as she * * * shall have named and appointed to take and have the same." This was held to be a special power and appointment in trust invalid. "It is very clear to our minds that the testator designed whoever the wife nominated to take an absolute estate in the personalty and fee in the realty. He gives the wife the simple power to name

who shall take the estate, and she is given no power by implication to create a trust."

We shall not attempt to reconcile apparent conflict in results reached by the courts in the cases cited. They reveal the not unfamiliar picture of lack of uniformity of results even though all profess to apply the same rules. This is no justification for discarding all rules. To do so would doubtless produce an infinitely worse result.

From the foregoing we think that the rule quoted from Sugden, *supra,* is quite generally recognized and even in New York notwithstanding what is said in the *Kennedy* case. Furthermore, we think the rule is sound and useful to all who are concerned with the drafting and construction of instruments involving powers. We adopt it as a rule of construction in this state. Like all rules, it will not have application in all cases, and the rule itself does not purport to be applicable to powers containing a prohibition or limitation upon the exercise of the power.

While it is difficult to reconcile the results reached in the cases cited, it may be said that all the courts had a common design, which is frequently stated as a rule of construction, and that is that the donor's intention is to be ascertained and given effect if lawful.

We think it may be said of the cases cited that in many of them the appointment in trust was upheld where the power was not as broad and unqualified both as to the quantum of the estate to be appointed and the eligible appointees as in the principal case and that no similar power was involved in those holding the appointment invalid.

We are inclined to agree with those courts which hold that where the power is unlimited as to the quantum of the estate that may be appointed, even though the appointees be limited to a class, an appointment in trust is valid.

Turning now to the language of the power before us, we think it can be said that there is no prohibition or restriction expressed against the appointment of estates less than absolute. By use of the words "to whomsoever may be designated" it seems clear that Martha Bostwick Massey was

given the widest possible latitude in selecting appointees. Like the court in the *Hart* case, we think this is of great significance. The donor having indicated complete indifference as to the ultimate beneficiaries of the power, it would be illogical, unreasonable and contrary to common knowledge of human nature to attribute to him concern about the nature of the estate they were to receive and especially in the absence of any language indicating any such concern.

The only language which appellants urge as indicating such concern is "to pay over and deliver the principal." They say that this language and that involved in the *Kennedy* case, "pay and divide the principal," are synonymous and therefore contend that we should reach the same result as in that case. This involves an assumption that the *Kennedy* case turned on the words last above quoted. We do not so construe the opinion and in this we find support in the other New York cases cited. Whether we agree or disagree with the result in the *Kennedy* case, it seems clear that the case turned on the limitation of the appointees to a designated class and the attempt to include beneficiaries who were not members of that class. See quotation from *Hart* case, *supra*. A vital and fundamental difference between the power in that case and the one before us is the utter absence of direction or concern as to beneficiaries.

It may also be noted that Martha Bostwick Massey was entitled to receive all of the income from the trust *res*, leaving only the principal for appointment. In expressing the power and authority of the trustee to manage the trust, the donor contemplates that the principal of the trust might from time to time consist of both cash and securities. It was therefore merely a natural choice and use of words to direct that the principal be *paid* over and *delivered* to the appointees, whether they be appointed to receive in trust or absolutely. If the donor had expressly directed appointment in trust, he would doubtless have used identically the same language in directing the transfer of the trust *res* from his trustee to the appointed trustee. This was nothing more or less than a direction to the trustee to make a

complete surrender of the trust property, whatever the eventual disposition might be.

Courts ought not to resort to rules of construction where the intention is made clear by the instrument and thereby thwart the intention. Neither should the courts resort to strained, unnatural and fanciful constructions to create an artificial intention where none actually appears.

The language of the Georgia court in *Regents of the University System v. Trust Co.*, 186 Ga. 498, 198 S. E. 345, is appropriate. "If we should write into the second clause a limitation that the property must be appointed in fee simple and not otherwise, we would in so doing be adding to the instrument something which is not clearly implied, or, as we might say, something that is clearly not implied. Words to this effect could have been so easily inserted by the testator had any such meaning been intended by him."

The power in that case was without limitation in regard to beneficiaries. The court continued: "It is presumed that Mr. Brownell was possessed of normal characteristics, and it is hardly supposable that he would have been willing for beneficiaries to be chosen by his wife from all the world, but at the same time would control her as to the kind of estate which she might devise. Would he as a reasonable man have said to her, 'You may give $100,000 to whomsoever you please, provided you give it absolutely and without condition; but you cannot bestow the slightest benefit on my nearest relation or dearest friend by any sort of estate on condition?' We cannot think so."

We hold that where a power is unlimited as to eligible appointees, and there is no restriction on the quantum or character of the estate to be appointed, the donee may appoint a fee or any lesser or qualified legal estate.

We conclude that Henry C. Bostwick expressed no intention that the appointment of Martha Bostwick Massey must vest an absolute estate in her appointees; that the power of appointment given her was not a limited power; and that her appointment was a valid exercise of that power. The judgment of the district court was therefore right and it is affirmed.

The guardian *ad litem* for Gertrude Read Massey is allowed a fee of $350 for his services in this court, the same to be paid out of the estate involved. Other costs incident to the appeal will be taxed to appellants.

AFFIRMED.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

SEPTEMBER TERM, 1942

OTIS LUSTER V. STATE OF NEBRASKA.
5 N. W. (2d) 705

FILED OCTOBER 9, 1942. No. 31430.

1. **Criminal Law.** "In order to review alleged errors occurring during the trial of a criminal case, such errors must be pointed out to the trial court in the motion for a new trial and a ruling obtained thereon." *Wilson v. State*, 43 Neb. 745, 62 N. W. 209.
2. ———. "Alleged errors not brought to the attention of the trial court in any way in a motion for a new trial are not entitled to be considered or reviewed by this court." *Hall v. State*, 109 Neb. 273, 190 N. W. 898.
3. ———. " 'Where the evidence in a criminal case is acutely conflicting, and from its consideration different minds may reasonably arrive at different conclusions, the weight to be given thereto is a question for the jury.' *Norton v. State*, 119 Neb. 588, 230 N. W. 438." *Guerin v. State*, 138 Neb. 724, 295 N. W. 274.
4. ———. Evidence in the record examined, and *held* ample to support the verdict; and further, the rights of the defendant during the trial were in all respects properly safeguarded by the trial court.

ERROR to the district court for Otoe county: WILMER W. WILSON, JUDGE. *Affirmed.*

John L. Mattox, for plaintiff in error.

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

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

EBERLY, J.

It is charged by the state that the plaintiff in error, hereinafter referred to as the defendant, "did on the 6th day of January, A. D. 1942, at and within the county of Otoe and the state of Nebraska, * * * then and there. by putting in fear, forcibly and by violence take from Randall Seyfer, money of value, with intent to rob and steal," in contravention of the provisions of section 28-414, Comp. St. 1929. To an information so charging, the defendant interposed a plea of "not guilty." A trial to a jury resulted in a conviction. From the judgment of the trial court overruling his motion for a new trial and imposing the penalty, the defendant prosecutes error to this court.

"In order to review alleged errors occurring during the trial of a criminal case, such errors must be pointed out to the trial court in the motion for a new trial and a ruling obtained thereon." *Wilson v. State,* 43 Neb. 745, 62 N. W. 209. See *Green v. State,* 116 Neb. 635, 218 N. W. 432. And we are committed to the rule that in criminal cases alleged errors of the trial court not referred to in the motion for a new trial will not be considered on appeal. *Hall v. State,* 109 Neb. 273, 190 N. W. 898; *Green v. State, supra.*

An examination of the record discloses that the scope of defendant's motion for a new trial, as discussed in defendant's brief on appeal, was substantially limited to the following: (1) That the verdict was not supported by sufficient evidence; (2) misconduct of the county attorney in questioning the defendant as to exhibits 19 and 20 (19 A); (3) the court erred in giving instruction No. 7 on the court's own motion; (4) errors of law occurring at the trial and duly excepted to.

The evidence is undisputed that defendant, in company with four other colored men, left Kansas City, Missouri, at about 10:30 p. m. January 5, 1942, in an automobile, with the avowed intention of going to the city of Chicago, Illinois. Three of the party were armed with revolvers. They proceeded northward and then eastward via Nebraska City, Omaha and Council Bluffs, and were apprehended at Cedar

Rapids, Iowa, on the afternoon of the 6th day of January following. When they had arrived at Nebraska City they stopped at a filling station and obtained a supply of alcohol for the radiator of their car and a further supply of gasoline for their gasoline tank. They then proceeded to the James Oil Station in Nebraska City, and there three of the party entered the same about 1:30 a. m. of January 6. A revolver was displayed by one of the party, the man in charge of the station was "held up," and the three men removed about $125 in money from the clerk in charge of the station, and also removed and took with them certain articles of merchandise belonging to the station proprietor. Defendant claims to have remained in the automobile while the robbery was perpetrated, and denies having in any manner participated therein. He admits, however, that when the stolen money was divided he was given $15 thereof, and when the party arrived at Cedar Rapids, Iowa, merchandise all similar in character to that removed from the station of the James Oil Company of Nebraska City (as some of which was clearly identified as part thereof) was in the automobile occupied by defendant and his party, packed in a box and by defendant personally delivered to the U. S. postal authorities at that city for transmission to an addressee in Kansas City, Missouri, and the receipt therefor taken by defendant and found on his person at the time of his arrest. In addition, the defendant was positively identified by the employee in charge of the James Oil Company station at Nebraska City as one of the three men who, without masks, entered this station at about 1:30 a. m. on January 6, with a revolver in his hand, "held him up," and with others removed the $125 and the merchandise therefrom.

We do not overlook the protestations of innocence on part of the defendant made as a witness in his own behalf; that he had no knowledge of the criminal intentions of the other members of the party; that he did not participate with them in the perpetration of the robbery but remained in the automobile while it occurred, and thereafter continued with the party only because of fear and duress; and that the testi-

mony of the state identifying him as an actual participant in the robbery is a matter of mistaken identity. However, in view of all of the attendant circumstances, this identification of the defendant is a mere matter of disputed evidence. The evidence establishing this fact introduced by the state is not without corroboration and, if believed, is ample to sustain the jury's verdict of guilty in this case. This conclusion of fact is sustained by the well-established principle of criminal procedure that, where in a criminal prosecution the evidence conflicts as to material facts, the credibility of the respective witnesses is for the jury. *Baker v. State,* 112 Neb. 654, 200 N. W. 876; *Johnson v. State,* 119 Neb. 217, 228 N. W. 253; *Norton v. State,* 119 Neb. 588, 230 N. W. 438; *Guerin v. State,* 138 Neb. 724, 295 N. W. 274.

And again, even, "Where the evidence in a criminal case is acutely conflicting, and from its consideration different minds may reasonably arrive at different conclusions, the weight to be given thereto is a question for the jury." *Norton v. State, supra.* See, also, *Guerin v. State, supra.*

Indeed, this jurisdiction is committed to the rule that "This court, in a criminal action, will not interfere with a verdict of guilty, based upon conflicting evidence, unless it is so lacking in probative force that we can say, as a matter of law, that it is insufficient to support a finding of guilt beyond a reasonable doubt." *Williams v. State,* 115 Neb. 277, 212 N. W. 606. See, also, *Haines v. State,* 135 Neb. 433, 281 N. W. 860; *Shannon v. State,* 111 Neb. 457, 196 N. W. 635.

The defendant charges misconduct of the county attorney in connection with exhibits 19 and 20 (19 A). It appears that a letter was written by the defendant after he was taken in custody. It was placed in an envelope, sealed by the defendant, addressed, proper postage placed thereon, and entrusted to an officer to be mailed. It came into the possession of the county attorney, who sought to lay a foundation for its admission. Incidentally the contents of the letter were not divulged to the jury. To its admission in evidence the trial court sustained the objection of defend-

ant's attorney, *i. e.*, "It doesn't have any tendency to prove the charge of the state against the defendant in this case." Obviously the defendant was not prejudiced by the transaction.

Instruction No. 7, given by the court on its own motion, related to the subject of "reasonable doubt." A careful reading of this instruction in connection with other instructions to the jury given by the court fails to disclose any substantial error on the part of the trial court. The closing words of this instruction, to which defendant's complaints are directed, in the light of other instructions given, could not possibly operate to defendant's prejudice. We have carefully read the entire record and are satisfied that the district court fully protected the defendant's rights, and that the trial was fairly conducted to that end.

It follows that no substantial error was committed, and the judgment and sentence of the trial court are affirmed.

AFFIRMED.

MARGARET E. KAFFENBERGER, APPELLANT, V. R. F. IVERSON ET AL., APPELLEES.
5 N. W. (2d) 687

FILED OCTOBER 9, 1942. No. 31431.

1. **Workmen's Compensation.** The burden of proof is upon the claimant in a compensation case to establish by a preponderance of the evidence that personal injury was sustained by the employee by an accident arising out of and in the course of his employment.
2. ———. A compensation award cannot be based on possibilities or probabilities, but must be based on sufficient evidence that the claimant incurred a disability arising out of and in the course of his employment.

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

Lawrence F. Welch and *Walter H. Smith,* for appellant.

James F. Begley and *W. A. Robertson, contra.*

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

CARTER, J.

This is a suit to recover benefits claimed to be due for the death of plaintiff's husband under the workmen's compensation law. The trial court entered an order dismissing plaintiff's petition, and plaintiff appeals.

The record shows that defendants operate a garage in the city of Plattsmouth. On June 2, 1941, the basement of the garage was flooded, as a result of which several inches of mud were deposited on the basement floor. On June 9, 1941, and for two days thereafter, the deceased was employed by the defendants to help wash out the mud with a city fire hose. On June 19, 1941, deceased became ill, and on July 1, 1941, he died of pneumonia. It is alleged by plaintiff that deceased, while at work for defendants, breathed sewer gas in quantities sufficient to injure the mucous membranes of the lungs and bronchial tubes and thereby subjected the deceased to the influx of the pneumonia germs which caused his death.

There is evidence in the record by one Charles Forbes to the effect that he worked with the deceased in clearing defendants' basement and that he smelled sewer gas on several occasions when they were unblocking the sewers. Several other employees testified that they smelled no sewer gas while the work was being performed. It is clear from the record that six or seven inches of mud and water had to be removed. It is also established that the men engaged in the work became damp and wet at various times while the work was being done. The ventilation in the basement consisted of four open windows, other windows with panes broken out, several small ventilators and an open stairway to the floor above. There was no forced ventilation through the basement.

It is contended by the plaintiff that the escaping sewer gas in the poorly ventilated and damp basement room injured the mucous membranes of the lungs and bronchial tubes of the deceased, resulting in his death from pneumo-

nia, and that such injuries were the result of an accident within the purview of the compensation act. In view of the conclusion reached, we do not deem it necessary to decide whether the breathing of sewer gas as shown by plaintiff's evidence constitutes an accident as defined by the compensation law. We think the evidence will not sustain a finding that there was any sewer gas of harmful quantity in the basement, or, even if there was, that it in fact caused the pneumonia resulting in deceased's death.

In this respect the record shows that deceased had worked for the city of Plattsmouth from June 3 to June 7, inclusive, washing mud and cleaning the streets. From June 11 to June 14 he had performed some part-time yard work. On June 15 he rode more than 15 miles in an open truck to mow peas in a muddy field, returning the same way. He worked a day and a half unloading lumber on June 16 and 17. The medical evidence is in dispute as to the incubative period of the pneumonia germ, plaintiff's witness testifying that it was seven or eight days and defendants' witness saying that it was approximately three days. Plaintiff's medical witness testifies that the incubation period for lobar and bronchial pneumonia is much different, the period being much longer in the case of the bronchial type. There is no evidence in the record as to the type with which deceased was afflicted. One of the attending physicians testified that it was impossible to determine the type after treatments were commenced and that a determination was not previously made.

There is evidence that the conditions in the basement may have lessened the resistance and predisposed the deceased to the disease. No witness was willing to say that it did cause the disease. No other employee suffered injury from sewer gas or contracted pneumonia while working in the basement. One physician testified that in his opinion the pneumonia did not result from sewer gas. There was no evidence of sewer gas in such a quantity that injury could be reasonably inferred from its presence. In fact, the weight of the evidence is to the effect that there was no

sewer gas present at all. We think the trial court correctly determined, as did the workmen's compensation court, that plaintiff had failed to prove that the pneumonia was contracted while working in the basement of defendants' garage.

The burden of proof is on the claimant to establish by a preponderance of the evidence that there was an injury to the employee by an accident arising out of and in the course of the employment. Awards of compensation cannot be based upon possibilities or probabilities, but must be based upon sufficient evidence showing that the injury is compensable under the compensation law. We think the case falls within the reasoning announced in *Townsend v. Loeffelbein*, 123 Neb. 791, 244 N. W. 418, wherein a recovery was denied for injury caused by pneumonia alleged to have been caused by inhaling gasoline vapor from a spraying machine. In that case, as here, the evidence showed that anything that produces a lung irritation might result in pneumonia, but no witness was willing to say that it did cause it. Other cases stating principles of law controlling the result in this case are *Lang v. Gage County Electric Co.*, 133 Neb. 388, 275 N. W. 462, and *Feeney v. City of Omaha*, 140 Neb. 497, 300 N. W. 571.

Upon consideration of the evidence in the record, we are of the opinion that plaintiff did not prove by a preponderance of the evidence that the inhaling of sewer gas was the cause of the pneumonia which afflicted the deceased.

AFFIRMED.

SIMMONS, C. J., not participating.

LAUDA ZIMMER, APPELLEE, V. ELMER GUDMUNDSEN ET AL., APPELLANTS (AND TEN OTHER CASES).

5 N. W. (2d) 707

FILED OCTOBER 9, 1942. Nos. 31374-31384.

1. **Attorney and Client.** An attorney at law standing in a fiduciary relationship with an estate of a deceased person or the heirs of

the estate may not properly represent interests adverse to his relationship with the estate or the heirs.

2. ———. "It is the duty of a lawyer at the time of retainer to disclose to the client all the circumstances of his relations to the parties, and any interest in or connection with the controversy, which might influence the client in the selection of counsel." From Canon 6, American Bar Association Canons of Professional Ethics, as adopted by order of this court.

3. ———. "It is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts. Within the meaning of this canon, a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose." From Canon 6, American Bar Association Canons of Professional Ethics, as adopted by order of this court.

4. ———. "The obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed." From Canon 6, American Bar Association Canons of Professional Ethics, as adopted by order of this court.

5. ———. "An attorney, after receiving the confidence of a client, may not enter the service of others whose interests are adverse to such client and those in privity with him, in the same subject-matter to which the confidence relates, or in matters so closely allied thereto as to be, in effect, a part thereof." *Federal Trust Co. v. Damron*, 124 Neb. 655, 247 N. W. 589.

6. ———. "An attorney owes to his client an undivided allegiance, and after he has been retained by, and received the confidence of, a client, he cannot, without the free and intelligent consent of his client, given after full knowledge of all the facts and circumstances, act both for his client and for one whose interest is adverse to or conflicting with that of his client in the same general matter, however slight such adverse interest may be; nor is it material that the intention and motive of the attorney may have been honest." 5 Am. Jur. 296, sec. 64.

7. ———. The design of the rule is not alone to prevent the dishonest lawyer from fraudulent and subversive conduct, but also to preclude the honest lawyer from putting himself in a position where he may be required to choose between conflicting duties, or to attempt to reconcile conflicting interests, rather than to enforce the rights of the interest which alone should require his concern.

8. **Descent and Distribution.** The administrator in a contest to es-

tablish heirship and distribution of an estate of a decedent is not an adverse party with the duty to defend against one claiming to be the common-law wife of the deceased.

9. ———. One assuming the position of heirs in the defense of one claiming to be the common-law wife of the deceased should be permitted to recover the proper expense of the litigation, especially where the litigation is beneficial to the interests represented.

10. **Wills.** The purchaser of an heir's interest, if the sale is set aside, may be entitled to reimbursement for expenditures made in good faith to protect the heir's interest or title.

11. ———. While the purchase of an heir's interest in an estate may be fraudulent and may be set aside for fraud, for expenditures made in good faith by the purchaser to protect the interest so purchased which are beneficial to the heir reimbursement may be allowed.

12. **Courts.** The county court has exclusive jurisdiction of the probate of wills and the administration of estates. Comp. St. 1929, sec. 27-503.

13. ———. "County courts shall be courts of record, and shall have original jurisdiction in all matters of probate, settlement of estates of deceased persons, and in such proceedings to find and determine heirship." Const. art. V, sec. 16.

14. **Trusts.** If an attorney, by statements and representations to his clients as to the condition and quality of their interest in an estate, procures the sale thereof to a third party for whom he is acting at the same time as attorney, for an inadequate price, a court of equity will set aside the transaction and restore the interest in the estate to the vendors on repayment of the purchase price with the legal rate of interest.

15. ———. In such a case, the relation is confidential, and whether the attorney acts upon information derived from the client or from any other source, he is affected with a trust. This rule is grounded on the question of public policy, and not necessarily on fraud, and prevails although the attorney be innocent of any intention of deceiving, and acts in good faith.

16. **Wills.** In the vacation of such transfers, the vendors are entitled to have the purchasers account for the rents and profits, or the value of the use of the lands with interest thereon at the legal rate.

17. **Principal and Agent.** "A party cannot retain the benefits derived from the fraudulent conduct of his agent, without being chargeable with the instrumentalities employed to effect the purpose." *McKeighan v. Hopkins*, 19 Neb. 33, 26 N. W. 614.

18. **Attorney and Client.** Where an attorney at law assumes a con-

fidential relationship, the party to whom he assumes such relationship has the right to believe and rely upon and be governed by the representations and conduct of such attorney.

APPEAL from the district court for Grant county: J. LEONARD TEWELL, JUDGE. *Affirmed in part and reversed in part.*

Cleary, Suhr & Davis and *King & Haggart,* for appellants.

Evans & Lee, contra.

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

YEAGER, J.

Here are eleven actions in equity which were, by stipulation of the parties, consolidated for trial in the district court. The purpose of each action is to set aside for fraud transfers of interest in the estate of Festus Corrothers, deceased, and for an accounting.

The findings and decrees of the district court sustained the causes of action of the various plaintiffs and separate decrees were entered. It is from these decrees that the defendants have appealed. The appeals have been presented on separate transcripts but on one bill of exceptions, and the cases have been briefed together.

Festus Corrothers, for many years a resident of Grant county, Nebraska, died testate in that county on October 7, 1937. His last will and testament was the following:

"Know all Men by these presents

"That I Festus Corrothers of Whitman Nebraska do make this will and testament First that all my honest debts Shall be paid. Second that one half of all my property Shall go too Lauda Sumers and Effie Hayhurst after Stella Eckels and Lillian Howell have been given ten thousand dollars each one to be payed her ten thousand as early as convenient Third all of the town lots can be sold, the same as the personal property Fourth all of my realstate all of my ranch property out side of town lots is to be held till Such

time comes that the younger great grand child of my Brother Andrew is twenty one years old. Fifth if my personal property should fail to pay my debs then the rent from said ranch can be used to pay said debs. Sixth my heirs can elect some one as often as necessary to handle my estate by giving the other heirs a good bond.

"This the 27 day of Nov 1931

"Festus Corrothers

"Witness Jay R Taylor

"Witness O. J. King."

This will was admitted to probate on November 23, 1937.

As will be observed from a reading of the will there were two named legatees, they being Stella Eckels and Lillian Howell. Also in the light of the character of the estate left there were also two named legatees and devisees. These were Lauda Sumers and Effie Hayhurst. At the time of the death of Corrothers, Lauda Sumers' name was Zimmer, and Effie Hayhurst's name was Smith. In addition to the two named legatees and the two named devisees and legatees there were nine brothers and sisters or their representatives.

Immediately following the death of Corrothers the defendant Elmer Gudmundsen procured the appointment of Martha Corrothers O'Kieffe as special administratrix of the estate, and Gudmundsen became attorney for the estate and continued as such at all times thereafter.

The first action in the order of filing is by Lauda Zimmer, plaintiff and appellee, against Elmer Gudmundsen and Abbie Gudmundsen, husband and wife, George Manning and Emily Manning, husband and wife, and Charles Finegan and Ada Mae Finegan, husband and wife, defendants and appellants, and the action bears No. 31374 in this court. It is not claimed that the defendants Abbie Gudmundsen, Emily Manning or Ada Mae Finegan participated in any of the matters which are the bases for the actions. They were made parties with their husbands since title to real estate is involved.

In her petition this plaintiff alleged substantially that she

was entitled to a one-fourth interest in the estate of Festus Corrothers after the payment of the two specific legacies totaling $20,000, and that the total value of the estate was about $360,000 subject to debts amounting to about $65,000, but that on account of a false and fraudulent conspiracy among the defendants, and false and fraudulent representations by the defendant George Manning and the defendant Elmer Gudmundsen, attorney for the estate of Festus Corrothers and for the plaintiff, but who in truth and in fact was acting for and on behalf of the defendants Manning and Finegan, upon which representations she relied, she, by assignment of interest in writing and quitclaim deed, transferred and conveyed her interest in the estate to George Manning for $7,500.

The false and fraudulent representations upon which she claims that she relied briefly stated are the following:

That there was no appreciable amount of personal property in the estate.

That the ranch consisting of 26,000 acres in Grant and Hooker counties was in a poor and run-down condition.

That it was nearly impossible to find a purchaser for the ranch, and in any event that the maximum value did not exceed $4 an acre.

That the debts in addition to a $60,000 mortgage were in excess of $10,000.

That unless the estate was settled promptly the special bequests, the mortgage and debts would consume the estate.

That the heirs were planning to litigate to the end that this plaintiff would get nothing under the will.

That $5,000 was about all that this plaintiff would get under orderly administration of the estate.

That the only way she and the other parties interested could obtain anything out of the estate would be by arrangement for immediate sale of the ranch properties.

That there was grave danger as to whether or not the will of Festus Corrothers would be admitted to probate, and if it failed of admission then the plaintiff would obtain nothing out of the estate, whereas in truth and in fact there was no contest of the will threatened.

That Stella Eckels and her attorney, Anson H. Bigelow, had a scheme whereby they would get control of the estate and keep it in litigation for a long period of time and thus prevent this plaintiff from obtaining anything of value out of the estate.

The sixth action in the order of filing, it being No. 31379, is by Effie L. Smith (formerly Effie Hayhurst), plaintiff and appellee, and is against the same defendants in the same capacities as in No. 31374, and the substantial allegations of the petition are the same except that all alleged false representations were made by Gudmundsen, and that she first transferred her interest in the estate for $5,000 and later she received an additional $2,500, together with $1,000, for settlement of a claim based on a power of attorney given to Stella Eckels and the employment of Anson H. Bigelow as her attorney, the details of which need not be set out here.

The second action in order of filing, it being No. 31375, is by Sarah Virginia Corrothers, guardian of the person and estate of Alexander Corrothers, plaintiff and appellee, against the defendants named in the first action and in the same capacities. Alexander Corrothers is an incompetent brother of Festus Corrothers.

The petition sets forth that the said Alexander Corrothers was entitled to a one-eighteenth interest in the estate of Festus Corrothers after payment of the two legacies named in the will.

The petition in this case sets forth the same conspiracy to defraud as is set forth in case No. 31374, and sets forth further that at a meeting held at Grafton, West Virginia, with the heirs of Festus Corrothers, and others, Gudmundsen made substantially the same false and fraudulent representations as to the amount, quality, character and condition of the estate as are alleged in the petition in No. 31374.

In addition it is alleged that Gudmundsen represented that Effie L. Smith and Lauda Zimmer could, and that they intended to, prove and establish that they were illegitimate children of Festus Corrothers, in which event Alexander Corrothers would be excluded from taking anything from

the estate, although Gudmundsen knew that Effie L. Smith and Lauda Zimmer had no such intention; and further that in no event would the interest of Alexander Corrothers in the estate exceed $1,000; and that this amount could not be obtained unless assistance were given to the end that immediate settlement of the estate could be made.

Plaintiff further says that she relied upon the representations of Gudmundsen, and that she and Altha Lee Rogers, daughter of Alexander Corrothers, by contract conveyed, or attempted to convey, to George Manning the interest of Alexander Corrothers in the estate of Festus Corrothers, deceased, for which they received $2,000.

The third action in order of filing, it being No. 31376, is by Ida Galliher, plaintiff and appellee, against the defendants named in the first action and in the same capacities. This plaintiff is a sister of Festus Corrothers.

The petition sets forth that the plaintiff was entitled to a one-eighteenth interest in the estate of Festus Corrothers, deceased.

The allegations of fraud are the same in all substantial particulars as those contained in case No. 31375.

The plaintiff says that, by reason of the false and fraudulent representations upon which she relied, she, by assignment of interest and quitclaim deed, transferred her interest in the estate of Festus Corrothers, deceased, to George Manning for the sum of $2,000.

The fourth action in order of filing, it being No. 31377, is by Anna McBee, plaintiff and appellee, against the defendants named in the first action and in the same capacities. This plaintiff is a sister of Festus Corrothers.

What has been said as to the petition in No. 31376 is equally applicable here and it need not be repeated.

This plaintiff says that, by reason of the false and fraudulent representations upon which she relied, she, by assignment of interest and quitclaim deed, transferred her interest in the estate of Festus Corrothers, deceased, to George Manning for the sum of $2,000.

The fifth action in order of filing, it being No. 31378, is

by Mary Poe, plaintiff and appellee, against the defendants named in the first action and in the same capacities. This plaintiff is a sister of Festus Corrothers.

What has been said as to the petition in No. 31376 is equally applicable here and need not be repeated.

This plaintiff says that, by reason of the false and fraudulent representations upon which she relied, she transferred her interest in the estate of Festus Corrothers, deceased, by assignment of interest and quitclaim deed to George Manning for $2,000.

The ninth action in order of filing, it being No. 31382, is by Stephen Corrothers, plaintiff and appellee, against the defendants named in the first action and in the same capacities. This plaintiff is a brother of Festus Corrothers.

What has been said as to the petition in No. 31376 is equally applicable here and need not be repeated.

This plaintiff says that, by reason of the false and fraudulent representations upon which he relied, he transferred his interest in the estate of Festus Corrothers, deceased, by assignment and quitclaim deed to George Manning for $2,000.

The tenth action in order of filing, it being No. 31383, is by Andrew Corrothers, Jr., administrator of the estate of Andrew Corrothers, Sr., and others, the others being widow and heirs of Andrew Corrothers, Sr., plaintiffs and appellees, against the defendants named in the first action and in the same capacities. Andrew Corrothers was a brother of Festus Corrothers and died subsequent to the death of Festus Corrothers.

Substantially the same allegations are contained in this petition with reference to false and fraudulent representations as are contained in No. 31375.

These plaintiffs say that, by reason of the false and fraudulent representations which were relied upon, Andrew Corrothers, Sr., conveyed his interest by assignment and quitclaim deed to George Manning for $2,000.

The eleventh action in order of filing, it being No. 31384, is by Martha Corrothers O'Kieffe, plaintiff and appellee,

against the defendants named in the first action and in the same capacities. This plaintiff is a sister of Festus Corrothers, deceased.

Substantially the same allegations as to fraud and misrepresentation are contained in the petition as in No. 31375.

This plaintiff says that, by reason of the false and fraudulent representations upon which she relied, she transferred her interest in the estate of Festus Corrothers by assignment of interest and quitclaim deed for $3,000.

The seventh action in order of filing, it being No. 31380, is by Lulu M. Holland, and against the defendants named in the first action and in the same capacities. The eighth action is No. 31381, and is by Mabel McCullough.

Lulu M. Holland and Mabel McCullough are daughters of Sam Corrothers. Sam Corrothers was a brother of Festus Corrothers and he predeceased Festus.

These plaintiffs claim in their petition that each of them is entitled to a one-thirty-sixth interest in the estate of Festus Corrothers, deceased, after payment of the two legacies totaling $20,000.

They further set out that in substance the same false and fraudulent representations were made to these plaintiffs as were made to the brothers and sisters. The representations, however, were in large measure made in letters to them and to attorneys.

They say that, by reason of the false and fraudulent representations, they were induced to and did transfer their interest in the estate for $3,000.

To each of the actions the defendants filed answers. In the answers they denied any fraud or misrepresentation, and alleged that the various plaintiffs were fully informed as to the true condition and value of the estate of Festus Corrothers, and alleged that the defendant Manning was an innocent purchaser in each instance for value.

They further alleged that relying on the good faith of the plaintiffs Manning expended the sum of more than $73,000 in payment of costs, debts and expenses of administration in excess of rentals and bills receivable collected; and that

the defendants Manning and Finegan expended for repairs, betterments, fencing, wells, windmills, tanks, houses, barns and other improvements on the ranch moneys which increased the value of the real estate in the amount of $18,000.

They deny that Gudmundsen ever represented Manning until after the sale of the interests of the respective plaintiffs.

They deny that Finegan participated in any of the matters mentioned until May, 1939, when he purchased a one-half interest in the properties in question from the defendant Manning. They also in their answers plead laches.

Replies were filed and trial was had to the court on the issues joined.

It may well be stated here that no effort has been made to set forth the full details of the pleadings, but only by abstraction the elements which we deem necessary to a determination of the cases. The pleadings in each case take up more than 25 pages of each transcript.

The trial court found that all of the plaintiffs had sustained the material allegations of their respective petitions and decreed accordingly. All of the transfers of interest in the estate of Festus Corrothers, deceased, were ordered vacated and set aside and the interest of each of the plaintiffs was restored. An accounting was also made and decrees entered thereon.

Certain pertinent and undisputed facts are the following:

Festus Corrothers died testate in Grant county, Nebraska, on October 7, 1937.

He left a will which has been hereinbefore quoted.

He had, at the time of his death, title to a ranch consisting of 26,848.11 acres.

He had a lease on 2,480 acres of school-land.

In his will a legacy of $10,000 each was provided for Stella Eckels and Lillian Howell.

On the basis of the interpretation placed upon the will by the defendant Elmer Gudmundsen, the brothers and sisters of Festus Corrothers, or their representatives, were the heirs at law of Festus Corrothers, and were entitled to take

proportionately one-half of the estate after payment of the named legacies and the debts and costs of administration, unless Stella Eckels established herself as the common-law wife of Festus Corrothers, or Lauda Zimmer or Effie L. Smith, or both of them, established themselves as the illegitimate children of Festus Corrothers agreeable to the laws of Nebraska.

On the basis of the interpretation of the will by the same defendant, Lauda Zimmer and Effie L. Smith were entitled to take in equal portions one-half of the estate after payment of the named legacies and the debts and costs of administration, unless Stella Eckels established herself as the common-law wife of Festus Corrothers.

The respective interests of the eleven plaintiffs were purchased by the defendant George Manning at the prices set forth in the petitions.

From the beginning the defendant Elmer Gudmundsen was attorney for the estate of Festus Corrothers, deceased, and so continued until the estate was presumably closed.

At least from the dates of the assignments of interest by the various plaintiffs Elmer Gudmundsen became and thereafter at all times continued to be attorney for the various assigning plaintiffs.

In view of the thousands of pages of the record and the hundreds of exhibits, it is not possible to review the evidence exhaustively in this opinion. It will be possible only to set forth the conclusion we have arrived at from an examination of the record.

First and foremost, each and all of the plaintiffs contend on the question of fraud and misrepresentation that Elmer Gudmundsen was the representative of the defendants Manning and Finegan.

We may state here that the evidence is insufficient to show that Finegan culpably participated in any of the matters which are the bases of these actions prior to his purchase of an interest in the estate in May, 1939.

The evidence does, however, preponderantly, if not conclusively, show that in all of the matters relating to the pur-

chases, and assignments of interest of the various plaintiffs, Gudmundsen was the agent and representative of Manning. Some of the facts pointing to this conclusion are the following: Almost immediately after the appointment of the special administratrix, Gudmundsen started to travel and to contact the parties interested in the distribution of the estate. As he contacted them he began negotiations for the sale of their respective interests. He saw Lauda Zimmer in Pittsburgh, Pennsylvania. He saw some of the parties in and about Grafton, West Virginia. He saw Effie L. Smith in Chehalis, Washington. He went a second time to see Lauda Zimmer and on this occasion was accompanied by Manning. He went a second time to see Effie L. Smith. On most of his trips and during most of his negotiations he was in constant communication with Manning. Manning paid all of his expenses. Manning furnished all of the money for the purchase of the various interests and took title thereto in his name. Gudmundsen urged the advisability of sale of interests of the interested parties, but never sought to put the properties of the estate on the market or to offer them for sale except to Manning. In fact, there is some slight evidence to the effect that he desired to exclude all prospective purchasers except Manning. Instead of attempting to get for the owners as much as possible for their interests, he induced them to sell and convey, and to Manning, for the lowest price possible. For his service in these connections he was compensated by Manning. In truth, as to some of the transactions Manning specifically admits that Gudmundsen was his representative. All instruments of transfer were prepared by Gudmundsen, and at least some of them were prepared before Gudmundsen called upon the interest-holder with the name of Manning appearing therein as grantee or assignee. As to some of the transactions the facts testified to by Gudmundsen amount to an admission that he was representing Manning.

It becomes clear then that Gudmundsen, in the transactions with regard to the sale and disposition of the interests of the eleven plaintiffs herein, while standing in a fiduciary

relationship with them and the estate, was representing interests plainly and notoriously adverse to his relationship and without full disclosure and consent.

Such a situation, even though in point of fact no harm comes from it, is severely to be condemned and with good reason. In fact, it is condemned by the decisions of the courts and the recognized canons of ethics. This is not an obscure condemnation, but is one known and recognized by every lawyer who has come into the profession with a proper background of education and training. The rule is adhered to by all lawyers who have the proper perspective of their high calling and the proper attitude toward their professional honor and integrity.

The Canons of Professional Ethics of the American Bar Association by official adoption have become the canons of ethics for the bar of this state. *In re Integration of Nebraska State Bar Ass'n,* 133 Neb. 283, 275 N. W. 265. Canon 6 is as follows:

"It is the duty of a lawyer at the time of retainer to disclose to the client all the circumstances of his relations to the parties, and any interest in or connection with the controversy, which might influence the client in the selection of counsel.

"It is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts. Within the meaning of this canon, a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose.

"The obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed."

This court said in the recent case of *Federal Trust Co. v. Damron,* 124 Neb. 655, 247 N. W. 589:

"An attorney, after receiving the confidence of a client,

may not enter the service of others whose interests are adverse to such client and those in privity with him, in the same subject-matter to which the confidence relates, or in matters so closely allied thereto as to be, in effect, a part thereof."

In 5 Am. Jur. 296, sec. 64, it is stated:

"An attorney owes to his client an undivided allegiance, and after he has been retained by, and received the confidence of, a client, he cannot, without the free and intelligent consent of his client, given after full knowledge of all the facts and circumstances, act both for his client and for one whose interest is adverse to or conflicting with that of his client in the same general matter, however slight such adverse interest may be; nor is it material that the intention and motive of the attorney may have been honest."

The rule has at least a twofold purpose. Its design is not alone to prevent the dishonest lawyer from fraudulent and subversive conduct, but also to preclude the honest lawyer from putting himself in a position where he may be required to choose between conflicting duties, or to attempt to reconcile conflicting interests, rather than to enforce the rights of the interest which alone should require his concern. *Strong v. International Bldg. Loan & Investment Union*, 183 Ill. 97, 55 N. E. 675.

Lauda Zimmer lived in Pittsburgh, Pennsylvania; Effie L. Smith at Chehalis, Washington; Lulu M. Holland at Edmonton, Canada; Mabel McCullough at Calgary, Canada; Martha O'Kieffe at Whitman, Nebraska; Stephen Corrothers at Cumberland, Maryland; and the remaining plaintiffs in the vicinity of Grafton, West Virginia. The plaintiffs were all contacted by Gudmundsen directly or indirectly in their home vicinities, and obviously not all at the same time. He came into contact directly, at different times, with Effie L. Smith, Lauda Zimmer, Martha O'Kieffe, Lulu M. Holland and Mabel McCullough. He also came into direct contact with some of the others.

As to all of them it is claimed that he misrepresented the character, quality, quantity and value of the estate.

As to those with whom he came into direct contact, from an examination of the evidence we are convinced he did falsely and fraudulently misrepresent the character, quality, quantity and value of the estate.

The preponderance of the evidence shows that Gudmundsen represented that the personal property of the estate was inconsequential and of little value. This representation was definitely untrue. There was cash in three banks totaling $3,519; there were debts due the estate in the amount of $4,564.05; there was a mortgage due the estate in the amount of $5,000; there was a claim against the Chicago, B. & Q. R. Co. on which ultimately a recovery was had in the amount of $1,000; there were probably 1,500 tons of hay of the value of over $6,000, together with other items of value which included some live stock.

Gudmundsen has testified that when he communicated with the plaintiffs he knew little or nothing concerning the personal property. Fairness may require that he be given the benefit of the doubt in this connection, but none of the transactions were closed at once. He certainly failed to disclose any of this information to the plaintiffs when he came into possession of it, which without doubt was before the transactions were closed. He withheld the information and by his connivance with Manning all of this property passed into the hands of Manning along with the real estate.

As to the real estate we find that there was no material misrepresentation as to quantity. However, it appears from the evidence that there was a glaring misrepresentation as to value. The district court found that the ranch was worth much in excess of the maximum value Gudmundsen represented. The evidence sustains the finding of the district court in this regard.

The evidence sustains the claim that Gudmundsen represented that foreclosure of the $60,000 mortgage on the ranch was threatened. That this representation was false is nowhere denied. No instalment on the mortgage was delinquent or even due.

Also the evidence sustains the charge that Gudmundsen

represented to the heirs that Lauda Zimmer and Effie L. Smith were proposing to take steps to establish themselves as recognized illegitimate children of Festus Corrothers in order that they might take as heirs to the exclusion of the brothers and sisters. These representations were false by the admission of Gudmundsen himself. They, and each of them, made it clear to Gudmundsen that they had no desire to have their illegitimacy made public, but only desired that which was to come to them by the terms of the will.

The representations made to Lauda Zimmer and Effie L. Smith, which we find to be supported by the weight of evidence, that the heirs were threatening to contest the will find no support in the evidence.

Whether the other charges of fraud and false representation have been sustained is of no great consequence. Without specific reference to them it will be stated that some of them do and some do not find sufficient support in the evidence. If those mentioned have been sustained, and we hold that they have, and the plaintiffs have thereby been defrauded, then the transfers should be set aside and the plaintiffs restored to their former relation to the estate of Festus Corrothers, deceased.

Returning now to those of the plaintiffs not contacted by Gudmundsen, it is pertinent to inquire as to whether or not the evidence is sufficient to support the charges of fraud and misrepresentation as to them.

Gudmundsen had a meeting at Musgrove's store at Grafton, West Virginia, with the heirs and representatives of heirs whose presence could be obtained, and there to the assembled group he explained his scheme. The scheme was carried back, as doubtless Gudmundsen purposed, to those who were not present and they like the rest, relying on the same representations, transferred their interests to Manning.

In addition to this and in final consummation of the scheme, Gudmundsen and Manning sent others with their message of deceit to those aged and aging and unsuspecting West Virginians.

The record indicates clearly that those who did not see Gudmundsen relied on his representations as did those seen by him.

Were these plaintiffs damaged by reason of the representations upon which they relied in making their respective transfers to Manning? Without doubt they were.

The evidence sustains the finding of the district court that the real estate was of the value of about $210,000, and that the personal property was of the value of about $24,000. There was a mortgage of $60,000. Thus it will be seen that the net value of the estate was at the time of the death of Festus Corrothers about $174,000. Out of this must come costs of administration, and the debts of the estate which were not large.

All of this George Manning obtained by payment of $37,000 plus payment of the two legacies, the debts of the estate, the expenses of administration and a fee of $10,000 to Gudmundsen, which items according to the contention of the defendants total $42,580.87. Thus it will be seen that Manning obtained an estate of the net value of approximately $174,000 for approximately $79,580.87. This does not take into account the value of the use of the estate for the period between the death of Festus Corrothers and the final consummation of the deals with the eleven plaintiffs. In fairness also it does not take into consideration payments of either principal or interest on the ranch mortgage, and the necessary cost of upkeep of the ranch and the estate properties.

As has been already indicated, the evidence is not sufficient upon which to predicate a finding that the defendant Finegan participated in the scheme of Gudmundsen and Manning to obtain control of and title to the Festus Corrothers estate, but there can be no question that he was familiar with the properties and their values and knew the financial condition of the estate. He had been a rancher and banker in that community for a long period of years. He knew what Manning had paid for the various interests. In May of 1939 he paid Manning half of the costs of the

purchase including costs and expenses to Manning for a one-half interest in the interests acquired. He also paid half of the $10,000 fee to Gudmundsen for his machinations in the acquisition of the interest and the estate for Manning. In the light of his position and knowledge he could not help knowing that these plaintiffs had been grievously and unconscionably cheated at the hands of Gudmundsen and Manning, and so knowing he projected himself into the picture and partook of the loot on even terms with Manning. Under these circumstances he is chargeable with and must be required to accept the consequences. His liability with regard to the interests acquired from the plaintiffs and the fraud practiced upon them is the same as that of Manning.

The district court found that the plaintiffs had sustained the charges of fraud and misrepresentation in the petitions. We are of opinion that these findings were supported by the weight of evidence and should be sustained. In addition the court made an accounting between each of the plaintiffs on the one hand and the defendants on the other. In the accounting it is found that the defendants are chargeable to the estate with the amount of $69,965.27 against which they are entitled to a credit of $47,079.81, leaving a balance due from them in the amount of $22,885.46.

The defendants object to this accounting for several reasons. They object to the valuation of the ranch equipment, the 1938 hay crop and the rental valuation for the period that the ranch has been in their charge. Without going into details or referring to specific testimony we conclude that the finding of the district court with regard to these three items is sustained by the evidence.

The defendants urge that they are entitled to an allowance for expense of defense of a suit by Stella Eckels who attempted to establish herself as the common-law wife of Festus Corrothers. This action was defended by Manning.

No obligation rested upon the administrators to defend this action.

Since this action was in the interest of the heirs and dis-

tributees, and it was defended successfully, no good and sufficient reason appears why the proper expense of this litigation should not be charged to the interests of the heirs and distributees. The items claimed total $3,172.74. All of the items composing this account appear to be reasonably proper except items totaling $730.78. These items include three of expense for the taking of the deposition of Stella Eckels, a ticket for H. E. Wolf to Omaha, hotel expense at Omaha for Manning, payment to George Howell and $400 as an attorney's fee to Claude A. Davis. Harry Gantz was the attorney who conducted the litigation, and for his services he received $2,057.13. As to this matter the defendants are entitled to an additional credit in the amount of $2,441.96.

The administrator in a contest to establish heirship and distribution of an estate of a decedent not being an adverse party and having no duty to defend against one claiming to be the common-law wife of the deceased, one assuming the position of heirs ought to be permitted to recover the proper expense of the litigation, and especially if the litigation is beneficial to those interests represented. See *Sorensen v. Sorensen,* 68 Neb. 483, 94 N. W. 540. Opinions on rehearing in this case appear in 68 Neb. 490, 98 N. W. 837; 68 Neb. 500, 100 N. W. 930; 68 Neb. 509, 103 N. W. 455.

Further, the general rule is that the purchaser of an heir's interest, if the sale is set aside, may be entitled to reimbursement for expenditures made in good faith to protect the heir's interest or title. *Durham v. Stubbings,* 223 Mich. 261, 193 N. W. 809; 12 C. J. S. 1098, sec. 83.

We hold that the sales here were fraudulent, but on the other hand that the expenditures of Manning, to the extent indicated, were made in good faith for the protection of the interests of these plaintiffs.

After trial in the district court and pending appeal in the supreme court, Manning settled this litigation with Stella Eckels at considerable cost. Defendants claim that they are entitled to a credit for this amount. This was done voluntarily and on his own initiative. No reason exists to charge this expense against the interests of the heirs and distrib-

utees. This is especially true in the light of the fact that Stella Eckels was unsuccessful in both the county and the district courts.

After rendering the accounting the district court allocated and apportioned to the various plaintiffs the net amount that was due the estate in accordance with the prayers of the respective petitions, and then set these amounts off against the amounts required to be tendered as a condition of rescission and vacation of the transfers on account of fraud, and rendered judgment accordingly. This was done in addition to setting aside the transfers and the restoration of the plaintiffs to their former positions with regard to the estate.

If we assume that the petitions correctly state the status of the plaintiffs with regard to the Festus Corrothers estate and conclude that this is an issue determinable in these actions, then we should, on the evidence, sustain the trial court. The evidence supports the computation made. However, we can neither so assume nor so conclude.

The right of the plaintiffs Zimmer and Smith to take is dependent upon the will, and the right of the others is dependent upon the will and heirship. Before the latter may take under the will their right to have taken as heirs in case of intestacy must be established. This right has not been established in these cases and moreover it could not have been established. It is not a triable issue here. Had there been a decree of heirship in the county court and such decree pleaded here, and if the decrees and judgments had been rendered conformable to a decree of heirship, then the full determinations made here would be properly sustainable. There, however, has never been a decree of heirship. The matter of heirship was not submitted to the county court for ascertainment and determination.

The county court has exclusive jurisdiction of the probate of wills and the administration of estates. Comp. St. 1929, sec. 27-503. See *Boales v. Ferguson,* 55 Neb. 565, 76 N. W. 18; *Smith v. Estate of Bayer,* 95 Neb. 488, 145 N. W. 1030; *State v. O'Connor,* 102 Neb. 187, 166 N. W. 556; *Pinn v. Pinn,* 108 Neb. 822, 189 N. W. 371.

"County courts shall be courts of record, and shall have original jurisdiction in all matters of probate, settlement of estates of deceased persons, and in such proceedings to find and determine heirship." Const. art. V, sec. 16.

We are of opinion that the will, fairly interpreted in the light of its context and the law, bequeathed to Stella Eckels and Lillian Howell $10,000 each, and then after the payment of debts and expenses the residue was left one-fourth to Lauda Zimmer, one-fourth to Effie L. Smith, and the remaining one-half to the heirs of Festus Corrothers.

Lauda Zimmer and Effie L. Smith and their interests having been named and designated in the will, on the accounting the values of their rights were ascertainable except to the extent that they may be reduced by further expenses of the estate not yet determinable, but the rights of the individual heirs are not determinable in these actions in the light of the fact that there has been no finding and decree of heirship. Until there is a legal and binding determination of heirship arrived at in the manner provided by statute, a judgment or decree which amounts to a final distribution to heirs is improper and cannot be sustained.

Likewise a distribution of a portion of a residuary estate, the amount of the residue being dependent upon the expense of estate which has not been fully determined, cannot be sustained until ascertainment of the estate expense.

It follows that the district court was in error in, in effect, making distribution of the estate by its decree in absence of evidence of a decree of heirship, and in the absence of a showing of full and final costs and expenses of administration.

Such activities as were engaged in here by Gudmundsen have been condemned by this court.

In the first paragraph of the syllabus in *Levara v. McNeny*, 73 Neb. 414, 102 N. W. 1042, it is stated: "Where an attorney, by statements and representations made to his clients as to the condition and value of their land, the subject of the litigation, procures the sale thereof to be made to a third party for whom he is at the same time acting in that

capacity, for an inadequate price, * * * a court of equity will set aside the transaction and the conveyances, and restore the estate to the vendors on the repayment of the purchase price, with interest * * * ." In the opinion it is stated: "In such a case the relation is confidential, and whether the attorney acts upon information derived from the client or from any other source, he is affected with a trust. This rule is grounded on the question of public policy, not of fraud, and prevails although the attorney be innocent of any intention of deceiving, and acts in good faith." So it is then that, even if the evidence here were not sufficient to show fraud, public policy would require that these transfers be set aside under the evidence showing that the transfers were disadvantageous to the plaintiffs.

In the vacation of such transfers the plaintiffs are entitled to have the defendants account for the rents and profits, or the value of the use of the lands together with interest thereon at the legal rate. *Levara v. McNeny, supra.*

The benefits of these transactions flowed in the first instance to George Manning, and then in part to Charles Finegan. They are chargeable with the fraudulent conduct of Gudmundsen. They have since retained the benefits.

"A party cannot retain the benefits derived from the fraudulent conduct of his agent, without being chargeable with the instrumentalities employed to effect the purpose." *McKeighan v. Hopkins,* 19 Neb. 33, 26 N. W. 614.

"If one avail oneself of the fruits of an act one thereby charges himself with the burden of all the instrumentalities employed by the agent to effect his purpose." *Osborn Co. v. Jordan,* 52 Neb. 465, 72 N. W. 479.

"Where principal and agent jointly participate in, and share the fruits of, actionable fraud, they are jointly liable for resulting damages." *Dresher v. Becker,* 88 Neb. 619, 130 N. W. 275. See, also, *Western Union Life Ins. Co. v. Mayhew,* 135 Neb. 6, 280 N. W. 250.

It is urged by the appellants that in these transactions Gudmundsen, from some point on, was dealing at arms length with the plaintiffs. This contention has no support

whatever in the record. We are unable to determine even when it was that the defendants contend that Gudmundsen's confidential relation ceased and his right to deal at arms length began. He was attorney for the estate and the administrators from beginning to end, and by power of attorney he represented the other parties up to and including the closing of the probate proceeding in Grant county, Nebraska. He stood at all times in a confidential relation with the plaintiffs.

This court said in *Wustrack v. Hall,* 95 Neb. 384, 145 N. W. 835, in dealing with this character of confidential relationship: "Plaintiff had the right to believe and rely upon the representations and to be governed by the conduct of the person whom she believed to be occupying a confidential relation to her."

Here the plaintiffs not only believed that Gudmundsen occupied a confidential relationship with them, but that was the fact.

These plaintiffs not only did but had to rely upon his representations, and those of Manning and others sent by them, in all things relating to the character, quality, quantity and value of the estate. They had no other source of information. It is true that some of them called in local attorneys for advice, but not upon the basic principles of these actions for fraud and misrepresentation. The attorneys even, upon the representations as to the estate, were required to rely upon the integrity of the defendants. This contention of the defendants is devoid of merit.

Having considered these cases *de novo,* we conclude that all of the findings and the accounting of the district court are correct and should be sustained except the following:

The findings of heirship, while probably correct, cannot be sustained. For a determination of this question resort must be had to the county court, and, of course, the decreed distribution based upon these findings must fall with the findings.

The defendants are entitled to an additional credit of $2,441.96, for the defense against the effort of Stella Eckels to

establish that she was the common-law wife of Festus Corrothers.

Except to this extent, and to the further extent that the decrees fix the interest in the estate and establish and declare the title to real estate to repose in these plaintiffs, the decrees of the district court are affirmed, the effect of which is that each of the plaintiffs will be required to complete his or her tender, with interest, as indicated by the several decrees for the full amount indicated, without any kind or character of set-off; that the right to participate in the avails of the estate and the money required to be paid by the defendants as hereinbefore indicated shall depend upon finding and decree of heirship and the further expenses of the estate; the several quitclaim deeds, assignments of interest or other instruments of transfer are vacated, set aside and held for naught; and the plaintiffs are restored to their former status with regard to the estate of Festus Corrothers, deceased, but that portion of the decree declaring title to respective interests is vacated and set aside, since the matter of title is dependent upon establishment of heirship in accordance with law.

The decrees are affirmed in part and reversed in part.

AFFIRMED IN PART AND REVERSED IN PART.

CALVIN RAINS V. STATE OF NEBRASKA.

5 N. W. (2d) 887

FILED OCTOBER 16, 1942. No. 31395.

1. **Criminal Law.** The habitual criminal law of this state does not purport to create a new and separate criminal offense, but provides merely that the repetition of criminal conduct aggravates the guilt and justifies greater punishment.
2. **Indictment and Information.** When a person is charged in an information with a crime which is made a felony by statute, and it is properly alleged further that said person has been twice previously convicted of crime, sentenced and committed to prison for terms of not less than one year, the requirements of the habitual criminal statute, section 29-2217, Comp. St. Supp. 1939, have been met.

3. **Criminal Law.** When an offense is not designated by the statute which creates it, either as a felony or misdemeanor, but its punishment is prescribed, then the grade or character of the offense is determined by section 29-102, Comp. St. 1929, and the maximum punishment which the statute authorizes.
4. **Indictment and Information.** The crimes necessary to be charged and proved to bring a person within the habitual criminal law must not only be felonies, but they must be felonies in which the defendant was sentenced and committed to prison for one year or more.
5. **Constitutional Law.** The habitual criminal law, section 29-2217, Comp. St. Supp. 1939, *held* not violative of sections 1, 3 and 11, art. I of the Constitution of Nebraska, and amendments V, VI, and XIV of the Constitution of the United States.
6. **Criminal Law.** A judgment or sentence of a court of record in a criminal case is supported by the usual presumption of validity and regularity, and, consequently, the failure to specify the offense for which defendant was convicted will not make a certified copy of the judgment inadmissible in a prosecution where the habitual criminal law is operative.
7. ———. In the absence of evidence to the contrary, it will be presumed that the provisions of section 29-2401, Comp. St. 1929, with reference to the commitment of convicted persons who have been sentenced, have been properly performed by the officers charged with so doing.
8. Evidence examined and *held* sufficient to sustain the verdict of the jury.

ERROR to the district court for Gage county: CLOYDE B. ELLIS, JUDGE. *Affirmed.*

Hubka & Hubka, for plaintiff in error.

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

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

CARTER, J.

Plaintiff in error, hereafter referred to as the defendant, was convicted of breaking and entering a barn, the property of one Tony Shalla, with intent to steal personal property belonging to the said Shalla. The jury also found that de-

fendant had previously been convicted of more than two crimes against the state, in each of which he had been sentenced and committed to the penitentiary for periods exceeding one year, thus bringing the crime within the provisions of the habitual criminal statute. Defendant was sentenced to serve ten years in the penitentiary for this offense. Defendant was also convicted of larceny of personal property of the value of $17.40 belonging to Shalla, and sentenced to pay a fine of $5 and costs for so doing. From these convictions and sentences defendant appeals.

Defendant complains of the trial court's action in permitting the amendment of the information by adding other convictions required to be established under the habitual criminal law without a preliminary hearing being held thereon. It is not questioned that a preliminary hearing was held in which it was determined that the crime of burglary had been committed and that probable cause existed that defendant committed the crime. This meets all requirements of law and the action of the trial court was in no way prejudicial to the rights of defendant.

It is next urged that the information is fatally defective in that it does not allege a "conviction of a felony," the term used in the habitual criminal statute. This statute, section 29-2217, Comp. St. Supp. 1939, defines an habitual criminal as follows: "Whoever has been twice convicted of crime, sentenced and committed to prison, in this or any other state, * * * for terms of not less than one year each, shall upon conviction of a felony committed in this state after the taking effect of this Act, be deemed to be an habitual criminal * * * ." The use of the words "conviction of a felony" is not required in the information. If the information charges a crime which is a felony under our statutes, the requirements of the habitual criminal law have been met. It is then urged that the crime charged does not constitute a felony because the punishment is not necessarily a sentence to the penitentiary for one year or more. The statutory punishment for burglary is imprisonment in the penitentiary not more than ten years nor less than one year,

or by a fine not exceeding $500, or imprisonment in the jail of the county not exceeding six months. Comp. St. 1929, sec. 28-538. Defendant contends that, as the sentence might be less than one year in the penitentiary, a felony has not been charged. This theory is untenable. This court in *Bright v. State,* 125 Neb. 817, 252 N. W. 386, said: "It is apparent that, under the charge in the information, the defendant could be, and in fact he was, sentenced to imprisonment in the penitentiary. He was, therefore, charged with, and convicted of, a 'felony.' " The applicable rule is that when an offense is not designated by the statute which creates it, either as a felony or misdemeanor, but its punishment is prescribed, then the grade or character of the offense is determined by the maximum punishment which the statute authorizes. Under the provisions of section 29-102, Comp. St. 1929, if the maximum penalty is one year or more in the penitentiary, the crime is a felony. Consequently, a felony was charged in the information and defendant's contention to the contrary is without merit.

It is next urged that the habitual criminal law and the criminal procedure thereunder provide a harsh, unfair, partial and unjust trial in violation of sections 1, 3 and 11, art. I, Constitution of Nebraska, and amendments V, VI and XIV, Constitution of the United States. The contention is, among others, that the charging and proving of previous convictions is prejudicial to the defendant. This question has been determined adversely to defendant's contention many times. In *Kuwitzky v. O'Grady,* 135 Neb. 466, 282 N. W. 396, this court said: "An habitual criminal statute is sound in principle and sustained by reason. The legislature may well enact such a law to permit law enforcement officers to take into consideration the persistence of an offender in his criminal course. That the defendant has been guilty of a second felony does not make him guilty of an offense for which he may be separately sentenced, but, upon proof that the habitual criminal statute applies to his case, he may have his punishment for the last felony of which he has been convicted increased as provided by law."

And in *Taylor v. State*, 114 Neb. 257, 207 N. W. 207, this court said: "It is argued by the defendant that it was greatly to his prejudice to have the matter of his previous conviction set out in the information. While it probably was not necessary to set out the fact of the former conviction in a separate count, we think it was proper to call the court's attention to the facts in the information. If the state desired to have the defendant punished under the habitual criminal statute, it was necessary to show that the defendant was the identical person named in the previous convictions."

The constitutionality of the habitual criminal law has likewise been previously determined by this court. In *Davis v. O'Grady*, 137 Neb. 708, 291 N. W. 82, this court said:

"The legislature may enact an habitual criminal law punishing habitual offenders.

"The habitual criminal law does not set out a distinct crime, but provides that the repetition of criminal conduct aggravates the guilt and justifies heavier penalties. * * *

"In the discussion of this question, Mr. Justice Hughes of the supreme court of the United States, in *Graham v. State of West Virginia*, 224 U. S. 616, 32 S. Ct. 583, 56 L. Ed. 917, employed the following language, viz.:

" 'The propriety of inflicting severer punishment upon old offenders has long been recognized in this country and in England. They are not punished the second time for the earlier offense, but the repetition of criminal conduct aggravates their guilt and justifies heavier penalties when they are again convicted. Statutes providing for such increased punishment were enacted in Virginia and New York as early as 1796, and in Massachusetts in 1804; and there have been numerous acts of similar import in many states. This legislation has uniformly been sustained in the state courts. *Ross's Case*, 2 Pick. (Mass.) 165, 170; *Plumbly v. Commonwealth*, 2 Met. (Mass.) 413, 415.' "

It is just as clear that the habitual criminal law does not contravene other sections of the Constitution cited by this defendant. Neither does it infringe upon any section of the

Constitution of the United States to which our attention has been directed.

Defendant complains of the rulings of the trial court in admitting exhibits 5 and 6 in evidence. Exhibit 5 is a certified copy of the conviction and sentence of Cal Rains for the crime of chicken stealing in Johnson county. Exhibit 6 is a certified copy of the minutes of the district court for Richardson county, showing the conviction and sentence of Cornelius Rains for the crime of chicken stealing. Objection was made to these exhibits on the grounds that the information failed to charge a crime, that the information fails to allege that defendant had been convicted of breaking and entering, that the allegations of prior convictions were irrelevant, that exhibit 6 is incompetent, irrelevant and immaterial and that it fails to show defendant was convicted of a felony. When defendant's counsel was called upon to amplify his objections to these exhibits, no complaint was made that exhibit 6 was a certified copy of the court's minutes rather than the court's journal. It must be assumed that, if timely objection had been made, a certified copy of the journal would have been produced. At any rate, by failing to make the objection specific when called upon by the court to do so, defendant will be deemed to have waived an objection to the use of the court's minutes rather than the entry on the court's journal.

Objection is made to the fact that the body of each of these exhibits does not state the crime with which defendant was charged. The objection is without merit. The judgment and sentence of a court of record in a criminal case is supported by the usual presumptions of validity and regularity when thus attacked. The foregoing rule was announced in *Davis v. O'Grady*, 137 Neb. 708, 291 N. W. 82, and we find no deviation from it in the later cases. We think therefore that exhibits 5 and 6, under the circumstances shown by the record, were properly admitted.

Defendant urges that proof of commitment, as required by the habitual criminal law, was lacking. We think not. Another statute, section 29-2401, Comp. St. 1929, provides

that within 30 days after sentence, unless execution thereof be suspended, the convicted person shall be delivered to the warden of the penitentiary, together with a copy of the sentence of the court, there to be kept until the sentence is served or a pardon granted. If sentence is suspended and the conviction subsequently affirmed, the same procedure is prescribed. It must necessarily be presumed in the absence of any evidence to the contrary that the directions of the statute were carried out by the public officers involved. We think the proof offered is in all respects sufficient to sustain the finding of prior convictions within the meaning of section 29-2217, Comp. St. Supp. 1939.

Defendant contends that certain of the instructions were prejudicial. An examination of all the instructions shows that the case was fully and fairly submitted to the jury.

Finally, defendant questions the sufficiency of the evidence to sustain the verdict. The defendant and his accomplice testify that they entered the barn through an open door and took the property in question. The complaining witness testifies that they went through another door which he had closed and latched. Other witnesses testify to circumstances tending to corroborate the complaining witness. The state's evidence, though contradicted, when taken as an entirety is sufficient to sustain the jury's verdict. The weight of the evidence and credibility of the witnesses were for the jury and, they having acted upon evidence sufficient to sustain their verdict, this court is required to give effect to it.

We have found no prejudicial error in the record.

AFFIRMED.

CHARLES LA ROSA, APPELLEE, V. UNION PACIFIC RAILROAD COMPANY ET AL., APPELLANTS.

5 N. W. (2d) 891

FILED OCTOBER 16, 1942. No. 31373.

1. **Release.** "To avoid a written release of damages for personal injuries on ground of mutual mistake of the parties, the mistake

must relate to a present or past fact or facts that are material to the contract of settlement, and not to an opinion as to the future conditions as to results of present known facts." *Simpson v. Omaha & C. B. Street R. Co.*, 107 Neb. 779, 186 N. W. 1001.

2. ———. "A mistake as to the future development of a known injury is one of opinion, and not a mistake as to fact." *Simpson v. Omaha & C. B. Street R. Co.*, 107 Neb. 779, 186 N. W. 1001.

3. ———. Evidence as disclosed by the record *held* not sufficient to avoid written release of damages for personal injuries on ground of mutual mistake of the parties.

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

T. F. Hamer, G. C. Holdrege and *W. J. Schall,* for appellants.

Carnazzo & Kazlowsky and *Grenville P. North, contra.*

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

MESSMORE, J.

This is a damage action, based on alleged negligence of the defendants, resulting in personal injuries to the plaintiff. The cause was submitted to a jury, and a verdict returned in favor of the plaintiff in the sum of $7,800. From the judgment thereon, defendants appeal.

The petition presents a factual statement sufficient in form to state a cause of action, in that the plaintiff, a mill worker, employed in defendant company's shops, was engaged in the operation of a crosscut saw; that the saw did suddenly and without warning swing forward toward and against the plaintiff, cutting his arm, while he was in the exercise of reasonable care in its operation; that he had never been warned by the defendants of the unsafe, insecure and dangerous condition of the saw, or that the same was liable to swing forward and against him; that the defendants knew, or should have known, of the dangerous condition of the device, and negligently allowed the same to become out of repair and dangerous and to continue in a dan-

gerous condition, and failed to maintain the crosscut saw in a safe condition for the use by plaintiff and others. Plaintiff alleged that defendant Nickels was employed by the defendant railroad, in charge of maintenance, inspection and repair of the saw and other devices, and knew, or should have known, its condition; that such negligence caused the plaintiff's injuries, which were described, and prayed for damages.

Defendants answered, admitting the employment of plaintiff and that defendant railroad maintained a crosscut saw described in plaintiff's petition, and admitted that he was injured, denying any negligence on their part causing said injuries. As a defense, defendants alleged that following the injury plaintiff made claim against the Union Pacific Railroad Company to perfect a settlement; that the claim, by agreement, was settled for the amount of $4,000, the plaintiff signing a release in full satisfaction, and dismissal of the plaintiff's petition was prayed. For reply, plaintiff admitted the execution of the release and receipt of $4,000 as consideration therefor, but alleged that at the time of signing the same he did not know the real nature and extent of his injuries; that the release was obtained through false and fraudulent statements and representations made by claim agents and doctors of the defendant railroad company prior to the signing of the release, and were with reference to the then physical condition of the plaintiff, setting forth a factual situation in explanation, which will be covered as far as material in a review of the evidence; secondly, that the release was signed under a mutual mistake of fact, had by each of the parties as to the injuries unknown, and also as to the severity of the injuries, in that plaintiff's injury was not slight and temporary, but serious and permanent; that it was not true that the muscles, cords, nerves and blood vessels of his arm were not injured, because, in fact, they were injured; that it was not true that his ability to work would be as good as ever and no disability would result, because plaintiff, since said accident, has been unable to do or perform any work whatsoever, suffered permanent

disability, and will be unable to do his customary work and labor for the rest of his life.

The court submitted the case to the jury on the question of negligence, if any, of the defendants, and denied the submission of fraud, but submitted the question of mutual mistake, as pleaded in plaintiff's reply.

The plaintiff, 34 years of age at the time of the accident, before his employment with the defendant railroad was a machinist and experienced in running saws of different kinds used in the cutting of wood. He went to work for the defendant railroad January 15, 1936, at $130 a month and worked until the 27th day of April, 1936, on which latter date the accident happened at 1:20 p. m. while he was operating a crosscut (circular) saw, cutting decking for box cars. The saw was powered by an 8-horse power electric engine; the motor and saw were together and hung from a platform which extended four or five feet from the west wall of the building, located like the pendulum of a clock. When it was not necessary to operate the saw, a counterweight automatically pulled it back to the west wall. The counterweight was held in place by a bolt which forced it or brought the weight of the counterweight into operation, so as to pull the saw back as soon as the operator was through with it. There was an arm where the weight was located that threw it out on a bar, which would clear the bench of this circular saw, and did so when the bolt was normal. At the time of the accident this bolt snapped, releasing the weight or counterbalance, permitting it to spring toward the plaintiff, who had just cut one end of a board.

The plaintiff testified that neither his foreman nor any other person had ever instructed him that there was anything dangerous about the machine, or that this pin, or bolt, was liable to break; that an employee, William Nickels, was in charge of the machine, to inspect it; that when the accident happened the plaintiff grabbed a handkerchief, saw blood coming from the wound, and put it on the wound; "Nickels put a piece of twine over my elbow and tightened it up with a sliver." Subsequently, plaintiff appeared at

the office of Dr. Otis Martin, who poured some medicine on the wound, and put on a tourniquet and bandaged the arm. Plaintiff was then taken to a hospital, where Dr. Kennedy unwrapped his arm and told him to turn his head so that he would not become sick from watching the operation. A nurse and one Ray Best, also a nurse, were present. Plaintiff stated he did not know what Dr. Kennedy did. His arm was bandaged and a cast applied, which covered his arm to his fingers, so that he could not move it, and it rested in a "trailer support." Dr. Kennedy performed the first operation on the plaintiff's arm, following which he dictated the details of the operation to a nurse, who incorporated the same in the hospital records, and which is in evidence. The operative record reads: "Lacerated wound about 3" long extending across the anterior aspecte of the left forearm going down almost to the bones; severing body and tendons of the flexor muscles, both deep and superficial, palmaris longus, pronator radii teres; severed both radial and ulnar nerves and the ulnar artery." Under "What Was Done," Dr. Kennedy's report reads: "Incision enlarged. Ligated the artery, sutured tendons and nerves with #00 chromic catgut and skin with dermal and arm dressed on a molded posterior plaster of Paris splint in extreme flexion." The cast was removed nine weeks after it had been applied, following which plaintiff went to Dr. Kennedy's office for bandaging from April until July. He returned to work December 5, 1937, and worked off and on until October 31, 1939, at the same classification as car man freight, and at the same rate of pay.

Plaintiff testified to conversations had with Dr. Kennedy. As to the first he was asked: "Mr. La Rosa, I wish you would tell us now just what you said to the doctor, that is, Dr. Kennedy, and what he said to you in that first conversation you had with him, and I want you to give it just exactly, as nearly as you can give it to us, word for word." He answered: "I says, 'Doctor, how about this arm?' And he told me, he says, 'There is nothing there that is cut that won't heal up. It is just a matter of time until you get your

use in the hand,' and told me not to worry." As to the second conversation he was asked to tell what he "said to Dr. Kennedy and what he said to you. A. Well, after they had dressed this hand the nurse and Mr. Best was on the way out, and I called Dr. Kennedy back. I says, 'Doctor, can I see you a minute?' He says, 'Yes, what is it you want?' I says, 'Doctor, am I ever going to use this arm? Are you going to cut it off, or what are you going to do?' " When asked what Dr. Kennedy said to him, his answer was: "He told me, 'There is nothing cut in that arm that is going to interfere with your hand to do the work you have been doing,' and he told me not to worry about that hand."

There had been a suggestion and talk of a settlement of the plaintiff's claim, and he, having this in mind and that he might perfect a settlement with the company, had a conversation with Dr. Kennedy, in substance, as follows: "A. I asked him,—they wanted me to settle you see,—I says, 'Doc. I want to know more about this arm.' He told me, he says, 'That arm is going to be all right.' He says, 'There is nothing there that is going to hurt the use of that arm. There is no reason why you can't do your work like you did and it will be as good as the other hand.' * * * He said it was just a matter of time for the rebuilding of the muscles. He said this hand had been laid up so long. He gave me a sponge ball, and the gripper I had too. Q. And you used those, did you? A. Yes. Q. That improved your hand, did it? A. Yes, it showed some improvement. Q. That was the extent of the conversation, was it? A. That was all at that time." The court and jury did not have the benefit of Dr. Kennedy's testimony, he having died prior to the time of the trial.

There is testimony of other and further treatments and another operation that was performed on plaintiff's hand a year after the accident. One Cox, claim agent for the defendant company, through Dr. Freyman, sent the plaintiff to Miss Potts for electrical treatments for about three times a week from July, 1936, to April, 1937, and Dr. Schrock in the same office with Miss Potts examined the arm in De-

cember, 1936, and arrangements were made for the second operation. Miss Potts told the plaintiff to see Dr. Kennedy, who, in turn, arranged for the second operation. Plaintiff went to the hospital for the second time, where he was given a local anesthetic and remained conscious all the time, but did not see any part of the operation, as he was told to look to one side. His arm was bare when he went into the operating room, and was bandaged when he came out. The operation lasted about 30 minutes. He remained in the hospital for 16 days, going to see Dr. Kennedy every other day for dressings, until the first part of June, when the bandages were taken off. This terminated the services of Dr. Kennedy.

The complaint is based on the proposition that Dr. Kennedy did not inform the plaintiff that the body and tendons of the flexor muscles, palmaris longus, pronator radii teres and the radial and ulnar nerves and ulnar artery had been severed. The second operation was for the purpose of removing adhesions. Dr. Mauer, one of the defendant railroad's doctors, is alleged to have told the plaintiff that he was not to worry; that his hand would come out all right, and there was nothing cut in the arm that would destroy the use of it.

With reference to the release, which was signed November 29, 1937, the plaintiff first talked, in February, 1937, about a settlement of his case with Joe St. Lucas, a friend. St. Lucas is a foreman in the Union Pacific shops where the plaintiff's father was employed and would come over to the house and talk about the case. Plaintiff first met Mr. Cox, the Union Pacific claim agent, in September, 1936, but did not talk to him about settling the case. He saw Mr. Cox, beginning in November, 1936, but did not discuss with him a settlement on occasions when he went to report the condition of his hand. Cox first suggested settlement in February, 1937, in the presence of St. Lucas. The company offered $1,500, a year's salary, to adjudicate the claim. Plaintiff thought over this offer for some considerable time, and finally, in a conversation with Cox in September, 1937, the

latter offered to settle for $4,000. Plaintiff said he would think it over. He came back in two weeks; the $4,000 was offered; he was told he was over 21 and could do as he pleased. On November 29, 1937, he went to see Cox, and the plaintiff and one Trout had a conference with reference to a settlement; $7,000 was suggested by the plaintiff, and finally $7,800 was mentioned, but the release was consummated on the day stated in the amount of $4,000; the plaintiff saying: " 'Well, I might as well sign it.' I couldn't starve. It was nineteen months after the accident. I had to get some money some place." He testified he read the release before he signed it and received $4,000. The next day he cashed his check, asking that he be given three 1,000-dollar bills and two 500-dollar bills.

The record discloses in behalf of the defendants with reference to the conversations claimed to have been had between Dr. Kennedy and the plaintiff the following, in substance: Ray Best, chief nurse for the Union Pacific ward of the hospital for 27 years, Miss Mary Gertrude Savage, a nurse by profession, and Dr. Roy Mauer, all remembering the plaintiff as a patient of Dr. Kennedy, and being present when the alleged conversations between plaintiff and Dr. Kennedy took place, testified that they were general in character, in that the plaintiff asked the doctor how he was getting along and the length of time he would be laid up; that the doctor would tell him that he was getting along nicely and the wound was healing properly, with no infection present, and all of these witnesses stated that no such conversations as testified to by the plaintiff were had.

Of the physicians testifying for the plaintiff, Dr. W. R. Hamsa made an examination of plaintiff October 13, 1941. He found a four and a half inch scar, one-quarter inch wide, running diagonally across plaintiff's forearm, and in the middle thereof a two-inch scar, about three-quarters of an inch wide, running directly upward; the scar being partly bound down to some of the tendons that bend the fingers and over the area where two large nerves come down the forearm into the hand, and that the scar moves with the

tendons of three fingers only and not with the deep tendons passing the tips of the fingers but only those passing underneath the skin; that there are two tender areas over the big nerves, producing a tingling sensation in the hand; that there is a loss in the muscles that separate the fingers and the "small muscles that do the fine movements of the hand are knocked out to a great degree;" that there is also a definite injury to muscles used for grasping, and definite disturbance of sensation in the hand; that the condition of the hand is at a standstill, for the reason that two years have elapsed without improvement; that unless intervention is had, that is, an exploratory operation, the condition will remain. In the doctor's opinion, one-third disability occurred; there is a shrinkage in plaintiff's left hand, compared with his right, and the efficiency of his hand is impaired in the movement of lumber.

The testimony of Dr. Muehlig corroborated that of Dr. Hamsa, with a slight variation in detail, in the conclusion that, as a laborer, plaintiff suffered the loss of the use of his hand for fine movements; that he could operate a crosscut saw but with some difficulty; that he would not be as efficient, depending on his eyesight.

Plaintiff's petition was filed on April 25, 1940, two days less than four years from the date of the accident. The record discloses a controversy with reference to the plaintiff's working status, in that some employees had on various occasions been placed back at work prior to himself, who he felt were junior, while his rights were senior. We will not detail this evidence except to say that it is apparent from the scope agreement between the railroad company and car men that certain employees are entitled to return to work when relieved from other duties, in preference to retaining employees bearing plaintiff's work status. Plaintiff obtained car man freight rating, due to a shortage of car men at that time who were engaged in other elements of work. There is additional evidence as to his ability as a musician in playing a saxophone and clarinet and the effects of his injury with reference thereto, and that he earned approximately $100 a month in this profession.

We are concerned with the validity of the release, and whether or not there was a mutual mistake, as contended for by the plaintiff, and whether the release should be vacated. A discussion with reference to the negligence of the defendants, if any, is therefore not required, and an examination of the record shows conclusively that the trial court did not err in not submitting to the jury the question of fraud.

In the case of *Simpson v. Omaha & C. B. Street R. Co.*, 107 Neb. 779, 186 N. W. 1001, this court held: "To avoid a written release of damages for personal injuries on ground of mutual mistake of the parties, the mistake must relate to a present or past fact or facts that are material to the contract of settlement, and not to an opinion as to the future conditions as to results of present known facts." The true rule as laid down in the opinion is "that the mistake must relate to either a present or past fact or facts that are material to the contract of settlement, and not to an opinion as to future conditions as the result of present known facts. A mistake as to the future development of a known injury is a matter of opinion, and is not one of fact, and is not such a mistake as will avoid a release, but, where the mistake is as to the extent of the injury due to unknown conditions or relates to injuries that were wholly unknown, then the release may be avoided, unless it further appears that the parties were contracting with respect to possible unknown injuries, and the releasor intended to relinquish all claims, whether known or unknown." In this connection the release is pertinent. It reads:

"Release of All Claims

"Received of Union Pacific Railroad Company Four Thousand Dollars ($4,000).

"In consideration thereof, I hereby release Union Pacific Railroad Company * * * from all claims or causes of action that exist or may hereafter accrue, for damages for any and all personal injuries, including possible unknown injuries, and for complications arising from such injuries or treat-

ment thereof; for loss of services; for medical or other expenses; and for loss and damage to property; growing out of an accident * * * .

"The above amount is the full consideration for this settlement, and no promise or contract of future employment has been made.

"I have read the foregoing receipt and release and fully understand the same."

The foregoing statement appears also in the handwriting of the plaintiff. The release is witnessed and dated at Omaha November 29, 1937.

It is uncontradicted that following the settlement of his claim the plaintiff returned to his job as car man freight in the company's Omaha shops, same classification and at the same rate of pay, and worked therein at times for a period approximating two years. The record is barren of proof that plaintiff was unable to do the work. He knew that a circular saw, powerful enough to cut heavy lumber, suddenly swung about and cut his arm. He saw the open wound, because he saw blood coming from it. He put a handkerchief over it, and he knew the wound was serious. He saw Dr. Martin put some medicine on the cut. He knew he was so seriously injured that he was taken to a hospital; knew that his arm was operated upon and that the operation lasted about an hour. He was told to look away, because it would make him sick to see it. He knew his arm had been in a plaster cast for a period of nine weeks. He knew that he had been severely cut, because he expressed concern to Dr. Kennedy about whether it would be necessary to amputate his arm, and whether he would be crippled for life. He knew that the movement of his fingers was restricted following the removal of the cast. He must have known the extent to which he could move his fingers, and would notice improvement, if any, from time to time. He knew that a second operation was necessary because of adhesions, or, as he put it, Dr. Schrock told him there were "brakes" in his arm, impeding the movement of his hand. He knew a second operation was performed, which lasted 30 minutes,

and when a settlement was first suggested, he wanted to wait until he knew what the result of the operation would be. He had the second operation in mind and wanted it "cleared up" before he perfected a settlement. This would indicate clearly that there was no mistake of fact, so far as plaintiff was concerned, when he made the settlement. The evidence discloses that defendant company's doctors knew precisely the nature and extent of the plaintiff's injuries. There was no mistake of fact on their part. The communications were merely expressions of opinion concerning the future development of a known injury. The plaintiff, himself, knew the extent and nature of his injuries.

Reviewing the record, it is conclusive that Doctors Kennedy and Mauer knew the nature and extent of the plaintiff's injury. The record in this case justifies the conclusion that there was not a mutual mistake, as contended for by the plaintiff, and that the release is a *bona fide*, valid instrument.

The judgment of the district court is reversed, and plaintiff's petition dismissed.

REVERSED AND DISMISSED.

GEORGE F. RUSHART, APPELLEE, V. DEPARTMENT OF ROADS AND IRRIGATION OF THE STATE OF NEBRASKA, APPELLANT.
5 N. W. (2d) 884

FILED OCTOBER 16, 1942. No. 31415.

Evidence. In a condemnation proceeding, evidence as to the price paid for other lands purchased from other property owners is not competent on the question of the value of the land taken, especially so where the portions and the selling price are designated by counsel to witnesses on cross-examination, and where the record fails to show that such other lands were similar to or used for the same purpose as the land taken.

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

Walter R. Johnson, Attorney General, Herbert T. White and *Guy E. Tate*, for appellant.

Ritchie, Swenson & Welpton, Joseph E. Strawn and *James F. Begley, contra.*

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

MESSMORE, J.

The state of Nebraska, through its department of roads and irrigation, brought an action in the county court of Sarpy county June 11, 1941, to condemn certain real estate belonging to appellees, for the purpose of constructing a state highway running between Omaha, Nebraska, and Fort Crook.

The sole issue involved in the district court, to which an appeal was taken, was the value of the property. The Rushart, Muchowicz and Stastney properties were involved. The Rushart property consisted of 4.898 acres, and the appraisers fixed its value at $3,578.60. A jury in the district court fixed the value of such property at $4,000, and the interest subsequently added made the award $4,111.22. The appraisers fixed the value of the Muchowicz property, consisting of 1.271 acres, at $900; the jury at $1,200, and interest subsequently added made a total award of $1,243.65. The value of the Stastney property, consisting of .093 of an acre, was fixed by the appraisers at $200, by the jury at $475, and with interest added made a total of $488.18. From such judgment on the verdict the department of roads and irrigation appeals to this court.

One assignment of error is determinative of this case. The department contends that the court erred in permitting cross-examination of appellant's witnesses to bring out, over appellant's objection, the price paid by the department for other property in the same neighborhood. This objection was developed in the cross-examination of the witness Jasper L. Hall as follows: "Q. Do you know of any sales of real estate in that locality along in the spring of 1941? A. Not in the spring, but in the summer. Q. Did you know of the sale of the John Tangeman property which is just south of the George Rushart property? A. No. I don't. Q. Did

you know that that property sold for Ten Thousand Dollars?" Counsel for the department objected as not proper cross-examination, as incompetent, irrelevant and immaterial. "The Court: If it is true." Counsel for appellees: "'Well, it is not untrue." Department's counsel: "It is not proper cross-examination. We didn't go into the price. The Court: It is to show whether he is familiar with the sale and value of land. A. No, I didn't. * * * Q. Do you know this Peter Vana property which was across the road here from the George Rushart property? A. Well, I know the property, yes. Q. And that which contained 1.783 acres, did you know that sold for Six Thousand Dollars? A. No, I didn't." Department's counsel objected as not proper cross-examination, incompetent, irrelevant and immaterial. The court overruled the objection. "A. No, I did not, * * * but that property has improvements on it, has it not? Q. I asked you if you knew what it sold for? A. No, I did not. * * * Q. Do you know where the Frank Harper property is situated? A. No. Q. Did you know of a sale by Frank Harper of 44/100ths of an acre in Tax Lot 90 C, 1 B, in the southwest quarter of Section 23-14-13, for Twenty-one Hundred Dollars? A. No." Objected to as not proper cross-examination, incompetent and immaterial. Overruled. "Q. Did you know the Victor Peterson property just south of the Tangeman property, and cornering onto the George Rushart property, to the southeast? A. Is that that filling station? Q. Yes. A. Yes, I know that. Q. Did you know that 16/100ths of an acre was taken in front of that property and payment made of Thirty-five Hundred Dollars for that?" Objected to as not proper cross-examination, incompetent, irrelevant and immaterial. Overruled. "A. No, I did not. Q. Did you know the M. P. Peterson property to the south of the Victor Peterson property and that certain portions were taken in the front, 25/100ths of an acre, and Thirty-five Hundred Dollars paid for that? A. I knew that the ground was taken. Q. Did you know Thirty-five Hundred Dollars was paid for that? A. No." Department's counsel moved to strike the answer as not proper cross-examination. Overruled.

On cross-examination of the witness, M. P. Peterson, he was asked: "Your brother or your son owns the property kittycornered from Rushart's?" to which he answered, "Yes." "Q. You knew did you not that your son sold off the front part of his property for the extension of the highway? A. Yes, I know that. Q. And you knew that he sold 16/100ths of an acre for $3,500? A. I don't know the acreage. * * * Q. And you also knew that it sold for $3,500, didn't you? A. Yes, I presume that is it. * * * Q. Isn't it a fact that you sold 25/100ths of an acre for $3,500, to the state?" Objected to as not proper cross-examination. Overruled. "A. I sold—I don't know the acres, but I sold that land to the state but I don't recall the acreage. * * * Q. Mr. Peterson, you knew of the John Tangeman property, didn't you? A. Yes. Q. You knew that that property was due south of the Rushart property on the same road? A. Yes. Q. And was comprised of one and 27/1000ths of an acre and was sold for Ten Thousand Dollars with the privilege of Mr. Tangeman to remove his improvements? A. Yes, I heard that. Q. You knew that?" Objected to as not proper examination. Overruled. "A. I heard that. * * * Q. Don't you know that that Hale property was sold to the state last spring, comprising 985/1000ths acres? That Hale property lies exactly south of the Tangeman property, does it not? A. Yes. Q. And just 269½ feet south of the Rushart property, is that correct, as shown here on this map? A. I can't dispute your word because I don't know exactly, but it isn't very far. Q. And it is on the same side of the road as the Rushart property? A. What was the acres there? Q. This shows here on the map as 985/1000ths of an acre; not quite an acre. Did that property run back to the railroad? A. Yes. * * * Q. You know of the front part of that property being sold? A. All of it. Q. Do you know that that was sold for Eighty-five Hundred Dollars?" Objected to as not proper cross-examination. Overruled. "A. Yes. Q. Do you know that the two houses on it were sold to you for Seven Hundred Fifty Dollars, weren't they?" Objected to as not proper cross-examination. Overruled. "A. Yes."

The contention of the department is that prejudicial error was committed by the trial court in permitting the jury to receive information as to amounts paid by the department of roads and irrigation for other property than that in question by condemnation or purchase. The appellees contend that all of the property concerning which the court permitted appellees' counsel to question appellant's witnesses were in the immediate vicinity of the condemned properties; that the questions were asked merely for the purpose of testing the credibility of the witnesses, and that appellees' counsel intended to state in the argument that such matter is evidence only to test the credibility of the witnesses and not as to the value of the real estate in question. During the argument before the jury, appellees' counsel stated: "I stated to the jury and am stating now and ask the court to make it clear to the jury, that that is not evidence as to the value of this land, but it goes, however, to the credibility of the witness." Appellees' counsel asked the court to instruct on this phase of the testimony, and the court asked if counsel would tender an instruction, to which appellees' counsel replied: "We will. Not only that, but we will argue that to the jury, which we intend to do."

Instruction No. 16, given by the court, is as follows:

"You are instructed that the evidence brought out on cross-examination of Mr. Peterson with respect to the sales of other real estate in the immediate neighborhood is not to be considered by the jury as evidence of the value of any of the real estate or the damages to any of the landowners claiming damages in this proceeding. The only purpose for which such evidence was admissible is to test the credibility of the witnesses.

"The jury is also instructed that with respect to the questions asked of Mr. Hall," etc. The instruction then details the same subject-matter and reason for the admissibility of the evidence.

This court in *State v. Wright*, 105 Neb. 617, 181 N. W. 539, held: "In a condemnation proceeding, evidence as to the price paid by the state for lots purchased from other

property owners, and which form a part of the tract openly intended to be acquired by condemnation in case purchases could not be made, is not competent on the question of the value of the lots of the defendant." Following the view that such evidence is not admissible, see annotation, 118 A. L. R. 905 *et seq.*

Some of the courts permit the introduction of sales of other lands in the vicinity of the land in question to show the knowledge of a given witness and his competence to speak as an expert upon the value of such land. Other courts permit evidence as to the general selling price of land in the vicinity, as considered with evidence as to particular sales of such land. This court follows the rule that, where the value of real estate is in issue, evidence of particular sales of other land may not be introduced as independent proof of the question of value. This is reflected by dictum in the case of *Chicago, R. I. & P. R. Co. v. Griffith,* 44 Neb. 690, 62 N. W. 868, and *Union P. R. Co. v. Stanwood,* also by dictum, 71 Neb. 150, 91 N. W. 191; on rehearing 71 Neb. 158, 98 N. W. 656. The holding in the case of *State v. Wright, supra,* is the first direct pronouncement of the rule in this state.

The appellees do not question the fact that in Nebraska it is definitely held that evidence of sale price of real estate in the immediate vicinity is not competent as substantive evidence to prove the value of property in condemnation proceedings. Appellees refer to the rule in Iowa and Kansas, where, on cross-examination, witnesses were permitted to testify as to values of other lands in the immediate vicinity of the land taken, such testimony being strictly limited to test the credibility of such witnesses. However, counsel in such cases did not designate the values of such land to the witnesses, about which they were testifying.

In *Watkins v. Wabash R. Co.,* 113 N. W. 924 (137 Ia. 441), it was held: "While a witness in a suit for the value of land taken by condemnation may be asked the selling price of a single piece of land similarly situated when necessary to test his knowledge and competence as an expert,

such testimony is not admissible as substantive evidence of the value of the property in controversy." The above holding was followed in *Maxwell v. Iowa State Highway Commission,* 223 Ia. 159, 271 N. W. 883.

The record in the instant case is void of evidence that any of the properties, upon which testimony of the sale price thereof was received, were even similar in improvements and character to the property here under consideration. The Nebraska rule has not gone to the extent as appears in the Iowa and Kansas cases.

In the instant case, the values of other lands, on cross-examination of the witnesses, were definitely stated by counsel, without the witnesses testifying to such values. The amounts were stated, and this brought before the jury the definite prices as to other parcels of land, and the argument of counsel as to the use of this evidence and the instruction with reference thereto, did not cure the fact that the jury had the full benefit of the knowldege of prices paid for other lands in the immediate vicinity. They could very well believe that, if such prices were paid for other lands, then, obviously, the landowners were entitled to the same amount or more. We conclude that the rule in Nebraska does not permit the reception of such testimony in this state under circumstances at least as manifested by this record.

We therefore hold that, under the circumstances here existent, the admissibility of such testimony, over proper objection, on cross-examination, constituted prejudicial error, and that the cause should be remanded for retrial, and the jury presented with proper evidence with reference to the value of the lands involved.

REVERSED.

JAMES K. LUDWICKSON, APPELLEE, V. CENTRAL STATES ELECTRIC COMPANY ET AL., APPELLANTS.
6 N. W. (2d) 65

FILED OCTOBER 30, 1942. No. 31442.

1. **Workmen's Compensation.** An award of compensation under the workmen's compensation act fixes the rights and liabilities of the parties, and is subject to modification only as authorized by statute.
2. ———. A petition to modify such an award cannot be used for the purpose of correcting judicial error, if any, in the original proceeding.
3. ———. The statute, section 48-142, Comp. St. Supp. 1941, authorizing a decrease or increase on the ground of incapacity due solely to the injury, limits the basis for the modification to that increase or decrease of incapacity which is due solely and only to that violence to the physical structure of the body which resulted from the accident, and which increase or decrease has occurred since the award was rendered.
4. ———. Any increase or decrease of incapacity due to other causes is not within the scope of the authorized inquiry and cannot be used as a basis for a modification of the award.
5. ———. The compensation act contemplates that there will ultimately be a partial rehabilitation of those employees who have received a permanent disability.
6. ———. The automatic reductions in compensation provided in the act do not presuppose a decrease of incapacity due to the injury, but rather presuppose that within the periods of time named the employee will have adjusted himself to his disability and established a new basis of self-support.
7. ———. The employer against whom a final award has been rendered is not entitled to a decrease of his compensation liability, in addition to those provided in the act, because the employee, since the award was made, has succeeded in assuring a livelihood to himself.
8. ———. The evidence has been reviewed and it is *held* that there has not been a decrease of plaintiff's incapacity due solely to his injury arising since the final award of compensation was rendered, which defendants seek to modify.

APPEAL from the district court for Thurston county: SIDNEY T. FRUM, JUDGE. *Affirmed.*

Stewart, Stewart & Whitworth, for appellants.

Alfred D. Raun and *Perry, Van Pelt & Marti, contra.*

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

SIMMONS, C. J.

Defendants here petitioned for a modification of a former judgment awarding compensation to the plaintiff under the workmen's compensation act. The district court denied their petition and defendants appeal.

In *Ludwickson v. Central States Electric Co.*, 135 Neb. 371, 281 N. W. 603, this court affirmed the judgment of the district court and held that plaintiff's disability was permanent and total. It is that judgment the defendants seek to modify.

Defendants base their petition upon two propositions. First, the plaintiff has rehabilitated himself by securing an advanced education and has been gainfully employed for more than four years at a salary greater than that which he was receiving at the time of the accident, and is therefore not totally disabled. Second, that, irrespective of his present employment, plaintiff's physical condition has improved to such an extent that he is no longer totally disabled. As to the first proposition the evidence is undisputed. At the time of the first trial plaintiff was attending the University of Nebraska as a student, seeking to obtain a Master's degree in mechanical engineering. He was at that time receiving $40 a month in wages as a graduate assistant. Beginning September 1, 1938, he has been an instructor at the University of Nebraska, teaching heat power engineering, thermo-dynamics and power machinery courses. His salary began at $1,450 for a ten-months year. Beginning September, 1940, his salary has been $1,500 for the comparable period.

As to the second proposition, the evidence is that plaintiff is able to do the work of an instructor about the classroom and laboratory, that he is able to do casual work about his home, that he walks a few blocks to meals, that he dances occasionally and is able to drive his automobile for an ex-

tended time. He suffers pain from the scars on his feet, the stump of his arm, and has other unfavorable reactions from the extensive scars on his body. Reference is made to the former decision for a detailed statement of his injuries and condition at that time. Defendants offered the same two doctors who testified for them at the original trial. These experts reexamined the plaintiff, and at this hearing reviewed their findings and conclusions made at the former trial, brought them down to date, and expressed their opinion that there had been a material improvement in plaintiff's physical condition, that his disability was definitely less, and fixed his present general "industrial disability" at from 25 to 50 per cent. Their examination upon which this opinion was based covered a period of a few minutes. Their evidence in some respects was rather indefinite.

Plaintiff offered three medical experts, one a witness who did not testify at the previous hearing. The plaintiff, in the court's chambers, removed his clothing, and the doctor testified as to the injuries with reference to the plaintiff's body in the presence of the court. This witness expressed the opinion that, "for any type of manual labor or work involving exercise of any type, he (plaintiff) would have at least 75 or 80 per cent. disability." Plaintiff presented also the evidence of the two medical experts who testified for him at the former trial. They also reviewed their previous findings, brought those findings down to date, pointed out the condition of his wounds as to scars, adhesions, loss of muscles, pain, etc., and expressed the basis for and gave their opinion that there had been no material change in his condition and that his disability amounts to the same now as then. One of them stated: "His disability for any gainful occupation having any labor was still 100 per cent." This witness stated that there had been some increase in the detrimental condition of his body arising from his injuries. Upon this record the trial court found generally for the plaintiff; that the defendants had failed to establish, by a preponderance of the evidence, any decrease in incapacity of plaintiff due solely to the injury upon which the final

judgment in the first trial was based; that there has been no appreciable decrease of incapacity due solely to the injury, and dismissed appellants' petition.

It must be remembered that we are here dealing with statutory rights, liabilities, and procedure. At the outset it is necessary that we determine the scope of the inquiry that may be made in this proceeding. That the judgment of the district court, which was affirmed by this court, was a final judgment, fixing the rights and liabilities of the parties, and subject to modification only as authorized by statute, cannot be successfully questioned. *Metropolitan Dining Room v. Jensen,* 126 Neb. 765, 254 N. W. 405. The statute applicable here provides that it may be modified upon application of either party "on the ground of increase or decrease of incapacity due solely to the injury." Comp. St. Supp. 1941, sec. 48-142. For what reason may the first judgment be modified? This proceeding cannot be used for the purpose of correcting judicial error, if any, in the original proceeding. *Connelly v. Carnegie Dock & Fuel Co.,* 148 Minn. 333, 181 N. W. 857. "An award will not be changed unless the board has statutory authority, and the one seeking to change the award presents evidence bringing the case within the statutory provisions." 2 Schneider, Workmen's Compensation (2d ed.) 1980. The question of "increase or decrease" must be determined upon facts arising "from the date of the agreement or award." *Huff v. Omaha Cold Storage Co.,* 136 Neb. 907, 287 N. W. 764. We start then with the fact, not to be here disputed, that the plaintiff was permanently and totally disabled as of March 5, 1938, the date of the district court's award in the original proceeding. The inquiry here then is, has the plaintiff had a "decrease of incapacity due solely to the injury" since that date? Defendants argue that the word "incapacity" as here used means "earning power" and "industrial worth." Plaintiff argues that it means "physical condition." It is noted that the inquiry is not limited to "increase or decrease of incapacity," but is further limited to incapacity "due solely to the injury." The legislature has defined injury for us as meaning "only

violence to the physical structure of the body and such disease or infection as naturally results therefrom." Comp. St. Supp. 1941, sec. 48-152. The incapacity therefore into which the courts may inquire in this proceeding and use as a basis for the modification of an award is that increase or decrease of incapacity which is due solely and only to that violence to the physical structure of plaintiff's body which resulted from his accident, and which increase or decrease has occurred since the award was rendered. It clearly relates to plaintiff's physical condition. In *Great Western Sugar Co. v. Hewitt,* 127 Neb. 790, 257 N. W. 61, this court said: "The judgment entered by the trial court in the case at bar is not final in the sense that it can never be inquired into again, but section 48-142, Comp. St. 1929, provides that, in a case of this kind, when payments have been ordered to be periodically made for a period longer than six months, at any time after six months an application may be made by either party on the ground of increase or decrease of incapacity due solely to the injury, and upon said application being filed the whole question of plaintiff's physical condition can again be inquired into as of that time." Any increase or decrease of incapacity due to other causes is not within the scope of the authorized inquiry and cannot be used as a basis for a modification of the award.

Clearly, the improved economic situation in which plaintiff has placed himself is due to his advanced studies and mental training. It has not resulted from any improvement in the physical structure of his body to which violence was done by his accident. This court early held that an employee should not be penalized "because he had by education and training fitted himself for more remunerative employment." *Epsten v. Hancock-Epsten Co.,* 101 Neb. 442, 163 N. W. 767. Defendants state that to so construe the statute is "unreasonable." We think such a construction is entirely in keeping with the language used and the intent of the act as a whole. The compensation act clearly contemplates that there will ultimately be a partial rehabilitation of those employees who have received a permanent disability. The

schedules of compensation set out in section 48-121, Comp. St. 1929, as amended by section 48-121, Comp. St. Supp. 1941, provide for automatic reduction of compensation after certain periods of time. These reductions do not presuppose decrease of incapacity due to the injury, but rather presuppose that within the periods of time named the employee will have adjusted himself to his disability and established a new basis of self-support. See *Hull v. United States Fidelity & Guaranty Co.*, 102 Neb. 246, 166 N. W. 628. The defendants are receiving that automatic decrease in the compensation they are obligated to pay the plaintiff. They are not entitled to a further reduction because of the plaintiff's success, since the award, in assuring a livelihood to himself during the period in which the act contemplates he should be able to work out that rehabilitation.

Defendants state that their first proposition is directly based upon the case of *Micek v. Omaha Steel Works*, 136 Neb. 843, 287 N. W. 645. Two questions were determined in the *Micek* case. First, was Micek partially or totally disabled? Second, what rate of compensation should he receive? On the first question it was determined that Micek was not totally disabled, and in reaching that conclusion his then ability to earn in another field of employment was considered. Here there has been a final determination that plaintiff was totally and permanently disabled as of the date of the first trial. We cannot now reinquire into that matter. Our inquiry here is limited to the question of whether or not since that time there has been a decrease of incapacity due solely to the injury. We do not consider the *Micek* case, or other cases cited, in point on the question here presented.

For authority of the court to modify this award defendants also rely upon the cases of *Safety Insulated Wire & Cable Co. v. Court of Common Pleas*, 90 N. J. Law, 114, 100 Atl. 846, *Fennessey's Case*, 120 Me. 251, 113 Atl. 302, and *Skelton Lead & Zinc Co. v. State Industrial Commission*, 100 Okla. 188, 229 Pac. 255. These cases may be distinguished on a number of grounds. It is sufficient here to point out that the courts of those states were given by stat-

ute far broader powers of modification than that which is vested by statute in the courts of this state.

In determining the question of the present disability of the plaintiff the trial court was presented, as are we, with this situation. There has been a determination, as of the date of the first trial, that the plaintiff was permanently and totally disabled. As has been pointed out, that finding became a final adjudication. Its correctness may not be questioned successfully in this proceeding, and any finding here made must be based upon that fact. The defendants' evidence here presented does not assume that fact, but rather is premised in part on the proposition that the plaintiff was but partially disabled at the time of the last trial and is now less so. On the contrary, plaintiff's two expert witnesses base their conclusion on the premise that he was totally and permanently disabled as of the date of the first trial. In the previous trial the plaintiff carried the burden of proof and the trial court and this court accepted their evidence and conclusions in determining the question of extent of disability. By the same token the evidence of the defendants was rejected. Defendants did not then, but now do, carry the burden of proof. *Metropolitan Dining Room v. Jensen, supra.* Were we now to accept the testimony of defendants' expert witnesses, we would now be accepting as true evidence which we refused to agree with at the first trial and would in effect be changing our former adjudication in this matter. While it is true that the testimony of one of plaintiff's witnesses might, if accepted, support a finding of less than total disability, we are not unmindful of the fact that the witness had not observed the plaintiff's condition at the time of the former adjudication, did not start with the base of his then total disability; that the trial court heard the testimony of that witness, saw the plaintiff's physical condition and accepted the testimony of the witnesses that there had been no material change in plaintiff's physical condition. We see no controlling reason for reaching a different conclusion.

The plaintiff is allowed an attorney's fee of $150 for services in this court.

The judgment of the district court is affirmed.

AFFIRMED.

VIRGIL G. PIETERS, APPELLEE, V. DRAKE-WILLIAMS-MOUNT COMPANY ET AL., APPELLANTS.

6 N. W. (2d) 69

FILED OCTOBER 30, 1942. No. 31503.

1. **Workmen's Compensation.** Dependency in fact under section 48-124 (e), Comp. St. 1929, of the workmen's compensation act is not created by contributions made for purposes other than the partial support of the alleged dependent.
2. ———. The determination of the fact of partial dependency under section 48-124 (e), Comp. St. 1929, of the workmen's compensation act must be based first upon contributions made by the employee for the purpose of support of the claimed dependent.
3. ———. It is not money contributed, but money contributed for the purpose of support of the claimant that must be the basis of any claim of partial dependency under said act.
4. ———. Proof that there has been a financial injury to the alleged dependent arising from the loss of contributions made by an employee is not sufficient, standing alone, to establish partial dependency under the act.

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

Lee & Bremers, for appellants.

Fitzgerald & Welch, contra.

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

SIMMONS, C. J.

This appeal presents the question as to whether or not a son, married and gainfully employed, was a dependent of his father so as to entitle the son to benefits under the workmen's compensation act. The compensation court and the district court held for the plaintiff.

On July 28, 1941, the father was working at a blacksmith's forge in the defendant's shop. The day was hot. Some time that afternoon he quit his work, started home, became ill and died that evening as the result of heat exhaustion.

Prior to March, 1941, the father, a widower 59 years of age, lived in Iowa. He was a blacksmith by trade. He had closed his shop for lack of business, and for some time had worked on a farm for board and room, supplemented by occasional earnings.

The plaintiff lived in Omaha. He testified that he visited his father in Iowa and there the father asked if the plaintiff could find him a job if he came to Omaha, and that the plaintiff told him, "Yes, you can come out and stay with me" and "he said when he found a job he would give me half of what he earned," and that nothing was said as to why he would give him the money and that nothing was said as to board and room, but that "I told him that any time he wanted to come and stay with me he could come and stay."

Subsequent to that conversation the father came to Omaha in late March, 1941, and made his home with the plaintiff. The father was penniless at that time.

The plaintiff is a married man 27 years of age, has one child. For a year and a half, prior to July 28, 1941, he had lived in Omaha where he was gainfully employed throughout that time. His wages ran as low as $12 to $15 a week during the winter months, but more in the summer. For a period of a month or less prior to July 28, 1941, his wages amounted to $24 a week. Before his father came to live with him he lived in a two-room apartment, for which he paid $5 a week, including light, gas and water. He had a cheap automobile that he used to transport himself to work and for an occasional ride in the country. He supported his family from his earnings, supplemented for two or three months by earnings of the wife. The record shows that he had some debts, but the amount or nature is not stated.

The father secured employment as a blacksmith from a Mr. Jensen at $2.50 a day. The work was occasional. In

March he earned and was paid $7.50, April $15.75, May $52.50, June $40.00, July $58.50; a total of $174.25. He quit working for Mr. Jensen at noon on Thursday, July 24, 1941, and that afternoon began working for the defendant at 60 cents an hour for a 40-hour week. He was paid $2.20 for his Thursday's work by the defendant. He worked for the defendant Friday and a part of Monday, July 28, for which the plaintiff was paid, after his father's death, the sum of $8.02.

The record is not clear as to the payments made by the father to the plaintiff. No record was kept by the plaintiff of payments made. He testified that the father gave him half of his earnings. He also testified that "most generally * * * he gave me $6 or $6.50" a week and "when he got to making $12 or $13 a week then he gave me $6, or half of whatever he made." However, it was stipulated that the father was paid $18.75 on July 26, 1941, by Jensen. He was also paid $2.20 by the defendant, or a total of $20.95. From these payments defendant testified that "he gave me $6."

Assuming the correctness of plaintiff's contention that he received one-half of his father's wages, he was given an average of 72 cents a day during the time his father worked for Mr. Jensen and would have been entitled to receive an average of $1.28 a day from the wages the father received from the defendant. The testimony of the plaintiff also is that, in addition to the amounts of money received, the father gave presents of clothing to the child and quite often bought articles of food that the father liked which went upon the family table. For this the father received his meals, a place to sleep, and the accommodations of a home. The plaintiff testifies that it cost him $1.50 a week to furnish this to the father, *i. e.*, his rent was increased 50 cents a week to cover additional water and gas, and that the increased grocery cost was $1 a week.

The plaintiff testified that prior to his father's coming to live with him, because of his limited income, plaintiff and his wife seldom, if ever, went to shows, dances or enter-

tained in their home, and that their clothing was restricted in amount and their food simple; and that after the father came they set a better table, were able to go to shows and dances, to entertain occasionally, and to catch up on his debts, and that the money of the father went to help pay for these items.

Over objection, plaintiff testified that he was "depending upon this money" from his father for the support and keep of his family and himself. After the father's death the plaintiff moved from the apartment where he had been living into a small three-room house for which he paid $14 a month. The record does not show whether gas, light or water were furnished at his new location. The evidence supports a conclusion that the plaintiff's living standards were reduced somewhat after the father's death.

Upon this record a judge of the compensation court and the district court held that the father's death came from causes which arose out of and in the course of his employment, that the deceased contributed 50 per cent. of his wages to the plaintiff for the support and maintenance of the plaintiff and his family, that the plaintiff was 50 per cent. partially dependent upon those wages and awarded $7.50 a week compensation for a period of 325 weeks, together with burial benefits and medical services. The district court also allowed plaintiff an attorney's fee of $125.

Section 48-124 (e), Comp. St. 1929, applicable here, provides that the question of dependency, "in whole or in part, shall be determined in accordance with the fact, as the fact may be at the time of the injury * * * ." This section of the statute was construed in *Kral v. Lincoln Steel Works*, 136 Neb. 31, 284 N. W. 761, and in *Meyer v. Nielsen Chevrolet Co.*, 137 Neb. 6, 287 N. W. 849. Pursuant to the provisions of the statute, we must determine the question of dependency here presented from the facts of this case. We are not presented with a question of weighing conflicting evidence, but rather with determining the ultimate fact from the testimony given by the plaintiff, who gave the entire testimony on that question.

Plaintiff relies upon the rule stated in *Powers v. Hotel Bond Co.*, 89 Conn. 143, 93 Atl. 245, and other cases, that the test of partial dependency is whether the contributions were relied upon by the dependent for his or her means of living, judging this by the class and position in life of the claimed dependent, and argues that plaintiff testified that he so relied, and that the facts support him by showing that reliance.

Plaintiff argues, in substance, that the facts are that the father came into his home and made the contributions in order that he, the father, might aid the son in his straitened circumstances and help the son maintain a better standard of living, and for that purpose the father agreed to contribute 50 per cent. of his wages "for the upkeep of the plaintiff's family." We cannot so read the record. We have here a son, gainfully employed, and supporting himself, his wife and child on his income. The support was meager, but plaintiff was maintaining his family in the place in life that he had carved out for himself. While the plaintiff may have desired to improve his status, and was actually doing so, he did not seek nor receive the aid of his father to that end. The father was indigent and in need. The father sought work in Omaha, clearly for the purpose of improving his own status in life. The record is silent of any intent or purpose of the father to aid the son. On the contrary, the plaintiff told his father "that any time he wanted to come and stay with me" he could do so. This was obviously an offer of aid to the father, then in need. The father said that if he came and found a job he would give the plaintiff one-half of what he earned. For what purpose? Obviously not to aid the son, but to relieve the son in part at least of the increased burden which the son proposed to assume. This condition and these arrangements remained the same from the beginning until the father's death.

Plaintiff has not established facts which call for the application of the rule upon which he relies. Before that test of dependency, or any other, may be applied, it is necessary that the plaintiff establish that the partial contributions

were made by the employee for the purpose of support of the claimed dependent. It is not money contributed, but money contributed for the partial support of the claimant that must be the basis of any claim of partial dependency. Dependency in fact is not created by contributions made for purposes other than partial support of the alleged dependent. 2 Schneider, Workmen's Compensation (2d ed.) 1235. Here the record sustains only the conclusion that the plaintiff assumed the burden of caring for his father, that while unemployed the burden of caring for his father was entirely upon the plaintiff, and that when the father was employed the burden was in part, at least, carried by the father. The record does not support a finding that the father at any time undertook to or did contribute to the plaintiff for the purpose of aiding in the support of the son or his family.

The record establishes that there was an improvement in the plaintiff's financial condition as a result of the money given him by his father. The plaintiff figures the amount received as about $6 a week and the increased expense at about $1.50 a week. The father, however, was not paying for groceries, nor water and gas, as such. He was receiving his meals, a place to sleep and the comforts of a home. His contributions did not exceed the reasonable value of that which he received. The fact that during this period, and in particular the last weeks, there was a small profit to the plaintiff in the difference between the cost of commodities purchased and the contributions made does not in and of itself establish dependency under the act. The test is not solely the financial injury which the alleged dependent has suffered. 71 C. J. 530.

To hold the plaintiff to be a dependent of his father, under the circumstances here shown, would be contrary to the plain meaning of the word. Such a result cannot be deemed to have been intended by the legislature.

The judgment of the district court is reversed and the cause dismissed.

REVERSED AND DISMISSED.

GLENN E. SMITH ET AL., APPELLANTS, V. UNITED STATES FIDELITY & GUARANTY COMPANY, APPELLEE.

6 N. W. (2d) 81

FILED OCTOBER 30, 1942. No. 31408.

1. **Insurance.** An insurance policy is a contract, and where there is no uncertainty as to its meaning and the same is legal and not opposed to public policy, it will be enforced as it is made.
2. ———. "In construing terms used in a policy of insurance, they are to be taken in their plain and popular sense." *Hamilton v. Mutual Benefit Health & Accident Ass'n*, 133 Neb. 464, 275 N. W. 863.
3. ———. In construing a written instrument for the purpose of ascertaining the intention of the parties, resort must be had to the instrument as a whole and, if possible, effect must be given to every part thereof.
4. ———. The parties to a contract of insurance may contract for any lawful coverage. An insurance company has the right to limit its liability and to impose restrictions and conditions upon its contractual obligations not inconsistent with public policy, or statute.
5. ———. The policy in suit construed, and *held*, that the language of this contract, considered as an entirety and taken in its plain, ordinary sense, clearly expressed the agreement of the parties thereto, that the insurance provided therein, including the duty of the insurer to defend against a claim, "whether groundless or not," does not contemplate or require the defense by the insurer of a claim against the assured, "resulting from liability imposed upon the assured by law for damages on account of bodily injuries, including death at any time resulting therefrom, accidentally suffered or alleged to have been suffered within the policy period," when such causative accident did not occur or is not claimed to have occurred "during the progress of the work."
6. **Contracts.** "Where a contractual relation exists by virtue of a written contract expressed in clear and unambiguous language, the court will not look further to construe it." *Farmers Educational and Cooperative Union v. Farmers Educational and Cooperative State Union*, 133 Neb. 397, 275 N. W. 464.
7. ———: REFORMATION. A preponderance of evidence sufficient to justify reformation of a contract in writing on the ground of mutual mistake requires proof that is clear, convincing and satisfactory, and must establish that the mutual mistake involved is common to both parties, each laboring under the same misconception.

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

Baylor, Tou Velle & Healey, for appellants.

Cline, Williams & Wright, contra.

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

EBERLY, J.

This is an action by the Glenn E. Smith Company, a copartnership, as plaintiffs, to recover from the United States Fidelity & Guaranty Company expenses of litigation, including attorney's fees, incurred in defending a civil action brought against such Smith company and others in the district court for Burt county, Nebraska, by one Dollie Spielman. This present suit is based upon a contractors' public liability policy issued by the defendant insurance company to plaintiffs, and the determining question is whether the cause of action set forth in plaintiffs' petition is within the coverage of this policy as defined by its terms. The judgment of the district court was adverse to the contention of plaintiffs, and they appeal.

The applicable provisions of the instrument in suit, so far as relate to the present controversy, include the following:

"No. PC 13279. United States Fidelity and Guaranty Company, Baltimore, Maryland. A stock company (hereinafter called the company).

"In consideration of the premium and of the statements which are set forth in the Schedule of Statements, does hereby agree with the Assured named in the Schedule of Statements as follows:

"Agreements. *Insurance Provided.* I. To settle and/or defend in the manner hereinafter set forth all claims resulting from liability imposed upon the Assured by law for damages on account of bodily injuries, including death at any time resulting therefrom, accidentally suffered or alleged to have been suffered within the policy period defined in Statement 2 by any person or persons other than em-

ployees of the Assured, by reason of and during the progress of the work described in Statement 4 at the places named therein and elsewhere, if caused by employees of the Assured engaged as such in said operations at said places; but who are required in the discharge of their duties to be from time to time at other places, except driving or using any vehicle or automobile or any draught animal or loading or unloading any such vehicle.

"*Defense.* II. To defend in the name and on behalf of the Assured any suit brought against the Assured to enforce a claim, whether groundless or not, for damages on account of bodily injuries, including death at any time resulting therefrom, accidentally suffered or alleged to have been suffered by any person or persons other than employees of the Assured. * * *

"The foregoing agreements are subject to the following conditions:

"*Exclusions. Condition A.* This policy shall not cover loss from liability for, or any suit based on, injuries or death: * * * (4) Caused by accidents occurring after the final completion of the work performed by the Assured at the place of occurrence of such accidents."

"The policy period" defined in "Statement 2" as referred to in "Agreements I" above set forth, expressly refers to Item 2 of the "Schedule of Statements" contained in the policy in suit, which expressly provides:

"Item 2. The policy period (unless sooner terminated by cancelation) shall be from June 20, 1934, to June 20, 1935, at twelve and one minute o'clock a. m. standard time at the Assured's address."

The evidence in the record discloses that Glenn E. Smith and Phil K. Smith, plaintiffs, were and are copartners engaged in the contracting business in Lincoln, Nebraska, in the name of the Glenn E. Smith Company, and that neither of such Smiths is a resident of Burt county in this state. The United States Fidelity & Guaranty Company is a foreign corporation, legally engaged in the insurance business in the state of Nebraska. For several years prior to June

20, 1934, the defendant company had issued to the plaintiffs annually a policy of insurance, commonly known as a "Contractors' Public Liability Policy." On June 20, 1934, the defendant company issued to the plaintiffs, as copartners, the policy here in suit. From this policy we have quoted, as applicable to this controversy, the provisions hereinbefore set forth.

It appears that plaintiffs Smith and E. J. Wilson & Sons entered into separate, independent, and unrelated contracts with the department of roads and irrigation of the state of Nebraska on October 1, 1934, in connection with a public road project in Burt county, Nebraska. Under the terms of these contracts plaintiffs Smith were to install culverts and Wilson & Sons were to do the grading. Plaintiffs Smith entered upon the work specified in their contract with the state on October 8, 1934, completed it, and moved all equipment owned or used by them from this job before December 31, 1934, and the work performed by them was duly approved and accepted by the state, and they received the final payment for the work performed and completed by them on April 18, 1935. On May 1, 1935, Dollie Spielman, riding in an automobile over the road grade in the public highway and across and over a culvert therein situated, all of which being within the "project" to which the several contracts of the parties hereinbefore set forth related, claimed to have received injuries by reason of the dangerous construction thereof, and sued the plaintiffs Smith, copartners doing business as the Glenn E. Smith Company, and Wilson & Sons, jointly, in the district court for Burt county. The only service of process upon the Smiths attempted was made outside of Burt county, and in Lancaster county, Nebraska. The validity of this service was challenged by the Smiths by special appearance, based on the claim of improper joinder, and alleging that there was no joint liability with the other defendants in the case. The special appearance thus made was first overruled by the trial court. It was preserved in their answer, however, and upon a later hearing on the merits it was determined by the district court for Burt

county in favor of the Glenn E. Smith Company; that court finally adjudging, "that the motion of the defendants Glenn E. Smith Company should be and the same hereby is sustained, finds that service on the defendants Glenn E. Smith and Company in Lancaster county, Nebraska, is void and without jurisdiction, and that the court has no jurisdiction." The court's final determination being that it was without jurisdiction, its first or interlocutory judgment overruling the challenge thereto by special appearance may not be made the basis of a claim of *res judicata.* It is only the final judgment of a court of competent jurisdiction that affords a just basis for that contention. "It is essential to the operation of the rule of *res judicata* that a competent tribunal possessing the requisite jurisdiction has, by final judgment between the same parties or their privies, adjudicated the identical point or question in issue." 23 Standard Ency. of Procedure, 11.

The plaintiffs Smith, after the institution of the Spielman suit against them in Burt county, Nebraska, in which they were named as defendants, made due demand upon the United States Fidelity & Guaranty Company that it defend them as required by the terms of policy No. PC 13279 theretofore issued to them. This the insurance company refused to do, claiming that there was no coverage due to the fact that the Spielman accident which happened on May 1, 1935, had not occurred during the "progress of the work" as stipulated in *"Condition A* (4)" above quoted.

In consideration of the questions presented by the present record, it is to be remembered that an insurance policy is a contract. *Stephenson v. Germania Fire Ins. Co.,* 100 Neb. 456, 160 N. W. 962. Where there is no uncertainty as to its meaning and the same is legal and not opposed to public policy, an insurance contract will be enforced as it is made. *Cilek v. New York Life Ins. Co.,* 95 Neb. 274, 145 N. W. 693. See, also, *Stephenson v. Germania Fire Ins. Co., supra; Hamblin v. Equitable Life Assurance Society,* 124 Neb. 841, 248 N. W. 397; *Himelbloom v. Metropolitan Life Ins. Co.,* 128 Neb. 52, 257 N. W. 525; *Rye v. New York Life Ins. Co.,* 88 Neb. 707, 130 N. W. 434.

And in construing terms used in a policy of insurance, they are to be taken in their plain, ordinary sense. *Hamilton v. Mutual Benefit Health & Accident Ass'n*, 133 Neb. 464, 275 N. W. 863.

So, also, in construing a written instrument for the purpose of ascertaining the intention of the parties, resort must be had to the instrument as a whole and, if possible, effect must be given to every part thereof. *Turner v. City of Fremont*, 159 Fed. 221, affirmed in 170 Fed. 259. See, also, *Lawton v. Fonner*, 59 Neb. 214, 80 N. W. 808; *McGavock v. Omaha Nat. Bank*, 64 Neb. 440, 90 N. W. 230. For it is the duty of the court, if possible, to give effect to all the provisions of a contract. *Wilson v. Perry*, 110 Neb. 535, 194 N. W. 455.

The unquestioned rule is, "A writing is interpreted as a whole and all writings forming part of the same transaction are interpreted together." 1 Restatement, Contracts, sec. 235.

In this connection, it must also be admitted that the parties to a contract of insurance may contract for any lawful coverage. An insurance company has the right to limit its liability and to impose restrictions and conditions upon its contractual obligations not inconsistent with public policy. 1 Couch, Cyc. of Ins. Law, sec. 57; *Cosgrove v. National Casualty Co.*, 177 Wash. 211, 31 Pac. (2d) 80.

In the examination of the first clause of the policy heretofore quoted, we note the presence of the words, "or defend in the manner hereinafter set forth," found in "Agreements. *Insurance Provided.* I," and fairly comprised and included therein by express reference are the subsequent provisions of the policy contained in "Agreements. *Defense.* II" and in "*Exclusions. Condition A.*" When these three paragraphs are read together as connected parts of the same instrument, as required by the authorities hereinbefore cited, it is plain that this policy of insurance we are examining contains neither ambiguity, uncertainty, nor inconsistency. The language of this contract, considered as an entirety and taken in its plain, ordinary sense, clearly expressed the

agreement of the parties thereto, that the insurance provided therein, including the duty of the insurer to defend against a claim "whether groundless or not," does not contemplate or require the defense of a claim against the assured by the insurer, "resulting from liability imposed upon the Assured by law for damages on account of bodily injuries, including death at any time resulting therefrom, accidentally suffered or alleged to have been suffered within the policy period," when such causative accident did not occur or is not claimed to have occurred "during the progress of the work." It is unquestioned in the record that the contract of the Glenn E. Smith Company, a copartnership, with the department of roads and irrigation of the state of Nebraska, in connection with a road project in Burt county, Nebraska, was entered into October 1, 1934, which specified the work to be performed by the Smiths thereunder, and the insurance policy in suit was obtained to cover the requirement of the statute relating to the making of this public improvement. The uncontradicted evidence also discloses that this contracted work was entirely accomplished and completed by the Smith company and all property owned or used by that company in connection therewith was removed from the "project" and from Burt county, Nebraska, before December 31, 1934. It is also fairly established that this construction and work by the Smith company, so completed, furnished and performed by them, had been inspected, approved, delivered to, and accepted by the agency of the state of Nebraska above named prior to the 31st day of December, 1934, and the final and complete payment therefor had been made on April 18, 1935. The accident alleged by Dollie Spielman admittedly occurred on May 1, 1935. It is obvious, therefore, that the claim for damages on account of bodily injuries accidentally suffered by Dollie Spielman had not occurred during the "progress of the work" which had been fully performed and completed by the Glenn E. Smith Company long prior to the date the accident complained of had been sustained. The damages claimed by her were, therefore, not within the coverage provided for by the pol-

icy in suit and no recovery can be sustained thereon against the United States Fidelity & Guaranty Company.

This conclusion, in view of all the circumstances involved in this case, is quite in harmony with the well-established principle applicable to the class of litigation here under consideration that an insurer is under no obligation to defend a groundless case against the insured when it would not be liable under its contract for any recovery had therein. *Pickens v. Maryland Casualty Co.*, 141 Neb. 105, 2 N. W. (2d) 593; *Kelly-Dempsey & Co. v. Century Indemnity Co.*, 77 Fed. (2d) 85; *Ocean Accident & Guarantee Corporation v. Washington Brick & Terra Cotta Co.*, 148 Va. 829, 139 S. E. 513; *Morgan v. New York Casualty Co.*, 54 Ga. App. 620, 188 S. E. 581; *Treadwell Co. v. United States Fidelity & Guaranty Co.*, 275 N. Y. 158, 9 N. E. (2d) 818; *United States Fidelity & Guaranty Co. v. Baldwin Motor Co.*, 34 S. W. (2d) (Tex. Com. App.) 815; *Texas Indemnity Ins. Co. v. McLelland*, 80 S. W. (2d) (Tex. Civ. App.) 1101; *Mitzner v. Fidelity & Casualty Co.*, 94 Ind. App. 362, 154 N. E. 881; *United Waste Mfg. Co. v. Maryland Casualty Co.*, 85 Misc. 539, 148 N. Y. Supp. 852; *Kramarczyk v. Jontz*, 282 Mich. 208, 275 N. W. 822; *Daniel v. State Farm Mutual Ins. Co.*, 233 Mo. App. 1081, 130 S. W. (2d) 244; *American Mutual Liability Ins. Co. v. Chadosh*, 123 N. J. Law, 81, 8 Atl. (2d) 64.

Appellants also in their brief question "whether the policy (in the instant case) is to be construed in accordance with the desire of the insured for coverage as expressed by them to the insurer's agent." The question propounded is fully answered by well-established rules of the common law, in effect, that when "any contract, agreement, or undertaking has been reduced to writing, and is evidenced by a document or series of documents, the contents of such documents cannot be contradicted, altered, added to, or varied by parol or extrinsic evidence." 22 C. J. 1070. See, also, *Waters v. Phelps*, 81 Neb. 674, 116 N. W. 783; *Gandy v. Wiltse*, 79 Neb. 280, 112 N. W. 569; *Apking v. Hoefer*, 74 Neb. 325, 104 N. W. 177.

In a case where the question involved was similar to that here presented, this court announced as the controlling principle that, "Where a contractual relation exists by virtue of a written contract expressed in clear and unambiguous language, the court will not look further to construe it." *Farmers Educational and Cooperative Union v. Farmers Educational and Cooperative State Union,* 133 Neb. 397, 275 N. W. 464.

It is only in connection with the attempt on part of plaintiff to secure a reformation of the policy in suit that the subject of parol evidence becomes material. However, here fraud is not alleged by the plaintiffs as ground for this relief. Plaintiffs' claim for reformation is predicated solely on alleged "mistake." This, the evidence adduced in this case wholly fails to establish. A preponderance of evidence sufficient to justify reformation of a contract in writing on the ground of mutual mistake requires proof that is clear, convincing and satisfactory (*Paine-Fishburn Granite Co. v. Reynoldson,* 115 Neb. 520, 213 N. W. 750), and must establish that the mutual mistake involved is common to both parties, each laboring under the same misconception. *Paine-Fishburn Granite Co. v. Reynoldson, supra;* 2 Cooley, Briefs on Insurance (2d ed.) 1429; 23 R. C. L. 365, sec. 65.

On this subject, in the class of cases under consideration, well-considered cases have determined that, in an action for reformation, where fraud was not alleged or proved, where the policy issued was the only one the agent intended to issue and was the standard form of policy and the only one he had authority to issue, this shows that there was no meeting of minds in an antecedent agreement necessary for reformation. *Kelly-Dempsey & Co. v. Century Indemnity Co.,* 77 Fed. (2d) 85.

A consideration of all the evidence in the record before us sustains the conclusion that the cause of action set forth in plaintiffs' petition is not within the coverage of the policy sued upon and that they are not entitled to a reformation thereof.

The judgment of the district court is, therefore, correct, and it is

AFFIRMED.

MARY ANN KEEFE, INCOMPETENT, APPELLANT, V. MILLEDGE F. GRACE ET AL., APPELLEES.
6 N. W. (2d) 59

FILED OCTOBER 30, 1942. No. 31495.

1. **Guardian and Ward.** "The death of the ward necessarily terminates the guardianship, and thereupon all powers and duties of the guardian cease, except the duty, which remains, to make a proper accounting and settlement in the probate court." 28 C. J. 1096.
2. **Abatement and Revival.** "The provisions of the Code of Civil Procedure relative to abatement and revivor of actions are applicable to causes brought to this court." *Schmitt & Bro. Co. v. Mahoney*, 60 Neb. 20, 82 N. W. 99.
3. ———. "Under our system of practice, where a party dies or his authority as a representative ceases, two methods of revivor coexist. A conditional order of revivor may issue and be served and the order made final, unless cause be shown against it, or the court may substitute the new party and supplemental pleadings may be filed and summons served. *Fox v. Abbott*, 12 Neb. 328; *Rakes v. Brown*, 34 Neb. 304, 312." *Missouri P. R. Co. v. Fox*, 56 Neb. 746, 77 N. W. 130.
4. ———. "When a party to an appellate proceeding dies, and his interest in the litigation passes to his heirs, the heirs are necessary parties to the proceeding." *Urlau v. Ruhe*, 63 Neb. 883, 89 N. W. 427.
5. ———. "Proceedings to revive a judgment should not be had in the name of an administrator, except where the administrator has succeeded to the rights of the decedent." *Vogt v. Binder*, 76 Neb. 361, 107 N. W. 383.

APPEAL from the district court for Hall county: WILLIAM F. SPIKES, JUDGE. *Motion to revive denied.*

Harold A. Prince and *Thomas W. Lanigan*, for appellant.

H. G. Wellensiek and *A. J. Luebs, contra.*

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

EBERLY, J.

This action was commenced by William P. Mullen, as guardian duly appointed by the probate court of Hall county, Nebraska, and also as next friend of Mary Ann Keefe, in the district court for Hall county on November 14, 1941, against the grantees of two warranty deeds, and others, such deeds being executed by Mary Ann Keefe and purporting to convey to the grantees therein set forth certain valuable farm lands in Hall county, Nebraska. These deeds were executed on March 12, 1934, and were recorded on March 14, 1934. It is alleged that the execution of such deeds was secured by fraud and imposition practiced by and for the benefit of the grantees named upon Mary Ann Keefe, an incompetent, and then "approximately 81 years of age." Issues were joined and trial was had to the district court, and on June 4, 1942, a decree was entered wherein that court "finds generally in favor of the defendants and each of them, and against the plaintiff." Plaintiff's motion for a new trial was overruled on June 6, 1942. Thereupon Mary Ann Keefe, an incompetent, by William P. Mullen, her guardian and next friend, on June 20, 1942, filed notice of intention to appeal to the supreme court, and on August 31, 1942, filed appeal bond which was duly approved. The transcript on appeal was duly filed in the office of the clerk of the supreme court on September 8, 1942. It appears that Mary Ann Keefe, late of Hall county, Nebraska, departed this life on June 23, 1942. On September 14, 1942, there was filed in this cause in the supreme court of Nebraska, by R. Frederick Sinkbeil, as special administrator of the estate of Mary Ann Keefe, deceased, suggestion of the death of Mary Ann Keefe, with his motion that said cause may be revived in the name of R. Frederick Sinkbeil, special administrator of the estate of Mary Ann Keefe. Notice of the pendency of this motion was served only on H. G. Wellensiek and A. J. Luebs, attorneys for appellees. Thereupon

appellees by special appearance challenged the sufficiency of the service of the notice.

It will be conceded, of course, that "The death of the ward necessarily terminates the guardianship, and thereupon all powers and duties of the guardian cease, except the duty, which remains, to make a proper accounting and settlement in the probate court." 28 C. J. 1096. This, of course, necessitates revivor of the action by the proper parties.

Sections 20-1406 and 20-1407, Comp. St. 1929, provide for a revivor by motion. Also, section 20-1406 provides for the revivor of actions by conditional order. Section 20-1408 provides if the revivor is not made by consent the conditional order "shall be served in the same manner, and returned within the same time, as a summons, upon the *party adverse* to the one making the motion."

Section 20-1912, Comp. St. Supp. 1941, provides, in part, for "a notice of intention to prosecute such appeal signed by the appellant * * * or his * * * attorney of record, and by depositing with the clerk of the district court the docket fee required by law in appeals to the supreme court. An appeal shall be deemed perfected, and the supreme court shall have jurisdiction of the cause, when such notice of appeal shall have been filed and such docket fee deposited in the office of the clerk of the district court," etc.

These preliminary prescribed steps in taking the appeal in this matter are unchallenged. So, accepting the situation as thus presented by the record, we deem the appeal properly lodged in this court before the death of the ward.

It appears that the provisions of the Civil Code relative to abatement and revivor of actions are applicable to revivor of actions in this court. *Schmitt & Bro. Co. v. Mahoney,* 60 Neb. 20, 82 N. W. 99; *Sheibley v. Nelson,* 83 Neb. 501, 119 N. W. 1124. However, in *Missouri P. R. Co. v. Fox,* 56 Neb. 746, 77 N. W. 130, we held:

"When a revivor of an action is sought by conditional order, the hearing in pursuance thereof is the proper occasion to try the right of the successor in whose name revivor is at-

tempted. By the absolute order that matter becomes *res judicata* and cannot be retried with the case on its merits.

"Service of a conditional order of revivor must be in the same manner as a summons, and it seems that service upon the attorney of record is insufficient unless a summons may be so served."

In the opinion in such *Fox* case, it was stated:

"Under our system of practice, where a party dies or his authority as a representative ceases, two methods of revivor coexist. A conditional order of revivor may issue and be served and the order made final, unless cause be shown against it, or the court may substitute the new party and supplemental pleadings may be filed and summons served. *Fox v. Abbott,* 12 Neb. 328; *Rakes v. Brown,* 34 Neb. 304, 312."

It will be noted that no supplemental pleadings were filed in this case and no conditional order was issued and served herein. It would seem that this court is without jurisdiction to revive this proceeding at the present time because of lack of proper service, and also because the procedure is not instituted by proper and necessary parties in interest.

In addition, in *Urlau v. Ruhe,* 63 Neb. 883, 89 N. W. 427, we held: "When a party to an appellate proceeding dies, and his interest in the litigation passes to his heirs, the heirs are necessary parties to the proceeding."

Also, in *Vogt v. Binder,* 76 Neb. 361, 107 N. W. 383, the rule was announced: "Proceedings to revive a judgment should not be had in the name of an administrator, except where the administrator has succeeded to the rights of the decedent."

In the instant case the action sought to be revived involved solely the legality of certain deeds. No claim is made that the action was necessary to provide funds for the payment of debts and claims against the estate. We are inclined to the view that upon the death of Mary Ann Keefe, the incompetent ward, any title to real estate involved which was vested in her passed to her heirs or devisees, and the special administrator appointed after her death, under

these circumstances, was wholly without power or right to maintain the action.

It is, therefore, ordered that the challenge to the jurisdiction of this court to revive this action in this proceeding at this time be sustained, and the motion to revive presented by R. Frederick Sinkbeil, as special administrator of the estate of Mary Ann Keefe, deceased, be denied.

MOTION TO REVIVE DENIED.

THOMAS STANDIDGE, APPELLANT, V. MAE CREVELING ET AL., APPELLEES.

6 N. W. (2d) 56

FILED OCTOBER 30, 1942. No. 31424.

Trusts. Record examined, and *held*, evidence insufficient to impress a constructive trust on real estate involved, or to establish a fiduciary relation between the plaintiff and defendants.

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

Charles R. Shopp and *Meeker & Curtis*, for appellant.

G. B. Hastings and *Clyde Anderson, contra.*

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

MESSMORE, J.

Plaintiff seeks, in an equity action, to impress a constructive trust on real estate, in that a fiduciary relation existed between the plaintiff and defendants, and that the defendants, using plaintiff's money inequitably, purchased real estate, taking title thereto in their names. The trial court found for the defendants and dismissed the plaintiff's action. From this judgment plaintiff appeals.

The pleadings detail the factual situation, are sufficient in form to raise the issue involved and denial thereof, and in the interest of brevity will not be detailed in the opinion. The record discloses: Plaintiff, 95 years of age at the time

of the trial, and a resident of Imperial for 55 years, owned considerable property, among which were a residence, in which he lived alone, and another house, one vacant lot removed from his residence, where the defendants resided, for which they paid as rent $15 a month from July, 1934, to April, 1940. Defendant Mae Creveling, from and since the time she moved onto the plaintiff's premises, performed certain services for him. On occasions she mowed his lawn, did his washing and ironing, cleaned his house, swept the snow from his sidewalks, took him occasionally to the cemetery, where his wife, who had died about seven years previously, was buried; helped him to sow down the cemetery lot, and performed other small services and courtesies which need not be set out. She received small sums of money for some of these services. She assisted in the payment of his taxes, telephone and other bills, and on occasions made out checks for him. The record reflects two checks, totaling $25, received from him by her. It is not clear for what purpose the checks were given; she testified they were for services she had rendered and money she had loaned the plaintiff on occasional trips when she had taken him to Sterling and Holyoke, Colorado, and to North Platte and McCook, when convenient for him to go, and on these occasions she generally received money from him for gasoline and meals. They were trips on which he transacted some business. About six years previous to the trial, the plaintiff gave her some household furniture, on one occasion a piano, and on another supplied her with sufficient money to obtain for herself a wrist watch. These matters are detailed in the record, but we deem the foregoing sufficient.

The principal item is with reference to two checks, one in the amount of $775 and the other in the amount of $200. These checks had to do with what was known as the Bremer property which was to be sold at referee's sale, and was finally bought in by one of the Bremers. Defendant Mae Creveling negotiated a deal with the purchaser to buy the property for $2,500 and payment of some delinquent taxes, and costs, and made application for an F. H. A. loan in the

sum of $2,000. The balance owing constituted the amount of the two checks. When plaintiff was asked about the checks, he replied that he gave them to her and "that was all there was to it," and indicated, but not specifically, in his testimony that he expected to have the property for which the checks were given, and that defendants would rent it. Plaintiff's son, living in Chicago, called upon him periodically and was there on or about the 12th of April, 1940, which was plaintiff's birthday, and a conversation at that time between the son and defendant Mae Creveling appears in the record. We here set out the substance of these conversations for the reason that, if the plaintiff has established a cause of action for a trust, as pleaded, this evidence will be sufficient to either sustain or deny it.

The following is the testimony of defendant Mae Creveling as to the conversation of April 12, 1940: "He (plaintiff) came to the door, knocked; I went to the door; he came into the kitchen. He says, 'What is this I hear about you purchasing the Bremer property?' I said, 'I haven't purchased it yet, but I did tell John Bremer if he bought it I would take it off of his hands.' Mr. Standidge said, 'In order to do that you have to have some money.' I said, 'Yes, I would.' He said, 'You didn't know this little house here—there has been a deed made out in escrow to you for three years;' and he said, 'Rather than have trouble from this deed, I have decided to give you the money you will need over and above your loan to buy this home.' Q. What did you say to that? A. Well, that surprised me. I had no idea of his intentions at all. I told him that would be fine and thanked him; told him I couldn't use no money because I had applied for no loan whatever and didn't know how much money I would need. * * * Q. Now, what, if anything else, did Mr. Standidge say about wanting to make you this gift? A. He said he had always been going to help me, give me something for what I had done for him; he wanted to see me get a start; he thought more of me than a lot of people, and he believed he would give me money then for what I had been doing for him." As to another conversation in plaintiff's home, wit-

ness was asked: "What, if anything, was said relative to his purchasing the Bremer property, if you recall? A. When I asked him if he would buy it and me rent it from him he said he was land and property poor; he didn't care for any more property at all. He said he wished it was his home that was selling, and he was sure of getting it sold." The witness testified as to a later conversation, June 28, 1940, in plaintiff's home, after the loan had been negotiated for the purchase of the property, as follows: "A. Yes; I told him that the loan had finally come and, well, we was going to complete the sale that day and I would need—he told me any time I needed the rest of the money—what the loan didn't cover—to come back. I told him I was ready for the rest of my money." This referred to the $775. She testified: "I told him the amount of money that was needed to be in the bank was seven hundred seventy-five dollars, and that was to be on deposit in order for me to get my loan; and he said he was going to help. I told him I was needing the money that day. He said he was going to give this to me." The check was made out that day and deposited in the Farmers & Merchants Bank in her name and remained there from June to November. Referring again to the conversation at the time the check was given, the witness testified: "Yes; he said he was a man of his word; he had wanted to help me, he was going to help me, and here was my money. He said he had been wanting to make a gift to me for the work I had been doing and the kindness I had shown him; he would rather see me get ahead than any one; he wanted to help me, gave me my check. * * * He said if this wasn't enough to come back and he would be glad to give me what more I was needing; in finishing up the sale any time more money was needed, to come to him, he would give it to me. * * * He says, 'Do you think this is going to be enough money?' I said, 'Enough for now until they go a little farther, see what more is needed;' he said he would be glad to help me then if I needed more."

Mrs. Creveling testified to another conversation on November 22, 1940, at the plaintiff's home. She stated that

she went into his home and "told him the loan had come and that I was needing two hundred dollars more to complete what I was to have on deposit to complete the sale; and that he had said he would help me; and he gave me two hundred dollars more to complete this and said he was glad that he could." In this connection the record reflects some conversations in that this defendant told the plaintiff that the second amount ($200) was to dig a sewer ditch, which was required by the Federal Housing Administration. She later explained that the sewer ditch was not dug; she had not obtained permission from the city, and the F. H. A. loan passed without this requirement. She further testified: "When he handed me this check, he said, 'I just wish that I could be alive when you get your loan paid off and could step into your home and see you in your home.' He says, 'I feel like you have got something to work for now.'" The $200 was likewise deposited in the Farmers & Merchants Bank.

Defendants moved to the Bremer property April 29, 1940, and continued to visit the plaintiff at his home two or three times a week from April to November. No demand was made on Mrs. Creveling by the plaintiff for a return of this money, or deed requested for the premises, and the only notice she claims to have had was the filing of this action. Her husband, who was standing in the doorway of the dining-room and about to proceed to his work at the time, corroborates her in testimony concerning the conversation of April 12, 1940. All of these conversations are detailed and are substantially alike on the cross-examination, with little variation.

Some contention is made with reference to plaintiff's son being out in the yard at the time of the conversation on or about April 12. This is denied by the son, inasmuch as he was en route from Chicago to Imperial at that time. The conversation, as testified by the son, was on the 20th of December, 1940, in the bedroom of his father's home. The son testified that he called Mrs. Creveling by telephone and told her that his father had asked that she come over. She

said she would come, and later called, stating that she had company, "and asked if it was important that she should. I told her that it was; so finally she came over. My father * * * was in the bedroom when I heard somebody coming. I walked to the dining-room. She came in, rushed past me, said nothing whatever to me; rushed in. I followed her into the bedroom. She rushed over, kissed my father. I said, 'Don't you kiss my father; he's my father, not yours.' I said, 'What would you do if a sister of mine'—." We give the substance of the rest of this conversation: The son demanded that Mrs. Creveling return the money or the deed to the father and stated that his father made the same request. Mrs. Creveling said he did not have any papers and she did not think he could do a thing about it. In testifying as to this conversation, Mrs. Creveling said she did make the remark that the plaintiff did not have any papers and that the money was a gift. The two versions of the conversation cannot be reconciled. The foregoing constitutes a résumé of the pertinent evidence.

The case is tried *de novo* in this court. A careful reading of the record is convincing that the plaintiff failed to prove the allegations of his petition by a preponderance of the evidence.

Cases cited and relied on by plaintiff are: *Stieber v. Vanderlip,* 136 Neb. 862, 287 N. W. 773, *Wixson v. Nebraska Conference Ass'n,* 122 Neb. 771, 241 N. W. 532, and other cases, presenting a much stronger state of facts, disclosing the confidence reposed in the person sought to be charged, and establishing a fiduciary relationship.

The plaintiff testified that he had no affection for this young married woman, 34 years of age and 60 years younger than himself. He said she hugged him a couple of times and kissed him oftener. He had confidence in her, he stated, to a certain extent; in fact, for his age he did a very good job of holding onto his property and attending to his business. True, there is evidence that he did not remember as well as he did formerly, especially so in the last year and a half or two years; but, had the defendant Mae Creveling

been a designing woman and had he placed full confidence in her, as disclosed by the facts in the cases cited by plaintiff, he would not still be owning 560 acres of land and town properties.

In weighing conflicting testimony in equity cases, this court will consider the fact that the trial judge observed the witnesses, their general demeanor while testifying, and reached a conclusion as to which testimony was the more credible. *Johnson v. Erickson*, 110 Neb. 511, 194 N. W. 670; *Ellingwood v. Schellberg*, 121 Neb. 207, 236 N. W. 451; *Eichholz v. Luikart*, 128 Neb. 368, 258 N. W. 869; *Cunningham v. Armour & Co.*, 133 Neb. 598, 276 N. W. 393; *Kennedy v. Buffalo County*, 134 Neb. 744, 279 N. W. 464; *Hild v. Hild*, 135 Neb. 896, 284 N. W. 730. The foregoing rule applies in the case at bar, and under the record we conclude that the judgment of the trial court is correct.

AFFIRMED.

EDWARD WILLIAM OLANDER, APPELLANT, V. CITY OF OMAHA, APPELLEE.

6 N. W. (2d) 62

FILED OCTOBER 30, 1942. No. 31458.

1. **Eminent Domain.** Where a petition alleges that, notwithstanding the condemnation proceedings and the award therein are null and void and without force and effect so far as the plaintiff is concerned, and he elects to ratify the said award, such election is, in fact, a ratification of the condemnation proceedings for the purpose of participating in the distribution of the award, the plaintiff claiming an interest therein.
2. **Evidence.** Where plaintiff introduces in evidence a warranty deed, vesting the entire title in the survivor, showing that the property was conveyed to his brother and wife and himself as joint tenants and not as tenants in common, such deed is the best evidence of the plaintiff's title and interest in the real estate described therein.
3. **Joint Tenancy.** "While as between joint tenancies and tenancies in common the law prefers the latter, yet, if the purpose to create a joint tenancy is clearly expressed in a deed of conveyance of

real estate, the law will permit the intention of the parties to control, and a joint tenancy with right of survivorship will be created." *Sanderson v. Everson*, 93 Neb. 606, 141 N. W. 1025.

4. ———. The right to create title in real estate by joint tenancy, when clearly and definitely expressed in the conveyance, has never been abridged in this state. *Arthur v. Arthur*, 115 Neb. 781, 215 N. W. 117.

5. ———. Where a conveyance fails to show that joint tenants in possession of real estate did not improve such real estate or pay the cost of the improvements thereon, and, further, that one of the joint tenants when residing thereon did not improve such real estate, but that all of such joint tenants have an equal interest, as disclosed by the deed, all of such joint tenants have an equal ownership in the improvements on such real estate, there being no evidence contrary to this conception.

6. **Evidence.** A mortgage in evidence disclosing that plaintiff with two other joint tenants signed the same, such mortgage is the best evidence of the plaintiff's liability thereunder and the amount to be taken from his part of the proceeds of the distribution of an award in condemnation proceedings in payment of the mortgage debt.

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

D. O. Dwyer and *W. L. Dwyer*, for appellant.

Harold C. Linahan, W. W. Wenstrand, G. H. Seig and *Edward Sklenicka, contra.*

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

MESSMORE, J.

Plaintiff brought this action, claiming one-half interest in property described in his petition. The city of Omaha, by condemnation proceedings, condemned the property, gave no notice to plaintiff, nor made him a party to such proceedings. In the condemnation proceedings an award of $1,740.27 was made to Carl Walter Olander, Bernice Olander, and the Byron Reed Company, as their interests may appear. Plaintiff alleges that the property was purchased by him and his brother, Carl Walter Olander, March 1, 1937,

for the sum of $950, the plaintiff paying $500 in cash, the balance of $450 being represented by a mortgage to the Byron Reed Company, which was to be paid in monthly instalments by Carl Walter Olander as his interest in the property, and he was to pay the taxes and assessments thereon, as he was occupying the premises as his home; that, notwithstanding the condemnation proceedings and the award thereunder are null and void and without force and effect so far as plaintiff is concerned, "he hereby elects to ratify the amount of said award" and claims of defendant city the amount of $870.13, half of the appraised value of the property, for which he prays judgment. The plaintiff asked leave in open court to amend the petition by interlining after the word "ratify" the following, "the amount of," thereby making the petition read "hereby elects to ratify the amount of said award." The answer is a general denial.

The record discloses a warranty deed vesting the entire title in the survivor, showing that the property was conveyed to Carl Walter Olander and Bernice Olander, husband and wife, and Edward William Olander, as joint tenants and not as tenants in common. Then the real estate is described, and it is provided:

"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.

"To have and to hold the above described premises * * * unto the said grantees as joint tenants, and not as tenants in common * * * ."

There is evidence in the record, which was objected to, that the plaintiff paid $500 in cash for the premises and that his brother agreed to pay the Byron Reed Company $450 or more, in monthly payments, with interest, and to pay the taxes, for the reason that he was living on the premises. The record discloses a mortgage to the Byron Reed Company, from whom plaintiff purchased the property, dated March 1, 1937, given by Carl Walter Olander and Bernice Olander, husband and wife, and Edward William

Olander, single, in the amount of $450, signed by Carl Walter Olander and Bernice Olander and the plaintiff, Edward William Olander.

The court found that the plaintiff was a joint tenant with Carl Walter Olander and Bernice Olander, and that he had an undivided one-third interest in and to the real estate only; gave him no interest in the improvements, and found that $1,250 constituted the appraiser's award on the real estate and $550 on the improvements, and further found that the plaintiff was jointly liable with his cotenants on the mortgage in favor of the Byron Reed Company to the extent of $233.62, and that said sum was paid to the mortgagee from the proceeds of the award, and that one-third thereof should be deducted from the plaintiff's interest in and to the real estate, making a finding for the plaintiff in the sum of $339. From this order and judgment the plaintiff appeals.

The record is void of evidence as to who placed the improvements on the premises. There is a statement in the record that the plaintiff did not pay for the improvements, and there is nothing to show that Carl Walter Olander or his wife paid for them. In any event, there is insufficient evidence upon which the court could base a finding that the plaintiff was not entitled to share to the extent of at least one-third interest in the improvements. The authorities cited by the defendant city are not in point, viz.: In the case of *Nelson's Heirs v. Clay's Heirs*, 7 J. J. Marsh. (Ky.) * 138, the court held: "In partition between joint tenants, or tenants in common, one having entered upon the land and improved it, he will be protected by the court, and his improvements assigned to him if practicable—making no allowance in division for the enhanced value of the land." And in *Campbell v. City of New Haven*, 101 Conn. 173, 125 Atl. 650, the court held: "If one erects improvements upon land which he occupies under actual or apparent authority and which is thereafter condemned for public purposes, he and not the owner of the land is entitled to compensation for the value of the improvements." It is clear the facts in the two

cases above are distinct and different from those in the case at bar, and the holdings therein are not applicable.

We conclude that under the circumstances of the instant case the plaintiff is entitled to one-third of the amount awarded for the improvements. This holding dispenses with plaintiff's contention with reference to the admissibility of testimony of an affirmative defense under a general denial.

It is clear that the deed is one of joint tenancy. In this connection, the elements of joint tenancy have been established; the deed discloses a unity of interest, a unity of title, a unity of time and a unity of possession. There is no evidence in the record to show that any of the elements in such estate are lacking; the deed is the competent proof of the plaintiff's interest, and an instrument that he is not privileged, by oral testimony, to modify or vacate under the circumstances as here presented.

In *Sanderson v. Everson*, 93 Neb. 606, 141 N. W. 1025, this court held: "While as between joint tenancies and tenancies in common the law prefers the latter, yet, if the purpose to create a joint tenancy is clearly expressed in a deed of conveyance of real estate, the law will permit the intention of the parties to control, and a joint tenancy with right of survivorship will be created." And this court has said that the right to create title in real estate by joint tenancy, when clearly and definitely expressed in the conveyance, has never been abridged in this state. See *Arthur v. Arthur*, 115 Neb. 781, 786, 215 N. W. 117.

We conclude that the court was correct in holding the plaintiff was a joint tenant and, as such, entitled to one-third of the award.

The contention is made with reference to the language of the petition, as herein set out, in so far as it applies to ratification, that the plaintiff did not in his petition ratify the taking, but merely accepted the amount of the award as a measure of the value of his interest in the property; nor is the acceptance of the amount of the award, as a measure of the value of the property, a ratification of one part of an un-

authorized act and a rejection of another part. The plaintiff has merely sued for damages for the trespass, and taken as the measure of his damages one-half of the value of the award. Whether or not the city, by negligence or inadvertence, eliminated the plaintiff is beside the question, under the circumstances. In order to participate in the distribution of the award, it is apparent, by the plaintiff's petition, that he must have intended to ratify the proceedings in condemnation.

The common legal definition of "ratify" is applicable: "To approve and sanction; to make valid; to confirm; to give sanction to." Black's Law Dictionary (3d ed.) p. 1496, and cases cited. " 'Ratify' * * * means to approve and sanction, to authorize, to confirm, to make valid." *Corbin Supply Co. v. Loftis*, 50 Ga. App. 309, 178 S. E. 185; 36 Words and Phrases (Perm. ed.) p. 138.

We conclude the plaintiff ratified the condemnation proceedings with the intent to assert his interest in the property as being one-half, and to obtain that one-half interest from the distribution of the proceeds of the award. The right of the court to make a deduction from the proceeds as against the joint tenants, as disclosed by the mortgage to the Byron Reed Company, cannot be seriously questioned. Suffice it to say that the plaintiff signed the mortgage as a party thereto and is bound thereby, and this instrument cannot be modified by oral testimony of the plaintiff as to what he claims his interest in the real estate to be.

That part of the judgment wherein the trial court held the plaintiff to be a joint tenant with Carl Walter Olander and Bernice Olander in the premises, and that part of the judgment making distribution for the amount of the mortgage due the Byron Reed Company, are affirmed. That part of the judgment in which the court denied plaintiff the right to participate in a distribution of the amount of the award for the improvements is reversed, and plaintiff is adjudged to be entitled to one-third interest in the improvements.

AFFIRMED IN PART AND REVERSED IN PART.

HELEN GORMLEY, APPELLANT, V. PEOPLES CAB, INC., APPELLEE.
6 N. W. (2d) 78

FILED OCTOBER 30, 1942. No. 31416.

1. **Trial.** Where there is a change of pleading accompanied by a material change of testimony which appears to have been made for the purpose of making a case against another defendant, justice requires that courts shall look beyond the bare allegations of the petition and the testimony given before challenge was made to its credibility.
2. ———. In a jury trial when the defentant moves the court for a directed verdict in his favor at the close of plaintiff's evidence, such motion must be treated as an admission of the truth of all material and relevant evidence favorable to plaintiff and of all proper inferences to be drawn therefrom, and if the evidence tends to sustain the allegations of the petition, and the petition states a cause of action, the case should be submitted to the jury.
3. ———. This rule, however, may not be permitted to apply when other evidence of the plaintiff demonstrates conclusively, or to a degree that the minds of reasonable men cannot differ thereon, that such evidence favorable to the plaintiff is incapable of belief.
4. **Appeal.** In order that a party may avail himself of error of the court in refusing to allow the witness of such party to answer a question, either an offer to prove the facts sought to be elicited must be made or the questions themselves must clearly indicate the materiality of the answers sought.

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

Paul I. Manhart and *M. J. Buckley*, for appellant.

Brown, Crossman, West, Barton & Fitch, contra.

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

YEAGER, J.

This is an action for damages for personal injuries by Helen Gormley, now Helen DeMare, plaintiff and appellant, against Peoples Cab, Inc., a corporation, defendant and appellee.

The case proceeded to trial to a jury and at the conclusion

of the evidence on behalf of the plaintiff, on motion of the defendant for a directed verdict or in the alternative that the petition of plaintiff be dismissed for want of evidence to sustain a cause of action, which motion was sustained, the action was dismissed. From this dismissal the plaintiff has appealed.

The petition on which the case was tried set forth substantially that on February 10, 1939, plaintiff was a passenger for hire in a taxicab of the defendant, which taxicab was being operated westward on St. Mary's avenue in Omaha, Nebraska; that when the taxicab reached a point just west of the intersection of Twenty-fourth avenue with St. Mary's avenue the driver thereof stopped the taxicab suddenly, without warning and negligently, and that because thereof the plaintiff was thrown about and injured. The character and extent of the alleged injuries are described in the petition.

The direct testimony of the plaintiff amply supported these allegations, and if there was nothing more to be considered we could say with unqualified assurance that the court erred in the rendition of the judgment in this case. However, from an examination of the entire sequence of events as disclosed by the record we are required to depart from this conclusion.

In the original petition in this action appellee herein was not made a defendant. The action as originally instituted was against one Howard Clark. In the petition plaintiff alleged that she was a passenger in the taxicab the same as was alleged in the petition on which the case was tried, but there she alleged that, after the taxicab had come to a full stop on account of traffic and street conditions, Clark negligently drove his automobile into the rear end of the taxicab, thus causing plaintiff to be thrown about in the taxicab and injured.

There is no rule of law and we can think of no rule of reason which would prevent her from changing the statement of her cause of action if in the light of full examination it was ascertained that the statement was contrary to the true

facts. *Peterson v. Omaha & C. B. Street R. Co.*, 134 Neb. 322, 278 N. W. 561. Where, however, there is a change of pleading accompanied by a material change of testimony which appears to have been made for the purpose of making a case against another defendant, simple justice requires that the courts shall look beyond the bare allegations of the petition and the testimony given before challenge was made to its credibility. *Peterson v. Omaha & C. B. Street R. Co., supra.*

The record examined in the light of the challenge to the good faith involved in the change in the pleading and the credibility of the testimony in support thereof discloses that within a short time after the original petition was filed, and about seven weeks after the accident, Clark took the deposition of the plaintiff, and at that time, when asked how the accident occurred, she stated that a minute or more after the taxicab had come to a full stop the Clark automobile ran into the taxicab from the rear and brought about the happenings and results described in the petition upon which the case here was tried. She not only admits that she so testified in the deposition, but she made a settlement with Clark for damages predicated thereon.

On cross-examination plaintiff admitted that she testified as her testimony appears in the deposition and substantially admits that all of such testimony was true and correct. She sought by her testimony on the trial of this case to avoid its effect by stating that all of the things alleged did happen when the Clark automobile struck the taxicab, but that the same things had previously happened when the taxicab suddenly stopped. She does not even differentiate between the injuries she claims were received from the alleged separate accidents.

The story, in the light of the entire record, is incredible. Clearly it was made to meet the exigencies of the situation in order to make a case for the plaintiff. Such conduct cannot be tolerated to the extent, when it is clearly apparent, of requiring a trial judge to submit the credibility of such testimony to a jury, and of permitting a party to mock law and justice.

It is the established law of this jurisdiction that on a jury trial when the defendant moves the court for a directed verdict in his favor at the close of plaintiff's evidence, such motion must be treated as an admission of the truth of all material and relevant evidence admitted favorable to plaintiff and all proper inferences to be drawn therefrom, and if the evidence tends to sustain the allegations of the petition, and the petition states a cause of action, the case should be submitted to the jury. *Rhoads v. Columbia Fire Underwriters Agency,* 128 Neb. 710, 260 N. W. 174. But this rule may not be permitted to apply when other evidence of the plaintiff demonstrates conclusively, or to a degree that the minds of reasonable men cannot differ thereon, that such evidence favorable to the plaintiff is incapable of belief. *Peterson v. Omaha & C. B. Street R. Co., supra.*

On the record the judgment of dismissal on the motion of the defendant was correct.

It is urged by appellant that the court erred in several instances in refusing to allow witnesses to answer questions propounded to them touching the issues presented. These assignments may not be considered here. In no instance where the subject of inquiry was material or relevant to the issues was an offer of proof of facts made, and the questions did not clearly indicate the materiality of the answers sought. In order that a party may avail himself of error of the court in refusing to allow the witness of such party to answer a question, either an offer to prove the facts sought to be elicited must be made or the questions themselves must clearly indicate the materiality of the answers sought. *Mordhorst v. Nebraska Telephone Co.,* 28 Neb. 610, 44 N. W. 469; *Barr v. City of Omaha,* 42 Neb. 341, 60 N. W. 591; *Nebraska Telephone Co. v. Jones,* 60 Neb. 396, 83 N. W. 197; *Wittenberg v. Mollyneaux,* 60 Neb. 583, 83 N. W. 842; *Bergfield v. Bergfield,* 124 Neb. 67, 245 N. W. 12.

Other errors are assigned, but in the view taken of those already discussed necessity does not arise to consider them.

The judgment of the district court is affirmed.

AFFIRMED.

FRED SLEDGE V. STATE OF NEBRASKA.
6 N. W. (2d) 76

FILED OCTOBER 30, 1942. No. 31452.

1. **Sodomy.** By section 28-920, Comp. St. 1929, the legislature extended the definition of the crime of sodomy so as to include both *per anum* and *per os* involvement.
2. **Criminal Law.** "Whoever aids, abets or procures another to commit any offense may be prosecuted and punished as if he were the principal offender." Comp. St. 1929, sec. 28-201.
3. **Indictment and Information.** A variance in the proof from an indictment or information for an offense as to name or description of any person described, or the description of any matter or thing named, is not ground for acquittal unless the trial court shall find that such variance is material to the merits of the case or may be prejudicial to the defendant.
4. **Criminal Law.** It is not prejudicially erroneous to allow an amendment to an information where there is a variance between the information and the proof as to a matter of description, where it would have been proper to submit the case to a jury without amendment notwithstanding the variance.
5. **Indictment and Information.** Where time is not an ingredient of a crime, a variance between the information and the proof is not fatal if the date proved is within the statute of limitations.
6. **Criminal Law.** The date of an offense is descriptive within the meaning of section 29-1502, Comp. St. 1929.

ERROR to the district court for Lancaster county: FREDERICK E. SHEPHERD, JUDGE. *Affirmed.*

C. E. Walsh, for plaintiff in error.

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

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

YEAGER, J.

This case comes to this court on petition in error from the district court for Lancaster county, Nebraska.

The plaintiff in error, who will be hereinafter referred to as defendant, was prosecuted on an information filed by the county attorney in the name of the State of Nebraska for

the crime of sodomy. He was tried to a jury, convicted as charged, and sentenced to serve a term of three years in the state penitentiary.

As grounds for reversal of the verdict and sentence the defendant assigns numerous errors.

The information in its original form charged in terms agreeable to the statute that the defendant committed the crime of sodomy on August 10, 1941.

The defendant contends that, assuming that the act complained of was performed, no crime was committed since such acts are not denounced as crimes by our statutes. The act complained of involved engagement of the mouth of defendant with the sexual organ of a thirteen-year-old boy who will be referred to as complaining witness. Defendant insists that the involvement must be of the sexual organ *per anum* with another human being; therefore, this claimed act having been *per os*, there was no crime.

Such an act committed prior to the enactment of our present statute was not a crime, since the earlier act contemplated only the common-law crime of sodomy. *Kinnan v. State*, 86 Neb. 234, 125 N. W. 594.

Section 28-920, Comp. St. 1929, which is the statute under which the defendant was prosecuted, and which follows, materially differs from the earlier statute and includes acts not contemplated thereby or by the common law:

"Whoever has carnal copulation with a beast, or in an opening of the body except sexual parts with another human being, shall be guilty of sodomy and shall be imprisoned in the penitentiary not more than twenty years."

A reading of the statute clearly discloses that this contention of the defendant that the statute contemplates only *per anum* involvement is baseless. Without doubt the legislature meant, as is clearly indicated by the words used, any opening other than sexual parts.

This court has not previously passed upon this question, but similar statutes have been before the courts of other states, and we observe in the decisions no good and sufficient reason for departing from the letter and evident in-

tent of the legislature in the enactment of this statute. See *Glover v. State*, 179 Ind. 459, 101 N. E. 629; *State v. Start*, 65 Or. 178, 132 Pac. 512; 8 R. C. L. 334, sec. 365.

The defendant contends further that the evidence does not sustain the charge, since the evidence of the state indicates that it was the sexual organ of the complaining witness that was involved, and that there was no involvement of any sexual organ of the defendant.

From a careful consideration it is felt that this interpretation placed upon the statute must be accepted, and that under the statute taken alone the defendant has not been guilty of the crime of sodomy. But we are not permitted to consider it alone. The alleged acts of the defendant and the complaining witness must be construed with reference to this statute, and also with reference to section 28-201, Comp. St. 1929, which is as follows:

"Whoever aids, abets or procures another to commit any offense may be prosecuted and punished as if he were the principal offender."

This statute has been held valid by the decisions of this court. *Stumpff v. State*, 122 Neb. 49, 239 N. W. 212; *Carlsen v. State*, 127 Neb. 11, 254 N. W. 744; *Baskins v. State*, 138 Neb. 334, 293 N. W. 270.

The evidence of the state was in proof of the fact that the complainant committed the crime of sodomy, but at the solicitation and insistence of the defendant; in other words, that the defendant aided, abetted and procured the complaining witness to commit the crime. In this view of the two related statutes, the defendant was properly charged and convicted if the evidence was sufficient to sustain the conviction.

The defendant claims that during the trial amendments were improperly allowed to be made to the information. The first is that the name of the complaining witness, Richard Roe, doubtless a fictitious name, was changed to the true name of this witness. We can speculate on the reason why the true name of this thirteen-year-old boy was withheld as long as possible. The defendant advances no tenable claim

that he was prejudiced by this amendment. No prejudice is apparent from the record.

By statute a variance in the proof from an indictment or information for an offense as to name or description of any person described, or the description of any matter or thing named, is not ground for acquittal of the defendant unless the trial court shall find that such variance is material to the merits of the case or may be prejudicial to the defendant. Comp. St. 1929, sec. 29-1502. See *Palin v. State*, 38 Neb. 862, 57 N. W. 743; *Goldsberry v. State*, 66 Neb. 312, 92 N. W. 906; *Marshall v. State*, 116 Neb. 45, 215 N. W. 564; *Balis v. State*, 137 Neb. 835, 291 N. W. 477.

Under this authority it would have been proper for the court to have submitted the case to the jury on the facts proved without amendment of the information. Amendment was not necessary. Under the terms of the statute and the reasoning of the foregoing decisions, if it was error to allow the amendment the error was without prejudice to the defendant.

Another amendment was allowed which changed the date of the commission of the offense from August 10, 1941, to June 15, 1941. This was within the meaning of section 29-1502, Comp. St. 1929, matter of description as regards the crime of sodomy, since where time is not an ingredient of a crime, a variance between the information and the proof as to the date of the commission of the offense is not fatal to the prosecution if the date proved is within the statute of limitations. *Palin v. State, supra.* It therefore follows that what was said with regard to the amendment as to name is equally applicable here.

The defendant asserts that the evidence is insufficient to sustain the charge that the act complained of was ever committed. Because of the character of the testimony we refrain from setting it forth in detail or in substance. Suffice it to say that the evidence was sufficient, if believed, to warrant a jury in returning a verdict of guilty.

Finally, the defendant urges that the court erred in not submitting the question of his mental capacity to commit the crime charged to the jury.

Under no recognized rule of law or evidence was the issue of mental capacity of the defendant tendered; therefore, the trial court was clearly correct in refusing to give the instructions on this question which were tendered.

The conviction and sentence are affirmed.

AFFIRMED.

LEILA M. JENNINGS, ADMINISTRATRIX, APPELLEE, V. EARL CAMPBELL, APPELLANT: LEONARD CAMPBELL, APPELLEE.
6 N. W. (2d) 376

FILED NOVEMBER 20, 1942. No. 31398.

1. **Automobiles.** In this case, involving the application of the family purpose doctrine to the use of a car, the evidence is examined and it is held that the case does not call for an application of the rule involving a surreptitious taking, a use in violation of orders or a use after authority had been specifically revoked.
2. ———. Where the testimony that the driver of a family purpose car did not have permission to use it is undisputed by other parol testimony, the jury have the right to test the credibility of the witnesses by their self-interest and to weigh that testimony against facts and circumstances in evidence from which permission to drive may be properly inferred.
3. ———. The family purpose doctrine is not a restatement of the rules of principal and agent or master and servant, but rather is a development from those principles.
4. ———. The rule is based upon public policy and is in the nature of an exception to the rule that a master or principal is not liable for the negligent conduct of his servant or agent, unless in driving he is pursuing an employment or agency for the owner.
5. ———. Where a family purpose car is being used by a member of the family and an accident follows from the use, the rule does not make it necessary that the injured party be able to prove that the driver had the authority of the owner to drive the car at the time and at the place of the accident.

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

Butler, James & Morrison and *Leon L. Hines*, for appellant.

Victor Westermark and *C. A. P. Falconer, contra.*

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

SIMMONS, C. J.

This is an action for damages, arising from the death of plaintiff's intestate, caused by an automobile collision between a car driven by the defendant Leonard Campbell and the deceased, Henry A. Jennings. The defendant Earl Campbell, owner of the car involved in the accident, is the father of the defendant Leonard Campbell, a minor not yet 16 years old at the time of the accident. Judgment was for the plaintiff. The father alone appeals. The negligence of the defendant Leonard Campbell is not an issue in this appeal. The appeal presents the propositions that the verdict of the jury is not supported by sufficient evidence and is contrary to law.

The evidence necessary to decide the question here presented goes to the use of the car by the son and the liability of the father for the actions of the son in driving the car.

The father's family consisted of his wife, two sons, a daughter and the children's grandmother. The car involved in the accident was purchased in January, 1940, and was used "for the family use." The father drove it as did an older son Lawrence. The son Leonard was not given specific permission to use it. The keys, however, were left, one set in the ignition and one set in a car pocket when it was not in use. The son Leonard had taken it and used it on several occasions prior to April, 1940, about which the father was advised shortly after each use. He had some of his boy friends with him on those occasions. On a Sunday in April, about a month before the accident in question, Leonard had taken the car from in front of the home without his father's knowledge and, accompanied by other boys, had driven it out of town. Mechanical difficulties developed, and the car was pushed home. In the meantime the father had discovered its absence, he and Lawrence went hunting for it, returning home they discovered it had been returned

to the garage. Leonard and the other boys were hiding in the garage. The other boys were sent home, Leonard was punished and was told that he was not to drive the car "any more." The keys at that time were taken out of the car and thereafter remained, except as herein set out, one set in the possession of the father and one set in the possession of Lawrence.

On the morning of May 23, 1940, the father told Leonard to wash the car. He told Lawrence to drive it out of the garage for that purpose. That was done. Leonard asked the father for the keys so that he could turn it around in the washing. The father gave the keys to him and went to his place of business. Leonard took the car to the schoolhouse a few blocks from the home, parked it, took the keys with him and went in to take an examination. The father, driving another car called a "pick-up" and used in his business, passed the schoolhouse about 10 a. m. and saw the car parked at the school, with a number of boys sitting in it. He asked about Leonard and was told that he was taking an examination. He told the boys to tell Leonard, when he came out of the examination, to take the car back home. This message was given to Leonard by one of the boys. Leonard said that he thought he had heard the pick-up. Others of the boys told Leonard that the father left no such message. Leonard, with several of the boys in the car, drove it through town to the swimming hole, found the water too cold to swim, decided to take a different road home, and while driving at 80 miles an hour on a country road ran into the Jennings car, causing the severe injuries to Jennings from which his death occurred several weeks later.

It is clear that the father had, prior to April, 1940, known that Leonard was using the car for extended trips and was accompanied by some of his boy friends; and the testimony of the father and Lawrence is that after the trip in April, 1940, Leonard was positively forbidden to further drive the car. The father appears to have had some doubt about the efficacy of his instructions for he removed access to the keys from Leonard.

On the morning of the accident, however, he placed the keys in Leonard's possession and made it possible for Leonard to drive the car if he again saw fit to disobey his father's orders. Leonard disobeyed those instructions. The father discovered that fact when he found the car at the schoolhouse. He did not regain possession of the keys, he allowed Leonard to keep control of the car, he did not instruct him not to drive the car, but rather left instructions that Leonard was to drive the car "back home." The father testified that he thought Leonard would do as he was told. Leonard did drive the car, but in doing so went on a trip not specifically authorized, and while so doing the fatal accident occurred.

Is the father liable under the family purpose doctrine, which this court has followed and stated as follows: "Where the head of a family has purchased or maintains a car for the pleasure of his family, he is, under the so-called 'family purpose' doctrine, held liable for injuries inflicted in the negligent operation of the car while it is being used by members of the family for their own pleasure, on the theory that it is being used for the purpose for which it is kept, and that in operating it the member of the family is acting as the agent or servant of the owner. * * * Where the car is kept for the use and pleasure of the family, and one member of the family is using it for his individual pleasure, or for one of the family purposes for which it is kept, it comes strictly within the reason of the rule that, in such use, the member of the family is acting as the agent, in furthering the purposes of the owner, as truly as though other members of the family were in the car with him, and that the owner can be held responsible for damages resulting from the negligent operation of the car while so used." *Linch v. Dobson*, 108 Neb. 632, 188 N. W. 227. See, also, *Stevens v. Luther*, 105 Neb. 184, 180 N. W. 87; *Hogg v. MacDonald*, 128 Neb. 6, 257 N. W. 274.

Defendant advances the proposition that the family purpose doctrine has no application where the car is taken surreptitiously or in violation of orders, or where the general

authority to drive has been specifically revoked. Defendant states that the evidence is undisputed on that point. Here, however, the car was not surreptitiously taken, nor taken in violation of orders. Here the defendant knew that the son had the keys, the car, the control and the propensity to drive it, and while it may have been taken to the schoolhouse by the son in violation of orders, it was definitely driven away from the schoolhouse in compliance with defendant's orders. The prohibition against driving had been specifically revoked by orders to drive the car from the schoolhouse to the home. With this distinction in mind it is clear that *Dow v. Legg,* 120 Neb. 271, 231 N. W. 747, and cases cited from other jurisdictions sustaining the rule contended for are not in point under the facts testified to in this case.

The defendant's next contention is that the owner of a family purpose automobile is not liable where it is driven to a place other than that where the owner directs it to be taken. Here the defendant again advances the contention that the evidence is undisputed on that point. The evidence is that the son was directed by the father, through the other boys, to take the car back home. There is neither evidence that the son asked authority to take the car for a ride, nor that the father denied him that right. While the denial of that permission might be implied from the instruction to take the car home, there is also ample evidence from which it could be found that the father should have known that the son would use the car exactly as he did use it.

Where the testimony that the driver of a family purpose car did not have permission to use it is undisputed by other parol testimony the jury have the right to test the credibility of the witnesses by their self-interest and to weigh that testimony against facts and circumstances in evidence from which permission to drive may properly be inferred. *Jensen v. Fischer,* 134 Minn. 366, 159 N. W. 827; *O'Dea v. Amodeo,* 118 Conn. 58, 170 Atl. 486.

In *Galpin v. Fisher,* 109 Neb. 700, 192 N. W. 205, the case was not submitted to the jury on the family purpose doctrine. However, there the testimony was that the father had

given permission to his sons to drive, with positive directions limiting the use of the car. In disobedience of his orders the sons drove the car to other than permitted places, and the father contended that he was not responsible for acts committed during such unauthorized use. We there said: "The evidence was such that, if the case had been submitted to the jury on the theory that the father had furnished the automobile for the customary convenience and pleasure of the family, under the rule adopted by this court in *Stevens v. Luther*, 105 Neb. 184, and *Linch v. Dobson*, 108 Neb. 632, the jury might have found the father liable." While the proposition here presented was not there directly involved, we believe the statement to be correct and consistent with our previous holdings in family purpose cases.

Defendant relies upon the case of *Vaughn v. Booker*, 217 N. Car. 479, 8 S. E. (2d) 603, 132 A. L. R. 977. In that case the son had specific directions not to drive the car in the city of Raleigh. In violation of instructions he drove in the city and an accident resulted. It was held that the father had the right to limit the locality in which the car could be driven. However, in *McCann v. Downey*, 227 Ia. 1277, 290 N. W. 690, a son was permitted the use of a car to go to a choir meeting and a high school "pep" meeting. During the evening the son with some of his school friends went riding into the country and an accident occurred. Specific authority to drive at the place was not shown. The court held that a jury question was presented. In *Evans v. Caldwell*, 184 Ga. 203, 190 S. E. 582, a minor son was permitted to drive a car to a picture show, with the understanding that he would come home immediately after the show. After the show the son started to a near-by community to attend a dance and an accident happened while on the journey. The court there said: "The application of the law of master and servant or of principal and agent to the 'family-car doctrine' is not without difficulty. However, the courts of this state are committed to that doctrine. If the automobile is a family-purpose car, and used by the minor children for their pleasure, comfort, and enjoyment, the car, when used

for such purposes is being used in the prosecution of the business of the parent or master, and the children are acting within the scope of their employment in the parent's or master's business. If the car is used for such purpose with the permission and consent of the parent, either express or implied, even though on the particular occasion the parent limits the use of the car to a particular destination and return, such limitation is not a limitation on the *purpose* for which the car is being used. The purpose for which the car is being used and for which consent is given is the pleasure, comfort, and enjoyment of the child. Therefore, if the child disobey the parent and use the car for the same purpose but in a different locality, he is still engaged in the business of the parent, and the parent is liable for the negligence of the child while so engaged. So long as the child uses the car for the *purposes* of pleasure, comfort, and enjoyment, no question of deviation arises, but only a question of disobedience of instructions." While here it may be said that the son's use, so far as verbal instructions given were concerned, was limited to taking the car "back home," still that would not change its characteristic as a "family use" car. To have the car at home was a part of that use. It retained that classification at all times here considered, and its use was subject to the family purpose doctrine.

Defendant points out that in *Hogg v. MacDonald,* 128 Neb. 6, 257 N. W. 274, we quoted with approval the statement from 64 A. L. R. 879, that "The doctrine is a development of the rules applicable to the relation of master and servant and principal and agent, which have been extended to meet a new situation brought about by the invention of the automobile," and argues that the rules applicable to master and servant and principal and agent apply, and that where there has been a substantial deviation in route by the servant from the place where he was authorized to drive the master or principal is not liable, citing *Ebers v. Whitmore,* 122 Neb. 653, 241 N. W. 126, and *Harrell v. People's City Mission Home,* 131 Neb. 138, 267 N. W. 344. To accept this contention would be to deny the full force of the family pur-

pose doctrine which this court has adopted. That the family purpose doctrine is a development from and is not a restatement of the rules of principal and agent or master and servant is clear from all of the authorities. In 5 Am. Jur. 704, sec. 365, it is stated: "The doctrine undoubtedly involves a novel application of the rule of *respondeat superior* and may, perhaps, be regarded as straining that rule unduly. There are, however, undoubted practical considerations in favor of the doctrine, since it puts the financial responsibility of the owner behind the car while it is being used by a member of the family, who is likely to be financially irresponsible, in the pursuit and furtherance of the purpose for which the car is kept, *and since it relieves the injured person from the difficult task of meeting the owner's claim that upon the occasion in question, the car was not being used for his pleasure or business.*" (Emphasis supplied.) In *Durso v. A. D. Cozzolino, Inc.*, 128 Conn. 24, 20 Atl. (2d) 392, the supreme court of that state held that the rule is based "upon grounds of public policy and in analogy to the principles governing agency" and was "in the nature of an exception to the general principle that one who permits another to use his car does not thereby become liable for the negligent conduct of that other, unless in driving it he is pursuing an agency or employment for the owner."

In *Linch v. Dobson*, 108 Neb. 632, 188 N. W. 227, we quoted with approval this statement from *King v. Smythe*, 140 Tenn. 217, 204 S. W. 296: "If an instrumentality of this kind is placed in the hands of his family by a father, for the family's pleasure, comfort, and entertainment, the dictates of natural justice should require that the owner should be responsible for its negligent operation, because only by doing so, as a general rule, can substantial justice be attained."

To adopt the theory of the defendant in this case would be in effect to modify the family purpose rule so as to require a plaintiff to be in a position to prove that the driver of a family purpose car had authority of the owner to drive the car at the time and at the place of the accident. The rule is not so restricted.

The evidence presented a jury question. The defendant is not entitled as a matter of law to a judgment in his favor.

The judgment of the trial court is affirmed.

AFFIRMED.

ORVILLE M. GRANTHAM, SPECIAL ADMINISTRATOR, APPELLANT, V. WATSON BROTHERS TRANSPORTATION COMPANY ET AL., APPELLEES.
6 N. W. (2d) 372

FILED NOVEMBER 20, 1942. No. 31355.

1. **Death.** In an action to recover damages for negligence causing or contributing to the wrongful death of a person, the sustaining of a motion by defendant for a directed verdict in his favor is erroneous, where properly admitted evidence is sufficient to make a case in favor of plaintiff for the determination of the jury.
2. **Automobiles.** On controverted issues that defendant parked a truck in a public street at night without statutory signals of danger, removed a wheel from the truck, left the wheel in the line of public travel while repairing a brake, and thus caused or contributed to an accident in which a passing motorist struck and fatally injured a bystander, evidence *held* sufficient to make a case in favor of plaintiff for the determination of the jury.

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

Wear, Boland & Nye, for appellant.

Votava & McGroarty and *Eugene Fitzgerald, contra.*

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

ROSE, J.

This is an action to recover from Watson Brothers Transportation Company, hereinafter called the "Watson company," and Pauline Backes, defendants, damages in the sum of $25,299.25 for alleged negligence causing the death of Juel Grantham who left surviving him his widow and three minor children. Orville M. Grantham, special administrator of decedent's estate, is plaintiff.

Juel Grantham was fatally injured in a motor-vehicle accident east of the intersection of Center and Fifty-fifth streets in or near Omaha about 1:25 o'clock on the morning of July 17, 1940. At that time and place a motor truck or an International tractor with a semitrailer attached, owned by the Watson company, headed westward, was standing on the north side of Center street. Driving westward in a Plymouth sedan on Center street, Pauline Backes, defendant, while passing the trailer on the left or south side, struck Juel Grantham.

In substance the petition alleged that the Watson company was negligent in leaving the tractor and trailer in the street at night without flares or other warning signals; in removing from the tractor a two-tire wheel of the same color as the highway and in leaving it in the street in the line of public travel. It was further alleged that the placing and leaving of the wheel in the street at night without any warning of any kind were also acts of negligence which caused the automobile driven by Pauline Backes to go out of control and fatally injure Juel Grantham.

In the answer, the Watson company, defendant, admitted that at the time and place alleged in the petition Juel Grantham was struck and fatally injured by an automobile driven by Pauline Backes. It was alleged that the accident was not due to any negligence of the Watson company and that the damages of which plaintiff complains were caused by the negligence of Pauline Backes; that negligence of Grantham contributed to the collision and was more than slight. The reply was a general denial.

In the course of a trial before a jury, the parties rested after adducing their evidence. The trial court sustained a motion by the Watson company, defendant, to dismiss the action as to it for failure of plaintiff to make a case. On motion of plaintiff the action was dismissed without prejudice as to Pauline Backes, defendant. Plaintiff appealed from the nonsuit.

The question for determination on appeal is the sufficiency of the evidence to make a case for submission to the jury

on the issues of negligence and proximate cause between plaintiff and the Watson company, defendant.

Some of the facts shown by the record without dispute are: The fatal accident occurred in Center street near the intersection at Fifty-fifth street. Fifty-fifth street runs directly north and south and crosses Center street which runs northeast and southwest at the intersection. The tractor was owned by the Watson company and had been driven westward along the north side of Center street and parked several feet east of the east line of Fifty-fifth street by E. H. White who was in charge of it as the owner's employee. By telephone he called mechanics in the employ of the Watson company to make repairs. They came in a light truck, parked it in front of the tractor and removed the left, or south rear tractor wheel. At the time of the accident, the driver of the truck, the two mechanics and Juel Grantham were in Center street south of the tractor and trailer. A Plymouth sedan driven westward by Pauline Backes on Center street struck and fatally injured Grantham.

The driver of the tractor testified in substance that he did not leave lights on it or on the trailer or put flares in the street or display a flag or give warning of any kind; that he held a flashlight for the mechanics while the wheel was being removed; that Juel Grantham was standing by him in Center street at the time.

A witness testified she was riding in the front seat of the Backes car, the Plymouth sedan, looking straight ahead as it approached the intersection on the north side of Center street near the center line thereof; nothing to show the truck; did not see it; night, dark; not a light on the truck. This witness said: "We struck those tires." She testified further that, when she got out of the Backes car, the man later identified as Juel Grantham was lying on the street; that the tires were next to the front end of the sedan and that the man was beyond the tires. There was other evidence of a rubber mark on the front bumper of the sedan after the accident.

Another occupant of the Plymouth sedan testified she was

looking straight ahead while approaching the Watson company truck; that there were no lights or flares of any kind on the street in the vicinity of the truck; that the Plymouth sedan passed the rear end of the trailer. In answer to a question, this witness testified further: "Well, we struck something. There was a thud, and then I saw something dark go bounding and rolling down the street ahead of the car. It sort of turned and went over toward the curb, to the right, that is. It is then our car struck the Watson Brothers truck. It seemed to me as though after we struck this object, whatever it was, that we were hurled over into the truck. In other words, we were clearing the truck. We did not hit the truck until we struck the object."

Police officers who said they arrived at Fifty-fifth and Center streets within a few minutes after the accident testified there were then no flares or other lights or danger signals on the truck or in the street by it. Exhibits show that the right front end of the sedan and the left fender of the tractor were smashed.

Plaintiff's theory is that the Plymouth sedan first struck the tires, went out of control through the negligence of the Watson company and struck Juel Grantham, thus causing or contributing to his death.

The Watson company contends that, at the time of the accident, Grantham was farther east than the wheel and that he was struck by the west-bound sedan before it reached the wheel; that the rear end of the trailer was undamaged and that the absence of flares and of other danger signals was not the proximate cause of the accident and did not contribute to it.

The record contains evidence in support of the Watson company's defense. There is proof that the wheel, as soon as it was removed from the tractor, was pushed forward or westward and placed beside the left fender of the tractor; that Juel Grantham was then standing farther out in the street and farther east at the time of the collision; that, approximately eight or ten feet from the north curb of Center street where the tractor and trailer were parked, there

were lights in the Bird House Café and illuminated advertising signs in front of it and that there was a street light at the intersection.

There is, however, other proof that the mechanics, while removing the wheel and while at work on the brake, and Juel Grantham, were in the shadows of lights from the Bird House Café and from the signs in front of it, and that the street light was at the northwest corner of the intersection, that Juel Grantham was a bystander. There is no evidence that he had a part in the parking of the tractor and trailer at night in the street or in the placing of the wheel in the line of travel without any warning by flares or other signals of danger. There is nothing in the record to prove he was under obligations to remove obstructions from the street or that he was chargeable as a matter of law with such contributory negligence as to prevent a recovery by plaintiff.

It was the duty of the operator of the motor truck, immediately after parking it in the highway during the period between one-half hour after sunset and one-half hour before sunrise, to put flares at the places designated by statute. Comp. St. Supp. 1939, sec. 39-11,112; *Gleason v. Baack*, 137 Neb. 272, 289 N. W. 349; *Simonsen v. Thorin*, 120 Neb. 684, 234 N. W. 628. The evidence on the issue of the Watson company's negligence, causing or contributing to the fatal collision, was in conflict.

In determining the sufficiency of the evidence herein to make a case for submission to the jury, the court must be guided by the following rules of law:

"The credibility of witnesses and the weight to be given their testimony are questions for the jury." *Davis v. Bixby*, 132 Neb. 25, 270 N. W. 834; *Burry v. Interstate Transit Lines*, 136 Neb. 695, 287 N. W. 66.

"Where evidence is in conflict and such that reasonable minds may draw different conclusions therefrom, the questions of negligence and comparative and contributory negligence are for the determination of the jury." *Parks v. Metz*, 140 Neb. 235, 299 N. W. 643. See *Lieb v. Omaha & C. B. Street R. Co.*, 119 Neb. 222, 228 N. W. 364.

"If one suffers injury and damage as the proximate result of the negligence of two others, and the damage would not have occurred but for the negligence of each of such parties, both are liable to the person so injured." *Koehn v. City of Hastings,* 114 Neb. 106, 206 N. W. 19.

"A motion for a directed verdict must, for the purpose of a decision thereon, be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed, and said party is entitled to have every controverted fact resolved in his favor, and to have the benefit of every inference that can reasonably be deduced from the facts in evidence." *Moncrief v. Interstate Transit Lines,* 129 Neb. 168, 261 N. W. 163.

In view of these established rules of law, the conclusion is that the evidence, considered in its entirety from every standpoint, was sufficient to make a case in favor of plaintiff for the determination of the jury on the issue of the Watson company's negligence, causing or contributing to the death of Juel Grantham. It follows that the trial court was in error in directing a nonsuit. For that error the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

The following opinion on motion for rehearing was filed April 9, 1943. *Rehearing denied.*

1. **Negligence.** Want of ordinary care, and not knowledge of danger, is the test of contributory negligence.
2. ———. A person who knowingly and of his own volition exposes himself to an obvious danger cannot recover damages for an injury which he might have avoided by the use of reasonable care.
3. **Highways.** When one engaged in the lawful use of a highway causes an obstruction to be placed upon it in such a manner as to be dangerous to traffic, he must use ordinary care to prevent injury to others where he knows, or in the exercise of ordinary care should know, that said obstruction is calculated to do injury to travelers upon said highway.

4. ———. One injured while momentarily standing in a highway is not, because of that fact, guilty of contributory negligence as a matter of law.
5. ———. The offending party is not exonerated from all duty and from liability by the fact that the injured party was not in motion on the highway when the accident occurred.

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

SIMMONS, C. J.

Our former opinion in this action is found *ante*, p. 362, 6 N. W. (2d) 372.

We granted an oral argument on the motion for rehearing limited to two questions. Was the deceased guilty of contributory negligence as a matter of law? What duty did those using the highway owe to the deceased?

Supplementing the statement of facts shown in our previous opinion the following evidence should be added.

As it relates to the deceased, the plaintiff's evidence disclosed only that, after the Backes car came to a stop, the deceased was lying close by the left front end of the Backes car. Plaintiff's evidence did not disclose how the deceased happened to be in the street, what he was doing, or how long he had been there before the fatal accident. Contributory negligence of the deceased was not shown when plaintiff rested.

Defendant's evidence shows that the deceased, sometime before the accident, had been in the café, left and walked east therefrom along the sidewalk. Later when the defendant's employees were working on the truck and defendant's driver was standing in the street, holding a flashlight on the part being repaired, the deceased came along the sidewalk going west, left the sidewalk, came around the front of the truck into the street, asked what was wrong and stood by and to the east of the driver talking with him and watching the work being done; he was there when the wheel was removed; he was not assisting in the work in any way; and he remained there for a period of from four to six or not to exceed ten minutes before he was struck by the Backes car. Plaintiff offered no evidence in rebuttal.

From the undisputed evidence of the defendant it appears the deceased went into the street and remained there as an onlooker; and that the position of the truck, lack of lights, flares and warning signal devices, and the location of the dual wheel, were all known or were patently visible to the deceased for some minutes before the accident.

Deceased remained there under those conditions until he was injured. Defendant relying largely on *Levine v. Shell Eastern Petroleum Products,* 73 Fed. (2d) 292, argues that the same facts that tend to establish the negligence of the defendant Watson Brothers Transportation Company likewise tend to establish the negligence of the deceased, and that deceased's care for his own safety diminished in the exact proportion that the negligence of the Watson company increased. We are unable to follow that line of reasoning.

As shown by plaintiff's evidence the Watson company's negligence consisted in leaving its equipment on the highway, without lights or flares, and in putting the dual wheel in the traveled portion of the highway, and in its taking no action to warn those using the highway of the conditions of danger which it had created. The deceased's negligence, if any, was not in doing those things, but in going into and remaining in the street where those conditions existed.

We have held: "Want of ordinary care, and not knowledge of the danger, is the test of contributory negligence." *Welsh v. City of South Omaha,* 98 Neb. 148, 152 N. W. 302, last followed in *Klement v. Lindell,* 139 Neb. 540, 298 N. W. 137.

We have also held: "A person who knowingly and of his own volition exposes himself to an obvious danger cannot recover damages for any injury which he might have avoided by the use of reasonable care." *Kerwin v. Thompson, Belden & Co.,* 110 Neb. 251, 192 N. W. 692.

The questions then for determination are whether or not the deceased was in the exercise of ordinary care in going into and remaining in the street under the circumstances there existing; could he have avoided injury to himself by the use of reasonable care; and if he was guilty of contrib-

utory negligence was that negligence more than slight so as to bar recovery under the provisions of section 20-1151, Comp. St. 1929? As we view it these are questions to be determined by a jury and that the facts shown do not establish contributory negligence which as a matter of law prevents recovery.

Defendant further contends that the deceased was merely loitering on the highway, and was not "actually making viatic use of the highway," and that it owed him no duty "except not to wantonly or intentionally injure him," citing 45 C. J. 840, and *Cooper v. Teter*, 15 S. E. (2d) (W. Va.) 152, and *Conner v. East Bay Municipal Utility District*, 8 Cal. App. (2d) 613, 47 Pac. (2d) 775.

We have held that, "When one engaged in the lawful use of the highway causes an obstruction to be placed upon it in such a manner as to be dangerous to traffic, he must use ordinary care to prevent injury to others where he knows that said obstruction is calculated to do injury to travelers upon said highway." *Simonsen v. Thorin*, 120 Neb. 684, 234 N. W. 628. It is clear then that the defendant owed the duty of ordinary care to prevent injury to the deceased unless the fact that deceased was a bystander on the highway prevents the application of the rule. We are not prepared to say that the mere fact that deceased walked into the street and stopped for the purpose of observing what was going on there relieves the defendant from liability to him for the results of its negligence. The controlling fact is that the deceased was in the street, and not the intent he had in being there.

The liability of the defendant is predicated upon the facts which plaintiff's evidence tends to establish. The deceased's liability for negligence or contributory negligence is predicated upon the fact that he went into and remained in the street under the circumstances then existing.

In *Brenning v. Remington*, 136 Neb. 883, 287 N. W. 776, we reviewed the authorities dealing with the question of a person who is injured while standing in a street. They will not be repeated here.

It is admittedly difficult to find cases in point on all the facts. We cite the following cases as supporting the conclusion we have reached in this matter.

In *Shore v. Minter,* 160 Minn. 215, 199 N. W. 744, plaintiff had been standing at an intersection talking for "a few minutes" with one foot on the curb and one foot in the street. While in that position she was struck by a truck driven by defendant. Neither party saw the other. Contributory negligence was claimed. The court held that a jury question was presented.

In *Walters v. Rowls,* 105 Ind. App. 632, 16 N. E. (2d) 969, plaintiff Rowls had been standing in the street at the side of defendant Walters' truck which was out of gas at night and without lights required by statute. Rowls saw the car of Pense approaching from the rear, and Rowls left his place in the street, walked around in front of the Walters' truck for the purpose of getting off the pavement. The Pense car hit the Walters truck and it in turn hit Rowls. Walters contended that Rowls was a spectator or bystander with full knowledge of the fact that Walters had not complied with the provisions of the statute as to lights and flares and was therefore guilty of contributory negligence as a matter of law. The trial court held that a jury question was presented and that judgment was affirmed.

In *Perrodin v. Thibodeaux,* 191 So. (La. App.) 148, the deceased was standing on the pavement, at 8 p. m., beside a car parked in front of a village store. Several men were standing beside or leaning against the car. Deceased was run into by a negligently operated truck of the defendant. The court asked this question: "Was the deceased guilty of contributory negligence in standing on the paved portion of the highway beside the parked car, and in his failure to get out of the way of the fast approaching truck?" The court said: "The mere fact that a person is standing on the edge of the road when struck by a car, does not necessarily show contributory negligence on his part as a matter of law, where there is ample room for the motorist to pass, as the pedestrian has a right to assume that the motorist will not, without warning, run over him."

In *White v. Edwards,* 222 Mich. 321, 192 N. W. 560, the plaintiff had walked across the street to talk to the driver of a truck to see if he could get a ride to a near-by town. He stood there for about three minutes. Defendant's automobile struck plaintiff while he was standing beside the truck. It was contended that plaintiff was not "walking" within the provisions of a statute determining the duty of one using the highway. The court declined to give "a narrow, limited construction," saying that such statutes are designed to protect life and limb and further said: "Numerous decisions of courts of last resort hold, and we think they should be followed, that one injured while momentarily standing in the highway and when not in motion is not *per se* guilty of contributory negligence, and that the offending party is not exonerated from all duty and from liability by the fact that he is not in motion." (Citing cases.)

The question of defendant's negligence, if any, and deceased's contributory negligence, if any, are jury questions to be determined by the rules as to ordinary care.

The motion for a rehearing is denied.

ARDELL WAINWRIGHT, APPELLEE, V. WASHINGTON NATIONAL INSURANCE COMPANY, APPELLANT.
6 N. W. (2d) 368

FILED NOVEMBER 20, 1942. No. 31457.

1. Insurance. A provision in an application to revive an industrial life insurance policy that applicant is in sound health and has not been sick or afflicted with any disease since the lapsation of the policy, and that no liability shall exist on the part of the insurer if such statements prove to be untrue, means that good health is a condition precedent essential to a valid reinstatement.
2. ———. The fact that an insurance company makes an investigation of its own relative to the insurability of the applicant by securing a medical examination does not absolve the applicant from speaking the truth in his application, nor lessen the insurer's right to rely upon the statements of the applicant therein contained.

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

Ellick, Fitzgerald & Smith and *R. B. Hamer*, for appellant.

H. J. Pinkett and *W. B. Bryant, contra.*

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

CARTER, J.

This is an action on an industrial life insurance policy to recover death benefits alleged to be due. The trial court entered judgment for the plaintiff and the defendant appeals.

On February 6, 1939, the defendant insurance company issued and delivered a policy of life insurance upon the life of Allison Frederick in the amount of $308 payable to plaintiff, the mother of the insured, as the designated beneficiary. The insured died on September 8, 1940, and proof of death was duly made. Plaintiff alleges in her petition that all conditions precedent to liability were complied with and prays for judgment in the full amount.

The defendant alleged and the evidence shows that the insurance policy lapsed on or about March 18, 1940, because of a default in the payment of premiums. On April 13, 1940, the insured applied for reinstatement of the policy. Defendant alleges that the insured, in order to obtain reinstatement, falsely and fraudulently warranted and represented in the application for reinstatement that he was in sound health and free from the effects of any injury, that he did not then have any physical or mental defect or infirmity and that he had not had any illness or accident during a period of three years preceding, except a disability of ten days' duration resulting from a sprained back from which he had fully recovered. The defendant alleges that it relied upon the warranties and representations made and on April 22, 1940, reinstated the policy, not knowing that said statements were false and fraudulent.

The application for reinstatement which the insured

signed appears in the record. In the application, insured was asked the following questions to which he gave the respective answers shown: "Are you now in sound health and free from the effect of any injury? Yes. When were you last sick or disabled from accident? March 15, 1940. Describe disease or injury. Fell against a stove in basement." Then follows this statement over the signature of the insured: "The undersigned hereby represents and declares that the person upon whose life the above described insurance was issued has not been sick or afflicted with any disease or injury, or consulted any doctor or surgeon since said policies were lapsed except as noted above, and agrees that no liability shall exist on the part of the Company unless and until said Company shall have approved this application at its Home Office in Chicago, Illinois." On the back of the application is the report of the medical examiner, including some questions which were answered by the insured over his signature. Immediately above insured's signature appears the following: "I hereby declare that the statements recorded above and on the reverse side hereof are true and complete. If the Company shall revive the policies described on the reverse side hereof, I agree that such revival shall be deemed to be based upon the statements contained in this application and upon the condition that if any of said statements be untrue, that the Company shall be under no liability for a period of two years from the date of such revival except to return premiums paid since date of revival."

The medical report shows that the insured was examined by a physician who answered the questions on the form report as follows: "Does life proposed appear to be in sound health and free from injury? Yes. Is the heart diseased? No. Are the lungs diseased? No. Do you detect disease of any kind? No." The evidence further shows that in connection with the making of the foregoing answers the physician made a cursory examination of the insured in his home by personal observation and by the use of a stethoscope.

The record conclusively shows that the insured was, at

the time he applied for reinstatement and long prior thereto, afflicted with pulmonary tuberculosis and epilepsy. He had been advised of his condition by physicians and had on September 8, 1939, entered the Douglas County Hospital for treatment for tuberculosis. Upon entering the hospital the insured had informed hospital attendants and the physician in charge that he had previously suffered from tuberculosis. On June 4, 1940, insured again entered the hospital where he remained until his death on September 8, 1940, from pulmonary tuberculosis and tubercular meningitis. The record shows without question that the insured had been afflicted with tuberculosis since April or May, 1939, and that he had been informed and was fully aware of his condition.

The insured, in order to obtain reinstatement, warranted that the statements he had made in the application relative to his health were true and that, if they were not true, liability would be limited to a return of premiums paid. The record shows that the questions were not truthfully answered and that because of such false answers the insurance company was induced to reinstate the insured at a time when he was afflicted with a fatal disease. There is ample evidence in the record that the reinstatement would not have been made had the true situation been stated by the insured. The breach of warranty of good health and the fraud thus shown upon which the insurer relied bar a recovery under the policy for any amount other than the premiums paid. *Wolski v. National Life & Accident Ins. Co.*, 135 Neb. 643, 283 N. W. 381.

Plaintiff urges that the insurance company was bound by the findings of its medical examiner. In this connection the officer of the company, whose duty it was to pass upon the application for reinstatement, testified that in approving the application sole reliance was had upon the answers given by the insured. This witness testifies that the medical report referred to does not constitute a physical examination, but is a report based upon a visual, superficial inspection for which the physician is paid a nominal fee. The purpose of the medical report is described as a check upon the com-

pany's agent, the securing of applicant's signature by more than one person and the discovery of any noticeable disability affecting the risk. We do not think the defendant is bound to rely upon such a report under the circumstances shown.

The mere fact that an insurer makes an investigation of its own relative to the insurability of the applicant does not absolve the applicant from speaking the truth, nor lessen the right of the insurer to rely upon his own statements as to his physical condition. *Reliance Life Ins. Co. v. Sneed,* 217 Ala. 669, 117 So. 307. If truthful answers had been given by the insured, an examination of the diseased parts of applicant's body could have been made and the insurance company could then have acted with full knowledge of the facts. But the evidence is clear that the applicant deceived the physician and caused him to rely upon an appearance of good health which did not in fact exist. Clearly, the applicant's beneficiary cannot now rely upon a physician's finding of good health, procured by the deception and fraud of the applicant, to overcome the effect of applicant's falsification of the facts concerning the condition of his health contained in his application for reinstatement. It is common knowledge that insurance companies insure the well and not the sick, and where one afflicted with a serious disease obtains insurance by his own deceit and fraud it avoids the insurance contract the same as any other agreement.

The trial court erred in failing to sustain defendant's motion for a directed verdict at the close of all the evidence.

REVERSED AND DISMISSED.

DOUGLAS COUNTY, APPELLANT, V. JOSEPH BELITZ ET AL., APPELLEES.

6 N. W. (2d) 370

FILED NOVEMBER 20, 1942. No. 31530.

Counties. The provisions of sections 12-124 and 12-125, Comp. St. Supp. 1941, authorizing the board of county commissioners to pay

the premiums on bonds of officers and employees designated therein, which have been approved by the board, are mandatory in character and create a binding obligation against the county.

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

James T. English and *Oscar T. Doerr,* for appellant.

Charles Battelle, for appellees.

Robert Smith, pro se.

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

CARTER, J.

This suit was commenced by the county of Douglas to secure an interpretation of sections 12-124 and 12-125, Comp. St. Supp. 1941. The trial court interpreted the statutes in question contrary to the contention of the county and the county appeals.

The facts in the case are not in dispute, the suit being submitted as a case stated on a stipulation of facts. The defendants are officers and employees of Douglas county, who are required to and have filed surety bonds with the proper county officers, which bonds comply with all statutory requirements and have been approved by the board of county commissioners. The defendants thereupon requested the board of county commissioners to pay the premiums on the bonds under the provisions of sections 12-124 and 12-125, Comp. St. Supp. 1941, which request was refused. It is the contention of the county that the payment of premiums on such bonds under the foregoing sections of the statute are permissive only and not mandatory. This suit was filed for the sole purpose of determining this issue.

The provisions of sections 12-124 and 12-125, Comp. St. Supp. 1941, are as follows:

"Subdivision 1. When any county treasurer, county attorney, clerk of district court, county clerk, county judge, county assessor, register of deeds, county sheriff, county superintendent of public instruction, county commissioner or

supervisor, in giving the bond required of him by law, shall furnish a bond executed by a surety company, authorized by the laws of this state to execute such bond, and such bond shall be approved by the county board, then in each and every case the county may pay the premium for such bond: Provided, that any surety bond so executed and approved shall contain a covenant to the effect that when said bond shall have been surrendered by the obligee and delivered to the obligor, or its resident agent, the obligor shall refund to the county the unearned portion of the premium so paid for the term of said bond. Subdivision 2. Whenever any deputy or employee of any county treasurer, county attorney, clerk of the district court, county clerk, county judge, county assessor, register of deeds, county sheriff, county superintendent of public instruction, county commissioner or supervisor, shall be required by law, or by order of the county board of any county, to supply bond, and when such deputy or employee shall furnish a bond by a surety company, and such bond shall be approved by the county board; then in such case the county may pay the premium for such bond.

"Upon the execution and approval of the bonds upon which the county pays premium, the county board shall direct the county clerk to draw warrants upon the county treasurer in payment of such premiums against the general fund of the county, such warrants to be signed by the chairman of the county board, countersigned by the county clerk and sealed with the county seal."

It will be noted that these statutes were amended by the legislature in 1941 to accomplish two primary objectives. Subdivision 1 of section 12-124 was amended to include county officers other than the county treasurer, and subdivision 2 of the same section was added for the purpose of including deputies and employees of designated county offices. This is important in the present case because of the fact that the language to be interpreted in the 1941 act is identical with that contained in the act in its previous form, and has been previously construed by this court.

The decision must rest upon a determination whether the

words "the county may pay the premium for such bond," as they appear in both subdivisions of section 12-124, are permissive or mandatory. In other words, should the word "may" be construed to mean "shall." We think this was fully answered in *Haase v. Buffalo County*, 86 Neb. 145, 124 N. W. 1130, wherein this court in construing the same language in the former statute said:

"The county attorney takes the position that the county may pay all or any part of the premium or reject its payment *in toto*, and argues that the statutes are permissive, and not mandatory. If this interpretation is adopted, it is perfectly obvious that the statutes will operate diversely in different counties, according to the varying convictions or motives of the officers comprising county boards. Uniformity of operation under similar circumstances is the evident intention of the legislature. Counties and compensation of officers are classified to that end. This purpose in a measure would be defeated by the adoption of defendant's construction.

"By the section first quoted provision is made for the giving of a personal bond. Where this course is pursued by the county treasurer and the county board, both avoid the expense of a surety bond. Where the bond is executed by a surety company, however, these provisions govern: 'The county may pay the premium for such bond,' and 'upon the execution and approval of any such bond the county board shall direct the county clerk to draw a warrant upon the county treasurer in payment of such premium.' In giving effect to these expressions, it should be observed that when the county board approved and accepted the surety bond executed by the Lion Bonding Company, individual obligations or rights of plaintiff arose. If the county did not become liable for the payment of the premium, that burden rested on plaintiff individually. When the surety bond was approved and accepted, the funds of the county were protected by a modern, statutory method created for the public welfare. When the county board approved and accepted the surety bond, its discretion as to incurring the resulting

expense terminated. Afterward the county could not arbitrarily refuse to pay the premium. This is believed to be the logical result of a correct interpretation of the statutes. The word 'may' in the sentence, 'The county may pay the premium,' and the word 'shall' in the sentence, 'The county board shall direct the county clerk to draw a warrant,' in their relation to all the legislation on this subject, when applied to the facts of this case, are mandatory."

We are of the opinion, therefore, that it is mandatory upon the board of county commissioners to pay the premiums upon the bonds of the officers and employees designated in the statute if and when such bonds are approved.

The county urges, however, that the change in the wording of section 12-125 from "upon the execution and approval of any such bond" to "upon the execution and approval of the bonds upon which the county pays premiums" shows a legislative intention to grant discretion to the board of county commissioners to pay or not to pay such bond premiums. With this argument we do not agree. The added words "upon which the county pays premiums" clearly refer to the bonds of the officers and employees which the board of county commissioners are authorized to pay by virtue of section 12-124, and were not intended as a grant of discretion to such board. We find no error in the record.

AFFIRMED.

EVANS A. JONSON, APPELLEE, V. SAMUEL G. HELLER ET AL., APPELLANTS.

6 N. W. (2d) 359

FILED NOVEMBER 20, 1942. No. 31460.

1. **False Imprisonment.** To sustain an action for damages for false imprisonment there must be direct evidence, or evidence from which a reasonable inference may be drawn, that the plaintiff was unlawfully restrained of his personal liberty or freedom of locomotion without his consent and against his will, with or without process of law.

2. ———. Evidence examined, and found that it fails to sustain the charge of false imprisonment against the defendants.

APPEAL from the district court for Hall county: WILLIAM F. SPIKES, JUDGE. *Reversed and dismissed.*

Cleary, Suhr & Davis and *Harold A. Prince,* for appellants.

B. J. Cunningham, contra.

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

YEAGER, J.

This is an action by Evans A. Jonson, plaintiff and appellee, against Samuel G. Heller and S. N. Wolbach Sons, Inc., a corporation, defendants and appellants, for damages for false imprisonment. The case was tried to a jury which resulted in verdict and judgment in favor of the plaintiff and against the defendants for $1,000. From this judgment the defendants have appealed.

The appellants, as grounds for reversal of the judgment, have in their brief assigned five errors.

The first error assigned is that the court erred in overruling the motion of the defendants at the close of the evidence to instruct the jury to return a verdict in favor of the defendants. From an examination of the record it appears that this assignment is of first importance and it will be so treated.

The petition upon which the case was tried substantially alleges, and the theory upon which the case was tried was, that the plaintiff on November 19, 1939, was an employee of the defendant corporation, and that the defendant Samuel G. Heller was in charge of and was managing the business of the defendant corporation; and that in his personal capacity, and as manager of the defendant corporation, Heller caused and brought about the false imprisonment of the plaintiff.

The defendants filed answers. Both defendants in their

answers generally denied the allegations of the petition. The answer of the defendant S. N. Wolbach Sons, Inc., contained other defensive allegations, the particulars of which are not required for the present phase of this discussion.

The parties to this action are in accord on the definition of false imprisonment, that is, that false imprisonment consists of the unlawful restraint of the personal liberty or freedom of locomotion of a person without the consent and against the will of such person, with or without process of law. *Johnson v. Bouton,* 35 Neb. 898, 53 N. W. 995; *Dillon v. Sears-Roebuck Co.,* 126 Neb. 357, 253 N. W. 331; *Doescher v. Robinson,* 132 Neb. 299, 271 N. W. 784.

It follows then that one who charges that he has been falsely imprisoned must show by evidence that he was falsely imprisoned by the person or persons charged, or adduce evidence from which it may be reasonably inferred that he was so imprisoned. Of course, he must also prove by evidence or reasonable inference from evidence that he was imprisoned, but with that phase of proof of the cause of action we are not as yet concerned.

Assuming for the purpose of consideration of this first assignment of error that plaintiff was falsely imprisoned, it is pertinent to inquire as to whether or not the defendants had any participation in the imprisonment.

Pursuing this inquiry the record discloses that plaintiff was an employee of the defendant corporation, which was a department store in Grand Island, Nebraska, and that the defendant Heller was in charge of the corporation. A gladstone bag was stolen from the store, which fact was reported to Heller, who in turn reported it to the chief of police, and a request was made upon the chief of police that he make an investigation. Pursuant to this request the chief of police sent an officer or officers to the store. The officer or officers did not know the plaintiff so, on request, defendant Heller described him. Thereupon and after plaintiff left the store, an officer requested plaintiff to accompany him to the police station. Plaintiff did accompany him to the police station where he remained for questioning for some period of time when he was allowed to leave.

There is no direct evidence whatever, nor is there any evidence from which a reasonable inference could be drawn, that Heller or any one on his behalf or on behalf of the defendant corporation accused plaintiff of the taking of the bag, or requested or suggested his detention, or in any wise directed, counseled or advised the chief of police or any police officer in the investigation which had been requested. On the record whatever was done in the investigation was at the sole instance of the chief of police.

On the evidence then we are required to hold that the evidence was insufficient to justify submission of the case to a jury, and that the trial court erred in refusing to sustain the motion of the defendants for a directed verdict at the close of the evidence.

This conclusion renders unnecessary a discussion of the remaining assigned errors.

The judgment of the district court is reversed and the action dismissed.

REVERSED AND DISMISSED.

MARCUS HOESLY, APPELLEE, V. DEPARTMENT OF ROADS AND IRRIGATION, APPELLANT.
6 N. W. (2d) 365

FILED NOVEMBER 20, 1942. No. 31482.

1. **Eminent Domain.** An award of appraisers in condemnation of land by the department of roads and irrigation of the state of Nebraska for highway purposes may properly be reviewed in the district court.
2. ———. The review of an award of appraisers in condemnation may be either by appeal or by prosecuting error.
3. **Appeal.** It is the general rule that one may not voluntarily accept payment of that part of a judgment in his favor and thereafter prosecute appeal or error from the part which is against him.
4. ———. An exception to the rule that one may not voluntarily accept payment of the part of a judgment in his favor and thereafter prosecute appeal or error from the part which is against

him is where the right to the benefit is absolute and cannot possibly be less affected by reversal of the judgment.

5. ———. Where there is a possibility that appeal or error may lead to a result showing that the party was not entitled to what was received under the judgment appealed from, the right of appeal or to prosecute error is defeated.

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

Walter R. Johnson, Attorney General, and *Herbert T. White,* for appellant.

Wagner & Wagner, contra.

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

YEAGER, J.

This is an action growing out of a proceeding by the Department of Roads and Irrigation of the state of Nebraska, defendant in error and appellant, to condemn certain lands of Marcus Hoesly, plaintiff in error and appellee, and others for highway purposes.

It appears that on August 17, 1940, the appellant, in conformity with statute, instituted its condemnation proceeding in Platte county, Nebraska, and thereafter, again in conformity with statute, appraisers were appointed to appraise the damages to appellee's lands. On August 31, 1940, the appraisers made an award of damages. The award to the extent necessary to be set out and as it appears in the transcript is as follows:

" * * * will suffer damages by reason of the taking of said land for right of way purposes by the department of roads and irrigation of the state of Nebraska, in the amount of:

"3.834 acres at $100.00 per acre	$ 383.40
160 rods of new fence	120.00
For moving 160 rods of old fence	32.00
For 19 trees at $5.00 per tree	95.00
For moving straw shed	25.00

For trench silo	20.00
For moving barn	500.00
For moving or damage to wind mill	25.00
Moving hog fence	37.50
Damage and inconvenience during construction	250.00
Permanent damage 40 acres in section 17	800.00
Permanent damage 80 acres in section 18	800.00
Total	$3,087.90

"In the event that the state elects to eliminate stock pass as shown between section 17 and 18, on the plans of said project then we find the total of all damage to be $5,087.90."

Following the rendition of the award and on September 20, 1940, appellant paid to the county judge on the award the sum of $3,087.90, and thereafter on November 4, 1940, appellee accepted this sum and receipted for it through his attorneys as follows:

"Receipt November 4th, 1940. Markus Hoesly has elected to take cash and declines to accept a cattle pass. He therefore acknowledges receipt of $3,087.90, on this award and claims the balance of $2,000.00."

No appeal was taken from the award. However, the appellee, on November 28, 1940, filed a petition in error in the district court. Later, on February 14, 1942, with leave of court, appellee filed an amended petition in error wherein he alleged that the appraisers erroneously considered a cattle pass in their appraisal and award of damages, and prayed that the court hold that the appraisers so erred and that the award be corrected by omitting reference to a cattle pass, and that the appellant be required to pay the balance of what appellee claimed was the true award, in the amount of $2,000 with interest.

To this amended petition the appellant filed a general demurrer which was overruled. Appellant elected to stand upon its demurrer, and judgment was rendered in favor of appellee for the relief prayed. From this judgment appellant brings the case here for review.

The only error presented here is that of whether or not the petition states a cause of action, or, to state it differently, was the petition sufficient to confer on the district court the right to review the condemnation proceedings?

That the appellee had the right to have reviewed in the district court the award of the appraisers there can be no doubt. Section 39-1403, Comp. St. 1929, empowers condemnation by the department of roads and irrigation. The same section provides that the procedure for condemnation shall conform to the requirements of sections 26-709 to 26-715, Comp. St. 1929, which contain the procedural requirements for condemnation by county boards. Section 26-711 of these provisions provides for review of the award of appraisers by appeal to the district court.

Another method of review is provided by section 20-1903, Comp. St. 1929, which method is by petition in error to the district court. It is urged *arguendo* that this latter method is not available to the appellee, but this contention cannot be sustained. *In re Estate of Berg*, 139 Neb. 99, 296 N. W. 460.

The first paragraph of the syllabus in *In re Estate of Berg, supra*, is as follows:

"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."

This statement is directly applicable here since the county court in the exercise of probate jurisdiction is one of the tribunals included in the provisions of section 20-1901, Comp. St. 1929. Boards of appraisement such as the one under consideration here are tribunals for condemnation and come within the purview of the section as well as does the county court in the exercise of probate jurisdiction. The section is as follows:

"A judgment rendered, or final order made, by a county court, justice of the peace or any other tribunal, board or

officer exercising judicial functions, and inferior in jurisdiction to the district court, may be reversed, vacated or modified by the district court."

Viewed in the light of these statutory provisions, it appears that a petition in error which sets forth the errors complained of entitles the petitioner, on his request for reversal, vacation or modification, to a hearing in the district court. Appellee complained that the appraisers erred in the consideration of matters which they had no right to consider. He had the right to have this matter considered and adjudicated in the district court.

We hold, therefore, that the appellee's proceeding in error was proper and the district court properly entertained it, unless by reason of matters presented on the face of the petition it is apparent that he has defeated or waived his right to assert error.

The matter which was submitted to the appraisers was damages, and on the petition in error the matter of damages and correction of the award were presented for review. It is obvious from an examination of the petition in error that to determine the matter presented by the petition it was necessary for the district court to examine the proceedings of the appraisers and the award, whatever it was, in its entirety. In other words, it became necessary to make a determination of what in fact and law was the award. The petition, fairly interpreted, pleads lack of certainty in the award.

Notwithstanding the lack of certainty of the award, as pleaded, the appellee chose to accept that portion which appeared favorable to him and received and receipted for the money, and thereafter sought a review of the award by petition in error in the district court.

The appellant insists that by acceptance of that which appeared to be favorable the appellee has forfeited and waived the right to review.

It is well established by the decisions of this court that it is the general rule that one may not voluntarily accept payment of that part of a judgment in his favor and afterwards

prosecute an appeal from the part which is against him. *Harte v. Castetter*, 38 Neb. 571, 57 N. W. 381; *Weston v. Falk*, 66 Neb. 198, 92 N. W. 204; *McKee v. Goodrich*, 84 Neb. 479, 121 N. W. 577; *Thurston v. Travelers Ins. Co.*, 128 Neb. 141, 258 N. W. 66; *Larabee v. Larabee*, 128 Neb. 560, 259 N. W. 520; *First Trust Co. v. Hammond*, 139 Neb. 546, 298 N. W. 144.

The rule, however, has its exceptions. An exception exists where the right to the benefit is absolute and cannot possibly be affected by reversal of the judgment. It is the possibility that appeal may lead to a result showing that the party was not entitled to what was received under the judgment appealed from that defeats the right of appeal. *Weston v. Falk*, 66 Neb. 202, 93 N. W. 131; *Meade Plumbing, Heating & Lighting Co. v. Irwin*, 77 Neb. 385, 109 N. W. 391; *First Trust Co. v. Hammond, supra.*

It is our conclusion that the situation here is controlled by the rule rather than by any exception. On the petition in error, and that is what must be the basis of consideration by this court, it cannot be said that there was no lack of possibility that on hearing in the district court a different result would have been reached with regard to money which appellee had accepted and for which he had given his receipt. On finding of irregularity in the award, as was pleaded by the appellee, the district court, there being no bill of exceptions, would have been required to make a *de novo* inquiry for the purpose of determining the truth or falsity of appellee's contention, and would have been required to ascertain and determine an award entire in character and enter judgment thereon. This would inevitably necessitate a change in the award even though the contention of appellee were sustained, since it is his contention that the appraisers severed the award, whereas it should have been entire. In addition to this it cannot be said certainly that on a hearing *de novo* the court would have arrived at the same conclusion as did the appraisers.

Since it may be urged that this is a proceeding in error and not appeal, and that therefore the rules of law laid

down in the cases cited on waiver by acceptance of benefits has no application, it is pointed out here that the rule applies alike in appeals as in proceedings in error to the district court. In *McKee v. Goodrich, supra,* it is stated: "The rule is well established in this jurisdiction that a party who voluntarily accepts the benefits or receives the advantage of a judgment or decree of the trial court is thereby precluded from afterwards prosecuting error or appeal."

We hold that the appellee, by accepting the benefit of the portion of the award of the board of appraisers which was favorable to him, waived the right to have that portion which was, or apparently was, unfavorable reviewed by the district court on petition in error.

The judgment of the district court is reversed and the petition in error dismissed.

REVERSED AND DISMISSED.

LANDIS MACHINE COMPANY, APPELLANT, V. OMAHA MERCHANTS TRANSFER COMPANY ET AL., APPELLEES.
6 N. W. (2d) 380

FILED NOVEMBER 27, 1942. No. 31426.

1. **Taxation.** The statutes of this state pertaining to listing for taxation all personal property do not take into account qualified or conditional sales of personal property and admit of no reference to legal and equitable or general and specific owners.
2. ———. Where a statute requires that property be assessed to the owner, the interpretation is that it means the general and beneficial owner; that is, the person whose interest is primarily one of possession and enjoyment in contemplation of an ultimate absolute ownership, and not the person whose interest is primarily in the enforcement of a collateral pecuniary claim and does not contemplate the use and enjoyment of the property as such.
3. ———. Personal property in the possession and control of a purchaser, under a conditional sales contract, who has been invested with all the indicia of ownership is properly assessed to the purchaser.
4. ———. The record in the instant case supports the right of the sheriff to levy on the property in question, under the circum-

stances, for the personal taxes assessed against the purchaser, especially so when the record fails to disclose that the assessment was invalid, and, further, that the distress warrant was invalid.

5. ———: REPLEVIN. Where personal taxes are assessed (and the validity of the assessment is not questioned) against the property of a person who is also in possession of certain property under a conditional sales contract, which provides that the purchaser shall pay all taxes levied on such property during the life of the contract, and that the same shall at all times remain the sole and exclusive property of the seller, with the right of the purchaser to have the beneficial use thereof, and, upon complying with the instalment provisions of the contract, to become the absolute owner of the property, and the purchaser defaults, surrenders the property, and the sheriff levies on it during the process of its removal, by virtue of a distress warrant, the validity of which is not questioned, and the seller proceeds in an action in replevin, as the owner, to recover immediate possession, under such circumstances, a judgment dismissing the plaintiff's replevin action is erroneous. The proper judgment to be rendered by the court in denying the plaintiff immediate right of possession and return of the property is to adjudge defendant sheriff entitled to the return of the property, or, in the alternative, for the value thereof, or the value of the sheriff's possession, if the property cannot be returned.

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

W. A. Ehlers, for appellant.

James T. English and *Oscar T. Doerr, contra.*

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

MESSMORE, J.

The plaintiff instituted an action in replevin in municipal court to recover certain merchandise, as owner thereof under a conditional sales contract, from the sheriff of Douglas county who had levied on such property under a distress warrant for personal taxes assessed to the vendee, in possession of the property. The municipal court found for the plaintiff. The defendant county appealed to the district

court which dismissed plaintiff's petition at its costs. Plaintiff appeals.

On October 3, 1936, the plaintiff's agent procured an order from Joseph Constantino, of Omaha, for the purchase of certain shoe-repair machinery and equipment. October 12, 1936, a conditional sales contract was entered into by the parties. Among its provisions is the following: "Said machinery shall at all times remain the sole and exclusive property of the Landis Machine Company; said second party shall have the right to use said machinery upon the conditions hereinafter named. Said machinery shall not be moved from the place where now situated, nor be transferred, assigned, or sublet to any other person or corporation," etc. Another provision is: "Said second party (Joseph Constantino) further agrees to pay any and all taxes that may be assessed against said machinery during the life of this contract;" and states, in the event of default, the manner in which the plaintiff may repossess the machinery.

An interpretation of the contract discloses the retention of the bare legal title in the name of the plaintiff, with the beneficial use of the property to Joseph Constantino, the purchaser, and the right of ownership to be in him upon his compliance with the conditions of the agreement, which called for instalment payments, some of which had been made, and the property, pursuant to the terms of the contract, had been delivered to him.

The distress warrant, dated August 3, 1939, No. 20308, is, in part, as follows: "Whereas, taxes have been duly levied and assessed in said county on the personal property of Joseph Constantino, 2735 Browne * * * taxable according to the law of the state of Nebraska in and for said county for the years herein set forth, in the sum of Two hundred twenty-two and 53/100 Dollars.

"You are therefore commanded to collect the same, together with penalty and costs allowed by law, by distress and sale of goods and chattels of the said party and pay the same to me, Treasurer of said county.

"You are further commanded to return this writ to the

undersigned treasurer within 60 days from this date, showing the manner in which you executed the same." A statement is attached thereto.

The contention is made by the plaintiff that the distress warrant included certain taxes levied against Josephine Constantino, the mother of Joseph Constantino, and the Boston Machine Company. The record fails to sustain this contention. It is probably based on the finding of the court in ruling on the motion for a new trial, wherein the court said: "While there is some contention made that these taxes were levied against a corporation in Boston, and also against Constantino's mother, yet it is admitted that part of the taxes were levied against Constantino." And in the testimony of A. W. Elsasser, deputy sheriff, answering a question, he said: "Then he made a levy and I think Mr. Ehlers said he wanted to test this question." What question Mr. Ehlers wanted to test does not appear in the record, so, obviously, without testimony in the record to sustain the court's finding, and with nothing appearing in the distress warrant to show that the taxes assessed were other than those to Joseph Constantino, we cannot speculate on the plaintiff's contention in such respect.

Constantino advised the plaintiff that he was quitting the business, and the plaintiff made arrangements with the Omaha Merchants Transfer Company to pick up the machinery. In the process of getting the machinery out of the basement and onto the sidewalk, the property was levied upon by a deputy sheriff under the distress warrant. As developed by the testimony of Elsasser, Ehlers wanted to test this question, so it was agreed to let the property be taken to the warehouse of the transfer company, to remain there until something could be done about it; hence, the replevin action.

Is the machinery in question, legal title to which was reserved in the plaintiff, subject to the right of Joseph Constantino to use it as long as the terms of the agreement were kept by him, considered under our taxing statute as owned by the plaintiff or Joseph Constantino?

Section 77-205, Comp. St. 1929, provides: "When property is assessed to any person as agent for another, or in a representative capacity, such person shall have a lien upon such property, or any property of his principal in his possession, for the taxes thereon, until he is indemnified against the payment thereof; or, if he has paid the taxes until he is reimbursed therefor."

Section 77-1959, Comp. St. Supp. 1941, provides in part: "Taxes assessed upon personal property shall be a first lien upon the personal property of the person to whom assessed from and after the first day of November next following the date upon which the same are levied and until paid."

In the case of *Massey-Harris Co. v. Lerum,* 60 S. Dak. 12, 242 N. W. 597, one Baker, a conditional purchaser of a reaper-thresher, owed personal property taxes for the year 1930. A distress warrant for the collection of certain personal property tax of Baker was issued by the county treasurer and delivered to the sheriff. The sheriff levied upon one Massey-Harris reaper-thresher, then in possession and under the control of Baker, which had been listed by Baker as his personal property. The plaintiff, vendor, commenced an action to enjoin the sale of the reaper-thresher until the matter could be decided upon its merits, claiming to be the owner of the property by reason of a conditional sales contract covering the property involved, and that the lien of all of the personal property tax of the purchaser Baker was not a lien on this particular property, but that said personalty was liable for only its own tax. The sheriff contended that the specific property concerned in the action was subject to levy and sale under a distress warrant for any and all of the purchaser's personal property tax. It was undisputed that the property levied upon was subject to a certain conditional sales contract entered into by the Massey-Harris Company and Baker, in which the title to the property was to remain in the company until all of the purchase price had been paid, and that the contract was duly entered of record in the office of the register of deeds. The property remained in the possession of Baker until the levy by the dis-

tress warrant was placed in the hands of the sheriff, who, by virtue of the distress warrant, levied upon the reaper-thresher for the entire amount of the personal property tax due from Baker. It was said in the opinion:

"The general rule subjecting property purchased under conditional sales contracts seems to be that the buyer's interest, when he is in possession, has been recognized as a proper subject of taxation and property may be legally assessed to a person in possession or control thereof and who claims an interest therein. Accordingly, personal property in the possession and control of a purchaser under a conditional sales contract and who has been invested with all the indicia of ownership is properly assessed to the purchaser."

In interpreting the South Dakota statutes, the court said:

"Our statutes pertaining to listing for taxation of personal property does not take into account qualified or conditional estates (sales) of personal property and seems to have no reference to legal and equitable or general and specific owners. The Legislature has not seen fit to require the assessor to ascertain and list separately the interest of the purchaser and the seller of the parties to a conditional sales contract." The court concluded that "Baker was in the lawful possession and had certain ownership in the reaper-thresher which created such an interest in the property that it was taxable to him just as much and with the same force and effect as though he held the legal title and for the purpose of securing the vendor had executed a chattel mortgage for the payment of the purchase price."

The supreme court of Alabama, passing upon a similar question in *State v. White Furniture Co.*, 206 Ala. 575, 90 So. 896, said: "So, when a statute requires that property be assessed to the owner, * * * it means the general and beneficial owner—that is, the person whose interest is primarily one of possession and enjoyment in contemplation of an ultimate absolute ownership—and not the person whose interest is primarily in the enforcement of a collateral pecuniary claim, and does not contemplate the use or enjoyment of the property as such."

In the instant case, some payments were made by Joseph Constantino in accordance with the conditions of the conditional sales contract; he had possession of the property and the beneficial use thereof; he had an equity in the property by virtue of the payments he had made. Furthermore, the conditional sales contract contained the agreement that Constantino was to pay the taxes that may be assessed against the machinery. Certainly, such language admits of no other conclusion than the right of the sheriff to levy on such property under the distress warrant. Many other cases are cited that have to do with statutes, not analogous in many instances but similar to ours, on the question of listing property for assessment of taxes. A résumé of these cases would unnecessarily lengthen this opinion, but cases holding similarly to *Massey-Harris Co. v. Lerum, supra,* are: *Jordan v. Baggett,* 37 Ga. App. 537, 140 S. E. 902; *Singer Sewing Machine Co. v. Cooper,* 263 Fed. 994; *State v. White Furniture Co., supra.*

The fact that the tax must be levied on the owner of the property does not necessarily mean the holder of the title. In a conditional sale the title in the seller is for security only, to assure the payment of the purchase price. It carries with it none of the ordinary incidents of ownership. The buyer has the use of the property to the complete exclusion of the seller, subject only to the seller's remedy in case of default, and both in a practical and legal sense the buyer is the beneficial owner. See *State v. J. I. Case Co.,* 189 Minn. 180, 248 N. W. 726; *County of San Diego v. Davis,* 1 Cal. (2d) 145, 33 Pac. (2d) 827; *Walker v. Houston,* 215 Cal. 742, 12 Pac. (2d) 952, 87 A. L. R. 937.

We conclude that when a statute requires that property be assessed to the owner it means the general and beneficial owner, the person whose interest is primarily one of possession and enjoyment and not the person whose interest is primarily one in the enforcement of a collateral and pecuniary claim and does not enjoy the use of the property as such.

We deem unnecessary a determination of the question of

plaintiff's failure to file the proper affidavit with the conditional sales contract required by section 36-208, Comp. St. 1929; nor is an analysis of section 77-1923, Comp. St. 1929, necessary, in view of the authorities and decisions heretofore cited.

The action of replevin is a law action, requiring return to or recovery by a person of goods or chattels, wrongfully taken or retained, and the right of immediate possession. The trial court dismissed the plaintiff's petition. The validity of the tax as against Joseph Constantino is not questioned, nor the validity of the distress warrant under which the sheriff sought to levy on such property. The trial court erred in dismissing the plaintiff's petition and action. This is conceded by both parties. The following authorities, under the circumstances, are applicable:

In *Securities Investment Corporation v. Krejci*, 128 Neb. 763, 260 N. W. 396, this court held: "Where property has been taken under a writ of replevin and delivered to plaintiff and the verdict is in favor of defendant, the judgment must be in the alternative for the return of the property or for its value, or for the value of defendant's possession, if it cannot be returned, and for damages for illegal detention."

In *Roberson v. Reiter*, 38 Neb. 198, 56 N. W. 877, the court held: "In an action of replevin, where the property replevied has been delivered to the plaintiff under the writ, in case the verdict finds for the defendant, the judgment must be in the alternative for a return of the property, or the value thereof, or the value of the possession of the same, and for damages." And in *Manker v. Sine*, 35 Neb. 746, 53 N. W. 734, it was said: "The error in the form of the judgment in the case at bar will not necessitate a new trial, but a proper judgment may be rendered upon the verdict."

The case is reversed and remanded, with directions to the trial judge to enter a proper judgment, in denying the plaintiff the immediate right of possession or return of the property, holding that the appellees are entitled to a return of the property taken, or, in the alternative, for the value of

the property, or for the value of appellees' possession, if the property cannot be returned.

There is some evidence of the sum of $40 for storage of the machinery which the plaintiff claims as damages. The evidence is not clear on this item, or that the plaintiff paid such storage charge, or that the same was a legal and reasonable charge therefor, or that any such charge was made.

REVERSED.

The following opinion on motion for rehearing was filed April 9, 1943. *Former judgment of reversal vacated in so far as it conflicts with this opinion and the cause is remanded, with directions.*

1. Taxation. The purpose and intent of section 77-1923, Comp. St. 1929, is to provide a just and adequate legal remedy for the tax debtor and prevent delay in the collection of public revenue during vexatious litigation. However, the remedy has no application to strangers to the tax, third persons whose property has been distrained for the taxes of another.
2. Appeal. In an action to replevin property claimed unlawfully distrained for personal taxes, if there is no evidence of the value of the property taken but no point is made thereof in the trial court, it will be presumed on appeal to this court that the case was tried on the theory that the property was worth more than the amount of the taxes, and judgment for defendant will not be reversed on the ground that it might have been less.
3. ———. If the judgment of the trial court in a replevin action is not in proper alternative form, a new trial will not be granted, but the judgment will be reversed and the cause remanded with directions to render a proper judgment upon the verdict.
4. Taxation. A conditional sales contract executed before November 1 is superior to statutory tax liens of prior years but inferior to such tax liens for subsequent years.

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

CHAPPELL, J.

Landis Machine Company, plaintiff, brought this action in replevin against Omaha Merchants Transfer Company and William H. Dorrance, sheriff of Douglas county, Ne-

braska, defendants, to recover the possession of certain shoe repair machinery taken under a distress warrant for delinquent personal taxes of one Joseph Constantino. Plaintiff appealed from an adverse judgment and the decision of this court thereon is reported *ante,* p. 389, 6 N. W. (2d) 380. Upon rehearing granted, we have concluded that our former opinion should be modified in certain particulars.

The record discloses that on October 3, 1936, Joseph Constantino ordered the machinery from plaintiff, the terms of the purchase to be settled by the execution of a conditional sales contract. On October 12, 1936, plaintiff, as vendor, and Joseph Constantino, as vendee, made, executed and delivered the conditional sales contract which details the full transaction *in extenso.* The affidavit required by law (Comp. St. 1929, sec. 36-208) appears on the back of the conditional sales contract. They were duly filed in the Douglas county clerk's office at 8 o'clock a. m. on November 6, 1936.

The machinery involved was accordingly delivered to vendee on October 12, 1936. He made a few payments and used the machinery until early in August, 1939, at which time he notified plaintiff that he had left his location and was quitting business. Thereupon plaintiff sent defendant, Omaha Merchants Transfer Company, to repossess the property. The transfer company went to get the property for plaintiff and had moved it out of the business location to the sidewalk on the street when the sheriff levied a distress warrant upon it for the delinquent personal taxes of the vendee Joseph Constantino for the years 1930, 1931, 1932, 1933, 1934, 1935, 1936, 1937 and 1939. Plaintiff later brought this action, repossessed the property from the sheriff, and gave statutory bond. There is no evidence in the record of the value of the property but the amount of the taxes for each year can be readily ascertained by reading the tax list attached to the distress warrant which appears in the evidence.

It is insisted that plaintiff does not have the remedy of replevin in view of section 77-1923, Comp. St. 1929. The

purpose and intent of this section is to provide a just and adequate legal remedy for the tax debtor, and prevent delay in the collection of public revenue during vexatious litigation. However, the remedy has no application to strangers to the tax, third persons whose property has been distrained for the taxes of another. See 54 C. J. 430; 61 C. J. 1105; 23 R. C. L. 879, sec. 32; 4 Cooley, Taxation (4th ed.) sec. 1620; *Rothwell v. Knox County*, 62 Neb. 50, 86 N. W. 903; *Tousey v. Post*, 91 Mich. 631, 52 N. W. 57; *Thompson Lumber Co. v. Hynes*, 84 Wis. 353, 54 N. W. 576; *Pioneer Fuel Co. v. Molloy*, 131 Mich. 465, 91 N. W. 750.

Defendants make point of the fact that Joseph Constantino, vendee, agreed with plaintiff, vendor, in their conditional sales contract to pay the taxes on the property taken. We do not believe the contention is material here for the reason that such contracts may be binding as between the parties but in the absence of privity they do not affect the rights of the taxing authorities. See 61 C. J. 172; 2 Cooley, Taxation (4th ed.) sec. 603; *Flavin v. Partello*, 132 Misc. 325, 229 N. Y. Supp. 578.

It is argued orally and in the brief by counsel for defendants that the conditional sales contract filed in the Douglas county clerk's office is void in that it failed to comply with section 36-208, Comp. St. 1929, by attaching the affidavit so required. This section has since been amended eliminating the requirement for the affidavit. Comp. St. Supp. 1941, sec. 36-208.

A careful examination of the record discloses that the conditional sales contract was signed by both the vendor and the vendee. An affidavit sworn to before a notary public with seal attached, executed by both vendor and vendee appears on the back of the conditional sales contract. The only defect in the affidavit is that it fails to state the true interest of the vendor. This all appears fully in the conditional sales contract of which the affidavit is a part. They were received in evidence without objection. The sole purpose of the act is to protect any purchaser or judgment creditor of the vendee in actual possession without notice.

In *General Motors Acceptance Corporation v. Sutherland*, 122 Neb. 720, 241 N. W. 281, the signature of affiant appeared only in the beginning of the affidavit, not at its conclusion, and the seal of the notary was not attached. However, we gave validity to the instrument, and *a fortiori* we give validity to the instrument in dispute. See, also, *Crancer Co. v. Cooper*, 98 Neb. 153, 152 N. W. 304, 100 Neb. 335, 160 N. W. 92; 2A U. L. A. (Bogert, Commentaries on Conditional Sales), p. 91.

Appellant's contention that the distraint was in violation of its constitutional rights by deprivation of property without due process of law is answered adversely to it in *Krug v. Hopkins*, 132 Neb. 768, 273 N. W. 221. See, also, 61 C. J. 1044; 12 Am. Jur. 86, sec. 443.

The important question for decision is whether under these facts and circumstances the county of Douglas had a first lien on the property involved for the delinquent personal taxes of the vendee, Joseph Constantino. Two sections of our statutes are of first importance to determination. Section 77-1959, Comp. St. Supp. 1941 (formerly section 77-204, Comp. St. 1929), provides in part: "Taxes assessed upon personal property shall be a *first lien* upon *the personal property of the person to whom assessed* from and after the first day of November next following the date upon which the same are levied and until paid." (Italics supplied.) Section 77-1915, Comp. St. 1929, also provides, in part: "The treasurer shall, on * * * the first day of February ("March" in section 77-1915, Comp. St. Supp. 1941) next after the personal taxes for the last preceding year have become delinquent, collect the same, together with interest and costs of collection, by distress and sale of *personal property belonging to the person against whom levied* in the manner provided by law for the levy and sale of personal property on execution." (Italics supplied.)

We have heretofore given consideration to the construction and meaning of section 77-204, Comp. St. 1929, and held that the statutory first lien for taxes upon the personal property of the person to whom assessed is not confined

to the specific article of personal property assessed, as it attaches to real property, but that it attaches to every variety of personalty including that subsequently acquired and belonging to the tax debtor on November 1 next following the date upon which the same are levied and until paid. This applies even where the property would be exempt from ordinary levy and sale. See *Krug v. Hopkins*, 132 Neb. 768, 273 N. W. 221; *Foster & Smith Lumber Co. v. Leisure*, 3 Neb. (Unof.) 237, 91 N. W. 556; *Reynolds v. Fisher*, 43 Neb. 172, 61 N. W. 695; *Farmers Loan & Trust Co. v. Memminger*, 48 Neb. 17, 66 N. W. 1014; *Woolsey v. Chamberlain Banking House*, 70 Neb. 194, 97 N. W. 241; *Midland Guaranty & Trust Co. v. Douglas County*, 217 Fed. 358, 133 C. C. A. 274. An examination of the record does not disclose any evidence that the specific property involved was ever assessed in any manner for any purpose, but the above authorities make that question entirely immaterial to decision.

We must determine whether the property involved is personal property of the person assessed, Joseph Constantino, vendee, so that there is a first lien for his unpaid personal taxes; if so, for what period and whether it is personal property belonging to the person assessed so that it can be distrained as provided by statute. It is conceded by counsel for plaintiff that the fact that plaintiff had the property involved in its possession in Douglas county, Nebraska, when the distress warrant was served, is immaterial and without force to decision, the lien, if any exists, being statutory and not dependent upon possession. See 1 Jones, Liens (3d ed.) p. 98; 33 Am. Jur. 432, sec. 24; *Grant v. Whitwell, Marsh & Talbott*, 9 Ia. 152.

We have held in *Union Stock Yards Nat. Bank v. Thurston County*, 65 Neb. 410, 92 N. W. 1022, relied upon by plaintiff, that the owner of personal property within the meaning of the tax laws is the person who has the legal title thereto. The opinion, however, was simply an adjudication that certain cattle must be assessed to the mortgagor as owner and not to the mortgagee. If we similize

chattel mortgages and conditional sales contracts, as has been done by many courts, the vendee is in the position of mortgagor and the vendor that of mortgagee. The theory of the Uniform Conditional Sales Act, adopted by many other states, is that these two transactions should be treated alike in the law since they have identical objects and effects. 2A U. L. A., *supra,* pp. 10-11.

Under a conditional sales contract each party has certain property interests in the goods less than complete and absolute ownership. The right of the seller to collect the price is the principal thing; the reservation of title, the secondary thing. The reservation of title is not absolute but for the limited purpose of collecting the price. The conditional buyer's rights are property rights and not mere contract rights. 2A U. L. A., *supra,* pp. 28-39, 48. The vendor under a conditional sales contract retains title solely for security; other attributes of ownership as possession, use, control, or right thereto under such a contract belong to the vendee. *Trust Company of Chicago v. Lewis Auto Sales,* 306 Ill. App. 132, 28 N. E. (2d) 300. Sections 69-301 and 69-302, Comp. St. 1929, recognize these conclusions and give mutual protection to the property rights of both the vendor and the vendee.

Bearing this in mind, shall the property involved be excluded from inclusion in the purview of the tax statutes? Section 77-1401, Comp. St. 1929 (now section 77-1401, Comp. St. Supp. 1941), provides in part: "Personal property shall be listed in the manner following: First. Every person of full age and sound mind, being a resident of this state, shall list all his * * * other personal property * * * *." Thereafter follow nine requirements for property listings in a representative capacity, none of which can include the vendee of a conditional sales contract. Sections 77-1413 and 77-205, Comp. St. 1929, are simply directive of representative listings for taxation, or provide a lien for recoupment of taxes paid in a representative capacity. The vendee is not an agent or serving in any representative capacity, as claimed by plaintiff.

It has been called to our attention that *Massey-Harris Co. v. Lerum,* 60 S. Dak. 12, 242 N. W. 597, relied upon in our former opinion, has since been modified by *General Motors Acceptance Corporation v. Whitfield,* 62 S. Dak. 415, 253 N. W. 450. The latter case adheres to the doctrine that the vendee is taxable as owner but holds that the property is not distrainable for taxes, as held in the *Massey-Harris* case. In other words, *General Motors Acceptance Corporation v. Whitfield, supra,* holds that the vendee in a conditional sales contract is an owner for taxation but not an owner for collection. We cannot logically concede that the state has the power to tax the property of the vendee as owner but is powerless to enforce collection by distraint upon the same hypothesis.

We adhere to the rule established in our former opinion, *ante,* p. 389, 6 N. W. (2d) 380, that the property involved was personal property belonging to the person assessed, Joseph Constantino, vendee, his interest under the conditional sales contract being one of possession, use and enjoyment as the general beneficial owner, attached to which are all the burdens incident to absolute ownership as against the world, except plaintiff vendor, whose interest in the property is one of title for security of payment only, and not absolute ownership. See, also, Vold on Sales, pp. 267-288; 50 C. J. 776, 778; 10 C. J. S. 242; 61 C. J. 636.

However, we depart from our former opinion in its application to the case at bar with reference to prior taxes. The principle of subordination of liens for taxes to liens lawfully created by contract has been recognized in the act providing that a first lien for taxes shall exist in favor of the state on all the personal property of the person to whom assessed, the tax debtor, from and after November 1 next following the date upon which the same are levied and until paid. See *Lincoln Street R. Co. v. City of Lincoln,* 61 Neb. 109, 84 N. W. 802; *City of Lincoln v. Lincoln Street R. Co.,* 67 Neb. 469, 93 N. W. 766.

The term "lien" is applied in various modes but in all cases it signifies an obligation, tie, duty or claim annexed

to or attaching upon property by the common law, equity, contract or statute, without satisfying which such property cannot be lawfully demanded by another. See 1 Jones, Liens (3d ed.) p. 4; 33 Am. Jur. 419, sec. 2. A lien affords a supplemental and additional remedy for collection which is given the force of law. A statute giving a lien is regarded as remedial and must be so construed as to give full force and effect to the remedy, in view of the beneficial purpose contemplated. See 1 Jones, Liens (3d ed.) p. 99. We are called upon to decide the question of priorities between the statutory first lien for taxes and the contractual lien of plaintiff.

We have held in this connection that, where there is an absolute sale with chattel mortgage back, the chattel mortgage if executed before the tax books came into the hands of the collector (now November 1) is superior to statutory tax liens of prior years but inferior to such tax liens for subsequent years. See *Woolsey v. Chamberlain Banking House*, 70 Neb. 194, 97 N. W. 241; *Platte Valley Milling Co. v. Malmsten*, 79 Neb. 730, 113 N. W. 229.

Justice demands that we apply the same rule to the case at bar. In other words, we must hold that a conditional sales contract executed before November 1 is superior to statutory tax liens of prior years, but inferior to such tax liens for subsequent years, in which event the first lien for taxes in the case at bar would be superior to the conditional sales contract only for the years 1936, 1937 and 1939, in the sum of $94.81. No taxes appear in the tax list attached to the distress warrant for the year 1938, and there is no evidence in the record that any of the taxes involved were assessed to other than Joseph Constantino.

Where property has been taken under a writ of replevin and delivered to plaintiff and the verdict is in favor of defendant, the judgment must be in the alternative, for the return of the property or for its value or for the value of defendant's possession if it cannot be returned, and for damages for illegal detention. *Securities Investment Corporation v. Krejci*, 128 Neb. 763, 260 N. W. 396; Comp. St. 1929, sec. 20-10,104.

In an action to replevin property claimed unlawfully distrained for personal taxes, if there is no evidence of the value of the property taken but no point is made thereof in the trial court, it will be presumed on appeal to this court that the case was tried on the theory that the property was worth more than the amount of the taxes, and judgment for defendant will not be reversed on the ground that it might have been less. *Forster v. Brown,* 119 Mich. 86, 77 N. W. 646; *Underwood v. Chicago & N. W. R. Co.,* 100 Neb. 275, 159 N. W. 408. If the judgment of the trial court in a replevin action is not in proper alternative form, a new trial will not be granted, but the judgment will be reversed and the cause remanded with directions to render a proper judgment upon the verdict. *Manker v. Sine,* 35 Neb. 746, 53 N. W. 734.

Our former opinion is hereby vacated and set aside, in so far as it conflicts with this opinion, and the judgment of the trial court is reversed and the cause remanded with directions to enter a proper judgment denying the plaintiff the immediate right of possession or return of the property involved, and holding that defendant is entitled to a return of the property taken by plaintiff, or, in the alternative, for the value of the property taken or the value of defendant's possession, in the sum of $94.81, the amount of the taxes for 1936, 1937 and 1939, with interest at the statutory rate from the respective dates of delinquency, if the property cannot be returned, together with nominal damages for unlawful detention.

REVERSED.

A. A. HULSE, ADMINISTRATOR, APPELLANT, V. IRIS TANNER, APPELLANT: CASSIUS TANNER ET AL., APPELLEES.

A. A. HULSE, ADMINISTRATOR, APPELLANT, V. WADE FLYNN ET AL., APPELLANTS: J. CHRIS PETERSON, ADMINISTRATOR, ET AL., APPELLEES.

6 N. W. (2d) 618

FILED NOVEMBER 27, 1942. Nos. 31446, 31447.

1. Wills. "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." Comp. St. 1929, sec. 76-109. See *Schnitter v. McManaman*, 85 Neb. 337, 123 N. W. 299.
2. ———. Where a testator uses language in a clause of his will, "It is my will," such words are more than a mere entreaty or expression of desire; they are words of command; they express an imperative testamentary design.
3. ———. In construing the will in the instant case, the testator intended no fee simple title to pass. He, in effect, created a trust for a period of 10 years after his death and gave as his reasons therefor the education, support and maintenance of his minor child. His children received an equitable interest only in the farms, subject to destruction, unless they lived until the termination of the trust.
4. ———. In construing the will of Frank G. Tanner in its entirety, the son Myron Tanner acquired a defeasible estate or interest in the real estate, described in the seventh clause thereof, and income therefrom, and from the death of Myron Tanner his interest in the real estate and income terminated and passed to the remaining legatees and devisees under the will.
5. ———. "Subsequent provisions in a will will not prevail to cut down an estate in fee simple previously given. They are, however, operative to define the estate devised, and may demonstrate that what without them would be an absolute fee was intended to be an inferior estate." *Schnitter v. McManaman*, 85 Neb. 337, 123 N. W. 299.
6. ———. The rule that words of limitation shall be applied to the death of the first taker without issue during the life of the testator is extremely technical in character and does not apply

where there are indications, however slight, that the testator referred to death subsequent to his own demise. In the instant case, the will was made seven days prior to the testator's death, and the indication is clear that the testator referred to death subsequent to his own demise.

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

Morrow & Miller, for appellants.

Howarth N. Olsen and *Curtis O. Lyda, contra.*

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

MESSMORE, J.

The two cases constituting the subject of this appeal were argued together, and a determination of the principal question involved will be decisive as to both. Therefore, one opinion suffices.

On April 16, 1940, the administrator with the will annexed of the estate of Frank G. Tanner filed a report of receipts and expenditures in the county court. On May 8, 1940, such administrator filed a petition in the county court, praying for a construction of the will of Frank G. Tanner, deceased, and for directions as to the distribution of the funds in his hands to the persons entitled thereto.

Frank G. Tanner died December 5, 1931. His last will and testament was probated January 2, 1932. The administrator of the estate of Myron Tanner, deceased, filed an application in the district court for license to sell an undivided one-fifth interest in the real estate described in the seventh clause of the last will of Frank G. Tanner, to pay debts allowed against the estate of Myron Tanner, a son of Frank G. Tanner and an heir, with certain interests, under the will of Frank G. Tanner. Myron Tanner died without issue January 18, 1940. His heirs consisted of his widow, his brothers and sisters.

In November and December, 1938, Myron Tanner and his wife executed and delivered mortgages to one Wade Flynn,

to secure payment of certain sums of money on an undivided one-fifth interest in the premises described in the seventh clause of the will of Frank G. Tanner.

The pleadings are proper in form to present the controverted issues to this court, which require a construction of the will of Frank G. Tanner, and present the following question for our determination: Whether or not Myron Tanner acquired under the will of Frank G. Tanner, and was at the time of his death the owner of the fee simple title to, an undivided one-fifth interest in the real estate described in the seventh clause of the will of Frank G. Tanner, or whether the interest acquired by Myron Tanner in said real estate under said will was a defeasible estate which terminated upon his death without issue. A subordinate question involved is whether or not an undivided one-fifth interest in the income from said real estate which was collected by the administrator with the will annexed of Frank G. Tanner at the time of the death of Myron Tanner belonged to Wade Flynn as the assignee of Myron Tanner, or to the estate of Myron Tanner, or to the remaining legatees and devisees under the will of Frank G. Tanner. The district court, affirming the county court, adjudged Myron Tanner acquired a defeasible estate or interest in the real estate described in the seventh clause of the will of Frank G. Tanner and the income therefrom, and that upon the death of Myron Tanner his interest in the real estate and income terminated and passed to the remaining legatees and devisees under the will of Frank G. Tanner. From the decree in each of said cases, the losing parties appeal.

The law is well settled in this state. Section 76-109, Comp. St. 1929, provides: "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." See *Schnitter v. McManaman*, 85 Neb. 337, 123 N.

W. 299; *Lehman v. Wagner,* 136 Neb. 131, 285 N. W. 124, and other Nebraska decisions. With the foregoing rule established, we set forth parts of the will and some parts in detail from which the controversy arises. The second clause reads:

"I give, devise and bequeath to my children, Cassius Tanner, Lawrence Tanner, Grace Tanner, Myron Tanner and Willo Tanner, and to their issue, all of my property in the manner following:"

The third clause of the will disposes of the family piano to Willo and the household effects to Grace, requesting the latter to give to several members of the family such articles as she may choose and in accordance with the requests made. The fourth clause of the will reads:

"I order and direct that my Executor shall provide for the support, maintenance and education of my daughter, Willo, from any funds of my estate until she has attained the age of twenty-one years and remains unmarried, and I suggest in arriving at the reasonable amount necessary for her maintenance, education and support that my Executor consult with my daughter, Grace."

The fifth clause of the will permits Lawrence to occupy certain premises for a period not to exceed 10 years, to pay no rent therefor, but to pay cost of reasonable repairs and taxes, and in the event that he does not occupy such premises the executor is authorized to sell the same at his discretion, the proceeds of sale to be divided share and share alike among the children living at the time of such sale, and if such premises are not disposed of within 10 years from the death of testator, then it shall be considered a part of the residue of the estate. The sixth clause provides for the sale of certain personal and real property at the discretion of the executor; distribution to be made among the children living at the time of testator's death, share and share alike, and until the sale thereof the premises designated in the paragraph to be occupied as a home by Grace and Willo, without rent. The seventh clause reads:

"It is my will that my two farms more particularly de-

scribed as * * * (premises described) be not sold or disposed of until ten years after my death and that during said period my Executor shall have full charge of the same and that the income therefrom be used first for the payment of taxes and upkeep on said farms and for the support, maintenance and education of my daughter, Willo, until she shall have attained the age of twenty-one years or be married and that the surplus of said income shall be distributed from time to time equally among my four other children until my said daughter, Willo, shall have attained the age of twenty-one years or be married after which said surplus shall be divided equally among my children."

The eighth clause reads: "Provided nevertheless that in case any child of mine shall have died before the period of distribution of any of my property leaving issue living at the time of distribution or descent, such issue shall stand in the place of and take per sterpes the share of the amount distributed or devised which said deceased child would have taken if he or she had been living at the time of distribution or descent, and provided further that if any of my children shall die without leaving issue then in that event my remaining heirs shall take his or her share."

The ninth clause contains a provision that Willo shall not receive her distributive share as provided in the fifth and sixth clauses until she shall arrive at the age of 21 years, and directs the executor to invest Willo's share and pay the same to her when she shall attain the age of 21 years. The tenth clause reads:

"I hereby designate my farms herein described and any real estate of which I may die seized and which has not been disposed of by my Executor within ten years of my death and any personal property, moneys or credits in the hands of my Executor ten years after my death as the residue of my estate." The eleventh clause reads:

"All the residue of my estate both real and personal and mixed I give to my children share and share alike."

At the time of Myron Tanner's death, all of the property except the two farms and the proceeds collected as income therefrom had been distributed to the legatees.

The appellants' contention is that, inasmuch as all of the testator's real estate except the farms described in the seventh clause of the will had been disposed of before Myron Tanner's death and the proceeds thereof distributed to the children, this eliminates from consideration all of the tenth and eleventh clauses of the will, so that such clauses now read as follows: "Tenth. I hereby designate my farms * * * (described) as the residue of my estate." "Eleventh. All the residue of my estate both real and personal and mixed I give to my children share and share alike;" that no provision of the will authorizes the executor to sell and dispose of the testator's farms, as set forth in the seventh clause of the will, and that the tenth and eleventh clauses of the will are the same as if the will had contained a single clause, giving the premises to his children share and share alike.

Section 76-105, Comp. St. 1929, is cited, reading, "The term 'heirs,' or other technical words of inheritance, shall not be necessary to create or convey an estate in fee simple," and the following cases in support thereof: *Little v. Giles,* 25 Neb. 313, 41 N. W. 186; *Schnitter v. McManaman, supra; Kluge v. Kluge,* 103 Neb. 534, 172 N. W. 756.

Appellants cite section 76-106, Comp. St. 1929, providing: "Every conveyance of real estate shall pass all the interest of the grantor therein, unless a contrary intent can be reasonably inferred from the terms used," and section 30-202, Comp. St. 1929, reading: "Every devise of land in any will hereafter made, shall be construed to convey all the estate of the devisor therein, which he could lawfully devise, unless it shall clearly appear by the will, that the devisor intended to convey a less estate," and contend that, therefore, the tenth and eleventh clauses of the will devised the farms of the testator to his children in fee simple unless the provisions of those clauses are limited, restricted or modified by the seventh and eighth clauses of the will or either of them.

With reference to the seventh clause of the will, the appellants state: It does not devise or purport to devise the

farms or any interest in them and does not absolutely prohibit the sale of the farms for the period of 10 years. It merely recommends that they not be sold during the period and provides that the executor collect the rents and apply them to the upkeep of the farms, and for the support and education of his daughter Willo until she arrives at the age of 21 years or is married. Appellants contend that this provision imposes a valid charge upon the farms and is not inconsistent with the devise of a fee simple title, and does not limit or restrict the title conveyed by the tenth and eleventh clauses of the will and does not create a trust; that its only effect is to impose a charge on the farms for the support of the testator's daughter Willo, and the balance of the clause consists merely of precatory expressions; quoting from *Howells State Bank v. Pont,* 113 Neb. 181, 202 N. W. 457, as follows:

" 'The modern tendency is to limit the application of the doctrine of precatory trusts, and words of desire, recommendation, and the like, will be given their ordinary significance and will not be held to create a trust unless, from the terms and dispositions of the will and the circumstances, relevant to proper construction, it clearly appears that said expressions were used in an imperative sense, and that the testator intended to create a trust.' 2 Alexander, Wills, secs. 1090, 1091." See *In re Estate of Greenamyre,* 133 Neb. 693, 276 N. W. 686.

Appellants cite *Smullin v. Wharton,* 83 Neb. 328, 119 N. W. 773, and 69 C. J. 126, contending, as said in the *Smullin* case, "It is an elementary rule that the provisions of a will take effect and become operative at the time of the death of the testator," and that there is nothing in the will to show that testator intended the title to his farms would not vest in the devisees mentioned in the eleventh clause of the will immediately upon his death, and that the laws of Nebraska favor the early vesting of estates.

We deem unnecessary an analysis of the fifth and sixth clauses of the will. The property described therein has been disposed of and the proceeds divided among the lega-

tees, which would include Myron Tanner, and such clauses furnish no basis for a conclusion relative to the desires of the testator on the disposition of other property not described therein.

In the eighth clause of the will, appellants contend, the first proviso refers to the death of any child leaving issue at the time of the distribution or descent, and applies to the property mentioned in the fifth clause of the will, which may be distributed as personalty at any time within 10 years after testator's death or descend under the will at expiration of 10 years after testator's death, and has no application to Myron Tanner's interest in the farms, because he died without issue, and the only part of the eighth clause which could in any manner have application to descent or termination of Myron Tanner's interest in the farms is the second proviso, which does not contain the phrase, "before the period of distribution," or "the period of descent." To sustain this proposition we are referred to the law on provisos, the principal authority being 50 C. J. 835, wherein it is said:

"The true office of a proviso is to restrict the sense or make clear the meaning of that which has gone before; to qualify, restrain, or otherwise modify the general language of a principal clause; its object is to except something out of the general terms of the grant, statute, or other instrument to which it may be attached; to except something from, or restrain the generality of, what precedes it. It implies a condition and defeats the operation of the antecedent clause conditionally; it avoids such antecedent clause by way of defeasance. A proviso can have no existence separate and apart from the provision which it is designed to limit or qualify. It should be confined to what precedes it, unless it clearly appears to have been intended to apply to some other matter. It applies to the immediately preceding clause or provision alone, unless there is something in the subject-matter which requires a different construction."

Therefore, it is argued, there is nothing in the Frank G. Tanner will to indicate that it was the intention of the tes-

tator to apply the provisos mentioned in the eighth clause of the will, or either of them, to any provision of the will following that provision.

Assuming the rule be accepted in attempting to apply it, then the eighth clause is a limitation on the seventh clause of the will, the subject of which is the testator's farms and the only property which remained at Myron Tanner's death. If it is a limitation on the devise of these farms and the income therefrom, the application of the rule is not helpful to the appellants.

Appellants further contend that, because the second proviso in the eighth clause of the will contains no reference to the period of distribution, it applies only to deaths occurring prior to the death of the testator. An analysis of the record discloses that Frank G. Tanner executed this will seven days before he died. We cannot believe that he contemplated any of his children would predecease him, and, if he had so believed, he undoubtedly would not have mentioned the period of distribution in the first proviso.

As stated in *Schnitter v. McManaman, supra* (p. 341): "The rule that the words of limitation shall be applied to the death of the first taker without issue during the life of the testator is said to be extremely technical in its character and does not apply where there are indications, however slight, that the testator referred to death subsequent to his own demise." This language is thoroughly applicable to the circumstances of the instant case, and we see no merit in appellants' contention in such respect.

Appellants claim that the tenth and eleventh clauses of the will are clear, unambiguous, definite and certain and, standing alone, convey to the devisees therein mentioned a fee simple title to the farms; that the seventh and eighth clauses of the will are subject to a construction which harmonizes with the plain, unambiguous provisions of the tenth and eleventh clauses of the will; therefore, a clearly expressed condition of one part of the will cannot be controlled by a doubtful construction of another part.

Referring to the second clause of the will and construing

the will in its entirety, it is evident that in the beginning of the testament Frank G. Tanner gave all of his property to his children, stating that such gift was "in the following manner;" in other words, subject to all of the provisions thereafter contained in the will. The eleventh clause of the will was unnecessary and could have been omitted by the testator, but the mere fact that it was not omitted does not change the devise or make the intention of the testator ambiguous. If anything, it confirms the second clause of the will which gave his property to the children, subject to all the restrictions and limitations therein contained. Then referring to the seventh clause of the will, the testator starts: "It is my will." This is more than a recommendation; it is a limitation. The words, "It is also my will," are more than a mere entreaty or expression of desire; they are words of command; they express an imperative testamentary design. *Hess v. Singler,* 114 Mass. 56; *Temple v. Russell,* 251 Mass. 231, 146 N. E. 679, 49 A. L. R. 1.

The appellants contend that the will granted to the children of Frank G. Tanner an estate in fee simple, and that provisions of limitations contained in the will should be held void because such limitations are repugnant to the estate granted; citing *Spencer v. Scovil,* 70 Neb. 87, 96 N. W. 1016; *Loosing v. Loosing,* 85 Neb. 66, 122 N. W. 707; *Yates v. Yates,* 104 Neb. 678, 178 N. W. 262; *Myers v. Myers,* 109 Neb. 230, 190 N. W. 491. In the latter case the question was the application of the rule in Shelley's Case. The court said: "Let us stop here to mention a rule quite universal, one which exists in this state, and one with which the appellants have no quarrel. Where a testator devises property to a person and to his heirs, the conveyance of a fee, he cannot, by his will, make a valid restriction to the effect that such person shall not alienate the property during his lifetime." And the case of *State Bank of Jansen v. Thiessen,* 137 Neb. 426, 289 N. W. 791, is cited wherein the court said: "It is a fundamental rule when an estate in fee simple is devised that an attempt by the testator to prevent alienation is ineffective and void for the reason that it is repugnant to the

estate devised." Such are the holdings cited by appellants, and unquestionably the correct law is stated. However, in an analysis of the Frank G. Tanner will the second clause thereof leaves the property to the children "and to their issue" "in the manner following:" These words indicate at once that no fee simple estate was intended by the testator.

In *Schnitter v. McManaman, supra,* the court reviewed some of the cases applying the rule, and then disposed of the question by saying (p. 340): "In *Sheets' Estate,* 52 Pa. St. 257, it is held that subsequent provisions in a will are at times operative to define an estate given, and to show that what without them would be a fee was intended to be a lesser estate." In *Loosing v. Loosing, supra,* it was said in the opinion (p. 74): "The rule does not of necessity apply merely for the reason that the first clause considered by itself might be construed as conveying a fee simple. The later clause, or clauses, may be read in connection with the first one for the purpose of advising the court whether it actually did transfer the fee, and if it does not in itself clearly and unequivocally do so, and by a comparison thereof with the remaining parts of the instrument the court is convinced that the testator did not in fact intend to vest the greater title in the first taker, the instrument will be construed accordingly."

In *State Bank of Jansen v. Thiessen, supra,* the grant was to testator's son and his heirs forever, with the provision in the same sentence to prevent the son from encumbering the land. The court found the provision repugnant to the estate granted either under the intent statute or under the rule in Shelley's Case. The court said: "Whether in a given conveyance a limitation to the heirs of a designated person creates an estate in such heirs as purchasers, or whether such a limitation operates to create an estate in fee simple absolute, depends upon the form of the limitation." There was no similarity between the form of limitation in that case and in the case at bar, and the rule announced therein is not applicable here.

As heretofore stated, every word in the will of Frank G.

Tanner must be analyzed to determine the testator's intent, having in mind the rule as announced, in giving the will its construction. We conclude that the county court and the trial court correctly construed the will.

Frank G. Tanner intended no fee to pass. What he did was, in effect, to create a trust to last 10 years after his death, and he gave his reasons for the creation of the trust, viz., the education, support and maintenance of his minor child. He disclosed his interest in the child Willo as plainly and considerately as he could. His children received an equitable interest only in the premises, subject to destruction, unless they lived until the termination of the trust. The will presents no new problem. Cases in point, which would unnecessarily lengthen the opinion if analyzed, we refer to: *Schnitter v. McManaman, supra; Merrill v. Pardun,* 125 Neb. 701, 251 N. W. 834. See, also, *Case v. Haggarty,* 91 Neb. 746, 137 N. W. 979; *Weller v. Noffsinger,* 57 Neb. 455, 77 N. W. 1075.

The appellants contend that they are entitled to a share of the money in the hands of the administrator on the date of the death of Myron Tanner, which is money collected by him from the farms; that under the seventh clause this income was to be used for payment of taxes and upkeep on the farms, and the surplus was to be distributed from time to time equally among the children, but before any child could recover money from the administrator it was necessary to show that a surplus actually existed, and that the executor wilfully refused to make distribution.

There is no evidence in the record that the administrator had a surplus on hand, at the time of Myron Tanner's death, not needed to pay taxes and upkeep on the farms. There was no definite time of payment fixed by the terms of the will, and it is clear from a reading thereof that the testator intended his own family to participate in his estate, and the money in the hands of the administrator belongs to the surviving children of Frank G. Tanner.

We find no ambiguity in the will and, giving proper consideration to the second clause thereof which the appellants

have eliminated in their consideration of the case, we conclude that the eleventh clause of the will was surplusage and unnecessary.

We conclude for the reasons given that Myron Tanner acquired a defeasible estate or interest in the real estate described in the seventh clause of the will of Frank G. Tanner, deceased, and in the income therefrom, and that, from the death of Myron Tanner, his interest in the real estate and income terminated and passed to the remaining legatees and devisees under the will.

The decree and judgment of the district court are affirmed.

AFFIRMED.

FRANCES FULCHER, APPELLEE, V. ALDEN DAVIS IKE, APPELLANT.
6 N. W. (2d) 610

FILED NOVEMBER 27, 1942. No. 31399.

1. **Automobiles.** It is the duty of an invited guest in an automobile driven by another, with knowledge of approaching danger, to exercise ordinary care to warn the driver of the danger, unless to a reasonably careful, cautious and prudent person it appears that the warning would be of no avail or go unheeded, or that the driver observed or should have observed the danger, as well as the guest, and for failure to give such warning the guest would be chargeable with contributory negligence.
2. ———. It is the duty of an invited guest in an automobile driven by another, with knowledge of approaching danger, in the exercise of ordinary care to protest to the host if there is time and opportunity, unless it reasonably appears that such protest would go unheeded or would be of no avail, and for failure so to do the guest would be chargeable with contributory negligence.
3. **Trial.** In a jury case where different minds may draw different conclusions or inferences from the adduced evidence, or if there is a conflict in the evidence, the matter at issue must be submitted to the jury, but where the evidence is undisputed, or but one reasonable inference or conclusion can be drawn from the evidence, the question is of law for the court.
4. **Negligence.** "As a general rule it is negligence as a matter of

law for a motorist to drive an automobile so fast on a highway at night that he cannot stop in time to avoid a collision with an object within the area lighted by his lamps." *Roth v. Blomquist*, 117 Neb. 444, 220 N. W. 572, 58 A. L. R. 1473.

5. ———. The gist of negligence is failure to exercise the care of a reasonable and prudent person under a given set of circumstances.

6. ———. The test of negligence is made by submission of the facts, if they are not admitted or if not more than one inference or conclusion may be drawn from the evidence, to a jury to determine whether or not the person charged with negligence failed to exercise the care, caution and prudence required of a reasonably careful, cautious and prudent person under the given circumstances.

7. **Automobiles.** The general rule with exceptions, which provides that it is negligence as a matter of law for a motorist to drive an automobile so fast on a highway at night that he cannot stop in time to avoid a collision with an object within the area lighted by the lamps on the automobile, should embrace in the exceptions all situations wherein reasonable minds may differ on the question of whether or not the operator of the automobile exercised the care, caution and prudence required of a reasonably careful, cautious and prudent person under the circumstances of the particular situation.

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

Stewart, Stewart & Whitworth and *Rosewater, Mecham, Shackelford & Stoehr*, for appellant.

Baylor, Tou Velle & Healey, contra.

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

YEAGER, J.

This is an action for damages for personal injuries by Frances Fulcher, plaintiff and appellee, against Alden Davis Ike, defendant and appellant.

The action was tried to a jury in the district court for Lancaster county, Nebraska. At the conclusion of the submission of evidence by the parties, on motion of the plaintiff, the court resolved all issues of negligence and of con-

tributory negligence in favor of the plaintiff and withdrew such issues from the consideration of the jury, and submitted only the question of the amount of damages to be returned in favor of the plaintiff, and instructed the jury accordingly. A verdict was returned in favor of plaintiff for $4,000, and judgment was entered thereon and the defendant has appealed.

At the time of the accident, which is the basis of the cause of action, plaintiff was a passenger in an automobile then being operated by one Jesse M. Polson in an easterly direction on a highway known as the S. Y. A. highway, in Lancaster county, Nebraska. The particular point on the highway was approximately 11 miles west of Lincoln, Nebraska. She charges that the defendant negligently drove an automobile which he was operating into the rear end of the automobile in which plaintiff was riding, causing the injuries and damages which she claims she sustained.

The defendant by answer denied that he was guilty of any negligence. The answer affirmatively charged that the plaintiff at the time of the accident was engaged in a joint enterprise with Polson and the other occupants of the automobile in which she was riding, and that the accident was the direct and proximate result and was solely caused by the joint and concurring negligence of the plaintiff, of Polson and one Leo Bert Hafer.

The defendant assigns as errors, among others, that the court erred in refusing to submit the question of negligence of the defendant to the jury; that the court erred in refusing to submit the question of contributory negligence of the plaintiff to the jury, and substantially in refusing to submit the question of negligence of Polson and Hafer as being the proximate cause of the accident.

These assignments of error require an analysis of the pertinent material evidence adduced by the parties. On certain phases of the evidence there is no dispute. An accident did occur in which the parties to this action were involved, and it occurred on what is known as the S. Y. A. highway, in Lancaster county, Nebraska, approximately 11

miles west of Lincoln, Nebraska, at about 9 p. m. on November 24, 1940, and in the accident plaintiff was injured. The plaintiff was a passenger and at the time of the accident was riding in the back seat of an automobile then being operated in an easterly direction on the right side of the center line of the highway by Jesse M. Polson. The accident came about because the defendant drove the automobile which he was operating into the rear end of the automobile in which plaintiff was riding. The automobile in which plaintiff was riding was, by the force of the collision, propelled about 183 feet eastward and into a ditch on the north side of the highway. At the time of the accident darkness had fallen and it was somewhat cloudy with slight fog. Both automobiles were properly lighted at the time of the accident. The accident occurred approximately 134 feet east of the crest of a hill, which hill descended to the eastward with a grade varying from about .3 to about 5.5 per cent. between the crest and the point of the accident.

The defendant contended, and he adduced evidence to support his contention, that at the time of the accident he was driving at a rate of speed from 40 to 50 miles an hour, and that because of the hill which elevated his lights above the automobile in which plaintiff was riding he was unable to see the said automobile until the distance between the two automobiles was about 80 feet, which distance was insufficient to allow him to stop without a collision. Defendant also adduced evidence to the effect that the automobile in which plaintiff was riding was stopped on the highway and that an automobile operated by Leo Bert Hafer, headed also in an easterly direction and a few feet to the north of and parallel with the Polson automobile was also stopped, and that the two automobiles blocked the highway. All of this evidence is in sharp conflict except that it is admitted that the Polson and Hafer automobiles were headed eastward and were parallel as claimed. The plaintiff's evidence is to the effect that the Polson and Hafer automobiles were moving eastward at a speed variously estimated at from 15 to 20 miles an hour when the accident occurred. Also, the

evidence of plaintiff indicates that the defendant, with proper lighting of his automobile, could have, in the exercise of proper care, seen objects over a much greater distance than the intervening space of 134 feet between the two automobiles when defendant's automobile came over the crest of the hill.

As has already been pointed out, the defendant urges that the court erred in failing to submit to the jury claimed contributory negligence of the plaintiff. It is urged that as an invited guest plaintiff was charged with the duty to warn the driver of danger observable to her, and for failure so to do she was chargeable with contributory negligence. As a rule of law it is the duty of an invited guest in an automobile driven by another, with knowledge of approaching danger, to exercise ordinary care to warn the driver of the danger, unless to a reasonably careful, cautious and prudent person it appears that the warning would be of no avail or go unheeded, or that the driver observed or should have observed the danger, as well as the guest, and for failure to give such warning the guest would be chargeable with contributory negligence. Also, it is the duty of an invited guest, with knowledge of approaching danger, in the exercise of ordinary care to protest to the host if there is time and opportunity, unless it reasonably appears that such protest would go unheeded or would be of no avail, and for failure so to do the guest would be chargeable with contributory negligence. *Morris v. Chicago, B. & Q. R. Co.*, 101 Neb. 479, 163 N. W. 799; *Tomjack v. Chicago & N. W. R. Co.*, 116 Neb. 413, 217 N. W. 944; *Murphy v. Shibiya*, 125 Neb. 487, 250 N. W. 746. The rule has no application, however, in this case, since there is no evidence from which a reasonable inference could be drawn that plaintiff knew or could have known of danger to herself or the automobile in which she was riding prior to the accident. That the speed of the automobile was reduced she knew, but there is no evidence to apprise her of any intention on the part of the driver to stop on the highway.

Again, the defendant urges that plaintiff was engaged

upon a joint enterprise with Polson and others, and that thereby she became chargeable with the negligence, if any, of Polson. There is no evidence to support this contention. The evidence points conclusively to invitation as a guest and not to joint enterprise.

We turn now to the theory upon which the trial court withdrew all questions from the consideration of the jury except that of damages.

In a jury case where different minds may draw different conclusions or inferences from the adduced evidence, or if there is a conflict in the evidence, the matter at issue must be submitted to the jury, but where the evidence is undisputed, or but one reasonable inference or conclusion can be drawn from the evidence, the question is of law for the court. *Craig v. Chicago, St. P., M. & O. R. Co.*, 97 Neb. 426, 150 N. W. 374; *Hickey v. Omaha & C. B. Street R. Co.*, 140 Neb. 665, 1 N. W. (2d) 304.

The trial court under authority of this rule applied to the facts of this case the general rule first announced by this court in *Roth v. Blomquist*, 117 Neb. 444, 220 N. W. 572, 58 A. L. R. 1473, as follows:

"As a general rule it is negligence as a matter of law for a motorist to drive an automobile so fast on a highway at night that he cannot stop in time to avoid a collision with an object within the area lighted by his lamps."

The case recognizes exceptions to the general rule as is pointed out in the opinion. The rule with recognized exceptions has been followed since it was first announced. *Benton v. State*, 124 Neb. 485, 247 N. W. 21; *Cotten v. Stolley*, 124 Neb. 855, 248 N. W. 384; *Murphy v. Shibiya, supra; Most v. Cedar County*, 126 Neb. 54, 252 N. W. 465; *Hendren v. Hill*, 131 Neb. 163, 267 N. W. 340; *Redwelski v. Omaha & C. B. Street R. Co.*, 137 Neb. 681, 290 N. W. 904; *Fischer v. Megan*, 138 Neb. 420, 293 N. W. 287; *Stocker v. Roach*, 140 Neb. 561, 300 N. W. 627; *Nichols v. Havlat*, 140 Neb. 723, 1 N. W. (2d) 829.

The appellant here contends substantially that the rule itself is unsound, and in any event that this case should

not be controlled by the general rule, but should fall within the recognized exceptions, and that the jury should have been permitted to pass upon the question of whether or not he was in fact guilty of negligence.

We do not deem it necessary at this time to discuss the soundness of the rule, but a discussion of the application of the exceptions is pertinent.

The defendant, while tacitly admitting that had the two automobiles been on a level and straight highway he could have seen the Polson automobile in time to avoid colliding with it, insists that the exception rather than the general rule should apply in this instance since, because the topography of the road was such that, although his lights were burning properly and were adjusted according to law, he was unable to see the Polson automobile until he was within approximately 80 feet of it, which did not allow him sufficient space or time within which to stop, this in view of the fact that his evidence indicates that the Polson automobile was stopped in his path on the right and the Hafer automobile on the other or left side of the highway.

We think that, clearly under the evidence of the defendant, and if it were not for the general rule announced as a rule of law in *Roth v. Blomquist, supra,* the issue of negligence of the defendant would have been for the jury under the well-established and generally accepted definitions of negligence, which definitions in essence require factual determinations, these being jury functions, and the application thereto of legal principles.

"Negligence" has been variously defined as:

"The want of ordinary care, that is, the want of such care as a reasonably prudent and careful person would exercise under like circumstances."

"The absence of care in the performance of an act, which may be one of omission or of commission; it is the breach of a duty which one owes to another by reason of the relationship existing or the circumstances presented."

"Consists in the doing or omitting to do some act which a person in the exercise of ordinary care and prudence would

not do or omit to do, and which act, if done or omitted by him, contributed and helped to produce the injury complained of."

"Failure to observe or do something one ought to have seen or done and would have noticed or done with ordinary vigilance; the failure to be prepared for something visible, or at least of probable occurrence, or that might be reasonably expected to happen."

"Failure to do what a prudent person would ordinarily have done under the circumstances of the situation, or doing what such person under the circumstances would not have done. The duty is indicated and measured by the exigencies of the occasion."

"In actions for personal injury, means the doing of some act which a cautious and prudent man would not do, or the neglecting to do some act which a cautious and prudent man would not neglect."

"Doing something which ordinarily careful person would not do, or failure to do something which ordinarily careful person would do."

"Failure to exercise such care as ordinarily prudent persons exercise under like or similar circumstances."

28 Words and Phrases (Perm. ed.) pp. 337, 339, 340, 341 (Negligence—collected definitions).

"Failure to do what reasonable and prudent persons would ordinarily have done under the circumstances and situation, or doing what reasonable and prudent persons under the existing circumstances would not have done." *Omaha Street R. Co. v. Craig,* 39 Neb. 601, 58 N. W. 209; *Eaton v. Merritt,* 135 Neb. 363, 281 N. W. 620.

"Consists in the doing of some act, under circumstances surrounding the accident involved, which a man of ordinary prudence would not have done, or the failure to do some act or take some precaution which a man of ordinary prudence would have done or taken." *Meyers v. Neeld,* 137 Neb. 428, 289 N. W. 797.

"Consists of doing what a reasonable and prudent person would not have done, or in not doing what a reasonable and

prudent person would have done under the existing circumstances." *Blanton v. Michael, Swanson & Brady Produce Co.*, 138 Neb. 883, 295 N. W. 883.

From an examination of the definitions, the gist of negligence is failure to exercise the care of a reasonable and prudent person under a given set of circumstances. In fact, except in the case of specific judicial or statutory declaration, there are no other criteria by which negligence may be determined. The test then is made by submission of the facts, if they are not admitted or if not more than one inference or conclusion may be drawn from the evidence, to a jury to determine whether or not the person charged with negligence failed to exercise the care, caution and prudence required of a reasonably careful, cautious and prudent person under the given circumstances.

It would appear, therefore, that the general rule with exceptions, which provides that it is negligence as a matter of law for a motorist to drive an automobile so fast on a highway at night that he cannot stop in time to avoid a collision with an object within the area lighted by the lamps on the automobile, should embrace in the exceptions all situations wherein reasonable minds may differ on the question of whether or not the operator of the automobile exercised the care, caution and prudence required of a reasonably careful, cautious and prudent person under the circumstances of the particular situation. Any lesser limitation of this general rule would have the effect of destroying, to that extent, the fundamental concept of negligence and, to that extent, of transferring a jury function to the judge.

In the light of these observations, was the evidence adduced of such a kind and character, if believed, that reasonable minds could differ on the question of whether or not the defendant exercised the care, caution and prudence required of a reasonably careful, cautious and prudent person under the circumstances disclosed?

The testimony on his behalf was to the effect that he was violating no law or rule of the road as to speed or place of driving; his automobile was properly lighted; he could not

see the automobiles in front until he was approximately within 80 feet of the other automobiles on account of the deflection of his lights, which was caused by the contour of the highway; he made every possible effort to stop; he could not stop within the intervening space, and that the two automobiles were stopped in front of him and blocked the highway.

We are unwilling to say and we conclude that the trial court erred in saying as a matter of law that the defendant was guilty of negligence. The question of whether or not the defendant was guilty of negligence should have been submitted to a jury under proper instructions.

As has been pointed out, the defendant urges that it was error to refuse to submit the question of the negligence of the plaintiff, Jesse M. Polson and Leo Bert Hafer, which alleged negligence defendant charged was the proximate cause of the accident. In view of what has already been said with regard to the alleged negligence of plaintiff, it is sufficient to say there was no error. The defendant had no burden, and it was not error to refuse to permit him to assume the burden, of showing that another or others not charged jointly or in complicity with him with responsibility for the accident were solely responsible for the accident. Under the circumstances he was charged only with the defense of the claimed liability against him. Of course he had the right to show all of the facts and circumstances, not for the purpose of fixing liability upon Polson and Hafer, but for the purpose of relieving himself.

The judgment of the district court is reversed, and the cause remanded for a new trial in accordance with the views expressed herein.

REVERSED.

DAWSON COUNTY IRRIGATION COMPANY, APPELLANT, V. LEONARD J. STUART ET AL., APPELLEES.

6 N. W. (2d) 602

FILED NOVEMBER 27, 1942. No. 31441.

1. **Easements.** An easement by prescription cannot be acquired except by open, notorious, exclusive and adverse user for a period of ten years.
2. **Judgment.** A decree from which no appeal has been taken becomes the law of the case, and is *res adjudicata* as to the same issues raised by answer in the nature of a cross-action.
3. **Equity: LIMITATION OF ACTIONS.** "If a litigant asks affirmative equitable relief, he will be required to do justice himself with regard to any equity arising out of the subject-matter of the action in favor of his adversary, and the statute of limitations is no bar to the imposition of such conditions." *Bank of Alma v. Hamilton*, 85 Neb. 441, 123 N. W. 458.
4. **Pleading.** Under the Code our chancery practice has been so enlarged that an answer in the nature of a cross-petition may properly seek affirmative relief beyond that which is merely defensive, and such relief sought need not necessarily be based upon equitable grounds.
5. ———. Affirmative relief, under our chancery practice, sought in an answer in the nature of a cross-petition must be germane to the original suit.
6. **Equity.** The maxim "Equity follows the law" in its broad sense means that equity follows the law to the extent of obeying it and conforming to its general rules and policies whether contained in common or statute law.
7. ———. "The maxim is strictly applicable whenever the rights of the parties are clearly defined and established by law, especially when defined and established by constitutional or statutory provisions." 30 C. J. S. 503, sec. 103.
8. ———. A claim for damages having been barred by statute of limitations, the maxim "Equity follows the law" prevents its assertion in an answer in the nature of a cross-petition in an action to quiet title to an easement obtained by prescription.

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

Lyman M. Stuckey, for appellant.

Cook & Cook, contra.

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

YEAGER, J.

This is an action in equity by Dawson County Irrigation Company, a corporation, plaintiff and appellant, against Leonard J. Stuart and Winifred S. Stuart, husband and wife, Wilfried V. Stuart and Mary T. Stuart, husband and wife, Charles Francis Stuart and ——— C. Stuart, first real name unknown, husband and wife, and Helen Stuart and ——— H. Stuart, first real name unknown, wife and husband, defendants and appellees. On the pleadings, in form and substance, the plaintiff sought to have title quieted to an easement for an irrigation canal extending in an irregular course and direction across the south one-half of section thirty-six (36), township ten (10) north, range twenty-one (21) west of the sixth P. M., in Dawson county, Nebraska, and the defendants denied the right of the plaintiff to the easement claimed, and affirmatively claimed damages for the value of the land actually taken for the irrigation canal, and for damages to adjacent lands not taken but the value of which was reduced by reason of the construction of the canal. Defendant Leonard J. Stuart is the owner of two-fifths of the land, and defendants Wilfried V. Stuart, Charles Francis Stuart and Helen Stuart are each owners of one-fifth thereof.

The case was tried to the court and decree was entered quieting title in the plaintiff or its successors in interest so long as the easement shall be used for the irrigation purposes of the irrigation system, and for ten years after abandonment of its use in case it shall be abandoned. In case of abandonment for ten years the easement shall revert to the then owners of the land.

As a part of the decree the defendants were awarded judgment against the plaintiff in the sum of $785 for the taking and damage to land.

The defendants have not appealed, but the plaintiff has appealed from the judgment rendered against it for damages.

Plaintiff bases its right to have the judgment rendered against it reversed on the proposition that the statute of limitations bars a right of recovery of damages for taking and for reduction of value of lands not taken. The theory of the defendants is that the action of the plaintiff being in equity, and though it has a prescriptive right to the easement which it has a right to have enforced, the court may require payment of damages as a condition of quieting title to the easement. They contend that this condition may be enforced under the maxim of equity that he who comes into equity must do equity.

The obvious effect of this contention is that a court of equity solely and alone under the authority of this maxim, without the interposition of other considerations or conditions, has power to suspend the operation of a statute of limitations against an action at law.

The theory on which plaintiff presented its case and obtained the decree favorable to it was that a prescriptive right had ripened in its favor, that is, that it had possession of the land involved for ten years or more before the commencement of the action under factual and legal conditions, which entitled it to have title to an easement declared therein by decree of court.

An easement by prescription cannot be acquired except by open, notorious, exclusive and adverse user for ten years. *Roe v. Howard County*, 75 Neb. 448, 106 N. W. 587; *Agnew v. City of Pawnee City*, 79 Neb. 603, 113 N. W. 236; *Dunbar v. O'Brien*, 117 Neb. 245, 220 N. W. 278, 58 A. L. R. 1033; *Onstott v. Airdale Ranch and Cattle Co.*, 129 Neb. 54, 260 N. W. 556.

Whether or not this portion of the decree was supported by sufficient evidence may not be considered here. From it, as has been pointed out, no appeal was taken, hence, it, to that extent, becomes the law of the case and is *res adjudicata* as to that issue in another action between the same parties, or as to the same issue raised by answer in the nature of a cross-action in the same action. *Wilch v. Phelps*, 16 Neb. 515, 20 N. W. 840; *Morgan v. Mitchell*, 52 Neb. 667,

72 N. W. 1055; *Wittenberg v. Mollyneaux,* 60 Neb. 583, 83 N. W. 842; *State v. Savage,* 64 Neb. 684, 702, 90 N. W. 898, 91 N. W. 557; *Shepard v. City of Friend,* 141 Neb. 866, 5 N. W. (2d) 108.

The court in its decree found that plaintiff's possession began ten years or more before the commencement and, *a fortiori,* found that the right of defendants or their predecessors in interest to damage accrued with the entry into possession under conditions which would ripen into an easement with the lapse of time.

It must follow then that the right of action claimed by defendants for damages, since no continuing damage was claimed but only for taking and depreciation in value, accrued more than ten years before the filing of the answer. It also follows that the right of action of the defendants or their predecessors in interest had expired long before the commencement of this action and the filing of the answer. See section 20-207, Comp. St. 1929; also section 20-212, Comp. St. 1929.

In support of their contention that they have a right to their damage, the action of plaintiff being in equity, notwithstanding at law their action was barred by the statute of limitations, the defendants cite *Hobson v. Huxtable,* 79 Neb. 340, 116 N. W. 278; *Bank of Alma v. Hamilton,* 85 Neb. 441, 123 N. W. 458; *Pettit v. Louis,* 88 Neb. 496, 129 N. W. 1005; *Bell v. Dingwell,* 91 Neb. 699, 136 N. W. 1128; *Love v. Park,* 95 Neb. 729, 146 N. W. 941; *Wiseman v. Guernsey,* 107 Neb. 647, 187 N. W. 55.

In the first paragraph of the syllabus in *Bank of Alma v. Hamilton, supra,* the rule is laid down as follows: "If a litigant asks affirmative equitable relief, he will be required to do justice himself with regard to any equity arising out of the subject-matter of the action in favor of his adversary, and the statute of limitations is no bar to the imposition of such conditions."

An examination of the opinion discloses that the action was to quiet title in plaintiff as mortgagee in possession. The defendant claimed an equity in the land which plain-

tiff insisted was barred by the statute of limitations. It will be seen that this was a situation where there were conflicting equitable interests in and to the same subject-matter.

In the eighth paragraph of the syllabus in *Wiseman v. Guernsey, supra,* it is stated: "Where a party comes into a court of equity asking affirmative equitable relief, he may be required to do equity with regard to the subject-matter of the action, and the statute of limitations is not available to him as a defense against the imposition of such requirements."

The action here was to quiet title by an adopted child to lands which had belonged to the adopting parent, who was deceased at the commencement of the action, against the heirs of one who claimed the right to take from the deceased adopting parent under an agreement for adoption.

From an examination of the opinion it is apparent that the syllabus is but the statement of an abstract principle. No such question was decided by the court. In the opinion appears the following:

"Plaintiff pleads the statute of limitations as a bar to any claim of interest by the defendants to the property in question. The defendants, however, did not bring this action to establish a constructive trust in the property, but have set up such a trust in defense of the plaintiff's action. The plaintiff claims under the agreement in the articles of adoption by which she was made an heir of the estate. The defendants' answer asserts, by way of defense, that the plaintiff is a trustee *ex maleficio.* The effect of that defense is to define and limit that title interest which the plaintiff claims. The statute of limitations would not be available to the plaintiff to prevent such a defense. * * *

"Though 19 years have elapsed since the death of Anthony Shovel, it appears that Susan Shovel, his widow, is still living and had become entitled to a dower interest and possessory rights in the property. During her lifetime there was no urgent reason why the matter of the interests of the plaintiff and the defendants should be settled. There is no suggestion that the plaintiff ever repudiated the trust or de-

nied that James Shovel or his heirs were entitled to an interest in the estate, until the commencement of this suit. It was not until that time that the defendants became apprised of the fact that she was attempting to exclude them from the inheritance and that she did not intend to carry out the implied promise contained in the adoption agreement. It is not suggested that the defendants were aware of her attitude prior to that time, nor that they were guilty of any laches in failing to assert their rights. The statute of limitations does not begin to run against the rights of the beneficiaries of such a constructive trust until they are apprised of the fact that the trustee did not intend to carry out the provisions of the trust. In this case, they were not apprised of that fact until the trustee repudiated it. The statute of limitations, therefore, had not run against the claim of the defendants."

We do not discuss the other cited cases since they are not in point from the standpoint of either fact or law.

It is true that under our Code the chancery practice has been so enlarged that an answer in the nature of a cross-petition may properly seek affirmative relief beyond that which is merely defensive, and that such relief sought need not necessarily be based on equitable grounds. *Armstrong v. Mayer*, 69 Neb. 187, 95 N. W. 51. However, the matters set up in such answer must be germane to the original suit.

No decision of this court has been found which passes upon the question of whether or not the claim of defendants here for damages is germane to the subject-matter of plaintiff's cause of action. Reason supports the view, and there is authority sustaining it, that the two are not germane. 51 C. J. 237, sec. 198.

The right to title by prescription is a right which has come into being by lapse of time under conditions which have been fulfilled. If it exists at all, every incident of the right has ripened before the commencement of the action to quiet title based upon the right. Moreover, in an action at law for ejectment by another from the lands held, holding by prescriptive right would be available as a defense and it

need not, agreeable to good authority, even be pleaded specially. It may be proved under a general denial. 1 Am. Jur. 924, sec. 235. Furthermore, the action to quiet title is an action *in rem* and the action for damages is *in personam*, each pertaining to entirely different subject-matter.

There is another convincing reason why defendants may not have their claim for damages in this action. The reason inheres in the maxim of equity that "Equity follows the law." This maxim, in 30 C. J. S. 503, sec. 103, is explained generally as follows: "In a broad sense the maxim means that equity follows the law to the extent of obeying it and conforming to its general rules and policies whether contained in the common or statute law." Again, as pointed out in 30 C. J. S. 503, sec. 103, "The maxim is strictly applicable whenever the rights of the parties are clearly defined and established by law, especially when defined and established by constitutional or statutory provisions."

This court, following the principles thus announced, in a case not similar as to facts but comparable in principle, stated: "When it is determined that the fund is an asset of the bank in the hands of the receiver, a court of equity must follow the banking law specifically dealing with it as such." *Jorgenson v. Department of Banking*, 136 Neb. 1, 284 N. W. 747.

In the case of *Alexander v. Shaffer*, 38 Neb. 812, 57 N. W. 541, the defendant set up in his answer a claimed lien obtained by reason of purchase of tax certificates on which he had not obtained tax deed, nor had he foreclosed his lien within five years which was the statutory period within which he was required to take a tax deed or foreclose the lien. Demurrer to the answer was sustained. The court said:

"It seems, therefore, established by the statute and by the later decisions of this court that the limitation fixed in the revenue law is not merely a limitation as to the right of action, but it is a limitation upon the duration of the lien itself, and that upon the expiration of the period it is not merely the remedy to enforce the lien which expired, but the lien itself is extinguished absolutely.

"The maxim that 'He who seeks equity must do equity' has never been so applied as to justify a court in imposing arbitrary conditions in order to carry out what, in the individual opinion of the chancellor, would amount to substantial justice between the parties. The rule only requires the plaintiff to do 'equity;' that is, to do what upon established legal principles he should be required to do. It has sometimes been applied in cases where the defendant was not in a position to affirmatively seek relief himself, but the vast preponderance of authority is that the maxim should never be applied so as to require that the plaintiff should perform an act not devolved upon him by established legal or equitable principles."

The claim of defendants for damages having been barred by the appropriate statute of limitations, the maxim "Equity follows the law" prevents its assertion in the answer in this case.

The decree of the district court to the extent that it awarded judgment in favor of the defendants is reversed and the claim of the said defendants is dismissed. Otherwise the decree is affirmed.

AFFIRMED IN PART AND REVERSED IN PART.

The following opinion on motion for rehearing was filed March 19, 1943. *Former opinion vacated and judgment of district court affirmed.*

Eminent Domain. Where a party having a lawful right to enter and take lands by eminent domain for public use by paying just compensation therefor does not enter in conformity to law, but the owner waives this feature and treats it as if the law had been followed, with only the question of compensation to be settled, then the law of compensation under eminent domain applies. It is just as if condemnation proceedings were begun and not yet completed. In such cases the action for just compensation is not barred except by adverse possession of the lands taken for ten years, the requisite period to establish a title by prescription.

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

CHAPPELL, J.

Upon a rehearing in this case we have concluded that the judgment of the trial court should have been affirmed.

The theory of plaintiff's suit is an action in equity to quiet title (Comp. St. 1929, sec. 76-401) to an easement in lands for an irrigation ditch over defendants' farm by reason of a prescriptive right (Comp. St. 1929, sec. 20-202).

Defendants by answer make general denial, and admit that plaintiff constructed an irrigation ditch over defendants' lands in 1930, but allege that the then owner (now deceased) was in California at the time and without knowledge of its construction; that upon her return negotiations were had with plaintiff's officers as to damages suffered, but no agreement was reached and nothing has been paid therefor. Defendants pray that as a condition to granting plaintiff equitable relief just compensation be awarded them for the land taken and damages resulting.

A search of the record discloses no evidence supporting the plaintiff's theory of prescriptive title as claimed in the petition. The evidence is that plaintiff constructed the ditch across defendants' lands by permission of the tenant who agreed to give plaintiff the right of way, but that the owner was in California at the time and without knowledge of its construction; that upon her return plaintiff's officers negotiated with her for settlement, but none was reached and the damages suffered were never paid by the plaintiff.

It must be conceded that a tenant would ordinarily have no legal right to consent to the appropriation either with or without payment of damages. See 29 C. J. S. 1123, sec. 206; 20 C. J. 867; *Propst v. Cass County*, 51 Neb. 736, 71 N. W. 748. There is no evidence that the tenant had such authority. Possession therefore was taken under a void agreement and not under any claim of continuous possession under claim of ownership for the statutory period of ten years.

The decree of the trial court quiets the title to the easement in plaintiff, not on the basis of a prescriptive right as claimed in the petition, but on the theory of an equitable

enforcement of the statutory condemnation law which had not been complied with by the plaintiff in its construction of the ditch upon and over defendants' lands, as claimed by defendants in their answer.

No appeal has been taken by either plaintiff or defendants from this part of the decree. To that extent it becomes the law of the case and is *res adjudicata* as to the same issues raised by the answer. See *Shepard v. City of Friend*, 141 Neb. 866, 5 N. W. (2d) 108; 34 C. J. 742. The appeal comes to this court solely on the question of damages awarded as prayed in defendants' answer.

"Eminent domain * * * is the right of the nation or the state, or of those to whom the power has been lawfully delegated, to condemn private property for public use, and to appropriate the ownership and possession of such property for such use upon paying the owner a due compensation to be ascertained according to law." 29 C. J. S. 776, sec. 1.

Our applicable condemnation law (Comp. St. 1929, ch. 46, art. 6, and ch. 74, art. 3) and constitutional provision (Const. art. I, sec. 21) against taking and damaging private property for public use "without just compensation therefor" forcibly imply that all damages must be paid; in the one case, to the county judge before the right to entry arises, and in the other it is self-executing. An answer praying for payment of just compensation as a condition of relief quieting title in plaintiff to lands taken and damaged for public use under the power of eminent domain, not exercised as the statute requires, is germane to the original action as it would be in an original proceeding for statutory condemnation.

In *Kime v. Cass County*, 71 Neb. 677, 99 N. W. 546, affirmed in 71 Neb. 680, 101 N. W. 2, involving comparable facts and circumstances, this court said: "No damages were appraised, or provision made for their payment, before or at the time of the attempted establishment of the alleged public road in controversy. Under the Constitution * * * such omission defeated the alleged right to appropriate the land to a public use. * * * If the legislature could

rightly require of the landowner one affirmative and initiatory act, as a condition precedent to obtaining damages, they might require of him any other, or a series of acts which might be difficult or onerous or, in some circumstances, impossible of performance, and so the constitutional guaranty might thus be seriously impaired or wholly frittered away. We are of opinion that the spirit, if not the letter, of the Constitution requires that the public seeking to appropriate private property to its use should, unless damages have been waived by some affirmative and unequivocal act, take steps of its own motion to ascertain their amount and secure their payment, and that mere passive acquiescence by an individual in the appropriation of property, unaccompanied by any conduct indicative of affirmative assent thereto, should not, unless continued for the statutory period of limitations, be regarded as a waiver of his rights. The second matter determined by the opinion, and about which the record leaves no room for doubt, is that the public have not occupied the lands in suit, continuously, for so long a time as is required by the statute to acquire, by that means, a prescriptive title to the alleged easement." See, also, *Johnson v. Peterson*, 85 Neb. 83, 122 N. W. 683; *Weinel v. Box Butte County*, 108 Neb. 293, 187 N. W. 939; *Lee v. Eyerly*, 109 Neb. 539, 191 N. W. 699.

Where a party having a lawful right to enter and take lands by eminent domain for public use by paying just compensation therefor does not enter in conformity to law, but the owner waives this feature and treats it as if the law had been followed, with only the question of compensation to be settled, then the law of compensation under eminent domain applies. It is just as if condemnation proceedings were begun and not yet completed. In such cases the action for just compensation is not barred except by adverse possession of the land taken for ten years, the requisite period to establish a title by prescription. *Schilling v. Carl Township*, 60 N. Dak. 480, 235 N. W. 126; *Oklahoma City v. Wells*, 185 Okla. 369, 91 Pac. (2d) 1077, 123 A. L. R. 662; 2 Lewis, Eminent Domain (3d ed.) sec. 967. Compelling

reasons for these rules of law are found in these authorities and in *Aylmore v. City of Seattle*, 100 Wash. 515, 171 Pac. 659, L. R. A. 1918E 127. They are controlling in the case at bar, and our former opinion, *Dawson County Irrigation Co. v. Stuart, ante*, p. 428, 6 N. W. (2d) 602, is hereby vacated and set aside, and the judgment of the trial court awarding defendants a judgment for $785 against plaintiff for land taken and damaged is hereby

AFFIRMED.

MARION F. MCCLELLAND, APPELLEE, V. INTERSTATE TRANSIT LINES, APPELLANT.
6 N. W. (2d) 384

FILED NOVEMBER 27, 1942. No. 31418.

1. **Negligence.** Negligence is essentially relative and comparative. What may be deemed ordinary care in one case may, under different surroundings and circumstances, be negligence. The surrounding facts and circumstances are of controlling importance.
2. **Automobiles.** Users of the highway are required to exercise reasonable care. What is reasonable care must, in each case, be determined by its own peculiar facts and circumstances.
3. **Negligence.** Where it is or should be apparent to a reasonable and prudent person that to pursue a certain course of conduct is likely to produce results injurious to others, the pursuit of such course of conduct is negligence. It is not necessary that the precise or particular result be foreseen.
4. ———. If the original negligence is of a character which, according to the usual experience of mankind, is liable to invite or induce the intervention of some subsequent cause, the intervening cause will not excuse it, and the subsequent mischief will be held to be the result of the original negligence.
5. ———. Where separate independent acts of negligence by different persons combine to produce a single injury, each participant is liable for the resulting damages, although one of them alone might not have caused the injury.
6. ———. "Tort-feasor is liable for all consequences which, in natural course of events, flow from unlawful or negligent acts, although results were brought about by intervening agency of others, provided intervening agents were set in motion by tort-feas-

or or were natural consequences of original wrongful act." *Paup v. American Telephone & Telegraph Co.*, 247 N. W. 411 (124 Neb. 550).

7. ———. An essential element of the emergency or sudden peril rule is that it cannot be invoked by one who has brought that emergency upon himself by his own wrong or who has not used due care to avoid it.
8. Appeal. The instructions of the trial court are the law of the case, even though they erroneously state the law itself, and where a verdict cannot be sustained under the instructions given, it must be set aside even though the evidence discloses a basis for the verdict under proper instructions.
9. ———. When the trial court wrongfully withdraws part of the charges of negligence from the consideration of the jury and those submitted, standing alone, will not support a verdict, the judgment will be reversed and the cause remanded for a new trial.

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

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

Kelsey & Kelsey, contra.

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER and YEAGER, JJ., and ELLIS, District Judge.

ELLIS, District Judge.

This is a personal injury action which has once before been before this court. At the first trial the plaintiff recovered a verdict and judgment thereon was reversed "for errors in the instructions" and the cause remanded for a new trial. 139 Neb. 146, 296 N. W. 757.

Upon retrial the plaintiff again recovered a verdict and from judgment thereon the defendant has appealed. Upon the second trial much of the evidence was put in by stipulation and it may be said that the facts as set forth in the opinion above referred to are substantially reflected in the record now before us. Reference is made to the former opinion for a statement of facts and for summary

of pleadings. With reference to the latter it may be said that in substance the plaintiff alleged negligence on the part of the defendant in parking its buses on the pavement, in creating a blockade of the two south lanes of the highway, and in giving the signals which caused plaintiff to bring his car to a practical stop, with the result that plaintiff's car was struck from behind by the Ford and was thrown into the rear bus, producing the injuries for which plaintiff sought recovery.

The defendant's answer, after denial of negligence on its part, alleged that the accident was caused by negligence of the plaintiff and of the driver of the Ford.

The defendant makes no complaint as to trial, the amount of the verdict or the instructions upon which the cause was submitted. With reference to the latter, it is apparent that they recognized every theory of the defendant. Plaintiff, having recovered a verdict, makes no complaint.

The only assignments of error by the defendant go to the sufficiency of the evidence to sustain the jury's finding of negligence on the part of defendant's servants, which was the proximate cause of the injury, and a contention that the plaintiff was guilty of negligence which as a matter of law precluded his recovery.

With reference to the latter contention we are convinced that it cannot be sustained. Under the comparative negligence statute evidence of some negligence on the part of a plaintiff does not necessarily bar recovery. The trial court submitted defendant's contention of contributory negligence. In the light of the evidence we think that this was an issue for the jury. We are convinced that there is utterly no basis for a direction against the plaintiff on the ground of contributory negligence. The evidentiary basis for what immediately precedes will appear in the course of the discussion which follows.

This accident occurred on a pleasant July Sunday afternoon at a point between the two entrances to Boys Town on a four-lane highway (No. 275) of this state, obviously

engineered and constructed to accommodate a large volume of swift moving traffic, and the defendant says at the time "there was a large amount of travel on this highway."

The angle of the east entrance driveway to Boys Town with the highway from the west was an acute angle of less than 45 degrees, so that a vehicle of the length of those being operated by the defendant could not approach said entrance from the west and enter Boys Town by the simple operation of turning off the highway to the right, but involved the necessity of a wide swing out in the current of traffic on the highway and the possible necessity of stopping, backing up and then proceeding again. To the west of the point of this operation, about 500 feet, was the crest of a hill.

Having approached from the east and entered Boys Town by the east entrance only a short time before and thus having actual and fresh knowledge of all the above stated facts, the defendant undertook to move four buses, 33 feet in length, in a concerted movement out of Boys Town from the west entrance onto this highway and from it back into the Town via the east entrance. Numbering the buses from 1 to 4 in their order in the procession, bus No. 1 failed to negotiate the turn due to some low hanging equipment not clearing, with the result that it had to stop, back up and then proceed. That this was not unanticipated is indicated by the testimony of the driver who testified: "Well I turned from the right-hand lane up into the driveway knowing I would have to back up, and the back end caught, which we more or less anticipated with this air-conditioned bus and I just backed up enough to release it." While this bus was in trouble and blocking both south lanes, bus No. 2 proceeded to swing wide to the north so that it occupied both east-bound lanes and extended over beyond the center line of this 40-foot highway.

Referring to this situation and as it appeared to the driver of bus No. 4, the defendant says: "The *two* south

or east-bound lanes were *blocked* by one bus which stood *completely* across them, and that a second bus, occupying part of *both* said lanes, was *with each moment* getting further *into the inner lane* as it swung wide to make the turn as required in leaving the highway from the west." (Italics ours.)

The defendant also says: "McClelland (plaintiff) was faced with a *complete* blockade, composed of buses on one side of the highway, and two west-bound cars on the other. The situation *compelled* some action on the part of the bus driver to warn McClelland and others approaching from the rear that *caution* in proceeding was needed." (Italics ours.) We pause to point out here that this situation, which the defendant accurately and graphically describes, was created solely by the acts of its agents and that the compulsion in the situation sprang from its own conduct.

As the plaintiff approached from the west at a very moderate rate of speed and before reaching the crest of the hill, he observed the top of bus No. 4 above the driving lane space. He moved from the driving lane over into the passing lane which was provided so that vehicles might pass slow moving or even stopped vehicles in the driving lane. As he came over the crest of the hill, he was suddenly confronted with the situation described above. At this moment the driver of bus No. 4, prompted by the apparent danger of the blockade *created by his fellow drivers,* began to wave his arm slowly up and down. The plaintiff responded at once to this signal by slackening his speed, which demonstrated that he was alert and watching ahead. This "slow" signal was followed by a violent up and down motion of the driver's arm and blowing of his horn. This was interpreted by plaintiff as a "stop" signal, to which he responded by bringing his car to a practical stop (about three miles an hour) well away from bus No. 4 which was the nearest object in his path. This demonstrates that plaintiff had his car under perfect control.

At this moment plaintiff's car was struck from behind by a Ford which the defendant thinks was traveling at least 60 miles an hour. The defendant contends that plaintiff was negligent in not giving an arm signal of his intention to move from the driving lane into the passing lane. Since plaintiff completed this movement *safely* and had traveled some distance in the passing lane, we think it immaterial that he gave no such signal. There is no evidence that his omission in this respect had anything whatever to do with the subsequent collision. The defendant also contends that plaintiff was negligent in not giving an arm signal of intention to decrease his speed and stop. Considering the suddenness with which the plaintiff was confronted with the situation created by the defendant and the further fact that his attention was demanded by the signals being given by defendant's agent, we think he was entitled to have his conduct measured by the emergency or sudden peril rule referred to later. The foregoing indicates the basis of our conviction that the defendant was not entitled to any more on the score of plaintiff's negligence than to have the issue submitted to the jury.

It also appears from the evidence that from the point where the signaling driver caused plaintiff to stop, the passing lane was clear for a distance of something more than 250 feet to the point where the nearer of the two buses forming the blockade stood. The plaintiff contends that had it not been for the defendant's stop signal the plaintiff could have proceeded slowly for a considerable distance and thus afforded an opportunity for all parties to avoid any collision. Likewise, the Ford might have been afforded a substantial distance in which to maneuver, substantially reduce its speed, or even stop.

In the light of these facts we turn now to principles of law.

"Users of the highway are required to exercise reasonable care. What is reasonable care must in each case be determined by its own peculiar facts and circumstances." *Lammers v. Carstensen*, 109 Neb. 475, 191 N. W. 670.

"Acts that might be considered prudent in one case may be deemed to be negligent in another." 20 R. C. L. 9, sec. 7. "The surrounding facts and circumstances are of controlling importance. What may be deemed ordinary care in one case may, under different surroundings and circumstances, be negligence. Negligence is essentially relative and comparative." 20 R. C. L. 24, sec. 18.

Negligence is the absence of care according to the circumstances.

"Negligence is the omission to do something which a reasonable man guided by those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do." *McGraw v. Chicago, R. I. & P. R. Co.*, 59 Neb. 397, 81 N. W. 306.

"Thus, it is to be seen that the rule is: 'Whenever the circumstances attending a situation are such that an ordinarily prudent person could reasonably apprehend that, as the natural and probable consequences of his act, another person, rightfully there, will be in danger of receiving an injury, a duty to exercise ordinary care to prevent such injury arises; and, if such care is not exercised by the party on whom the duty rests and injury to another person results therefrom, liability on the part of the negligent party to the person injured will generally exist, in the absence of any other controlling element or fact, and this, too, without regard to the legal relationship of the parties.' *Lisle v. Anderson*, 61 Okla. 68, 159 Pac. 278." *Zimmer v. Brandon*, 134 Neb. 311, 278 N. W. 502.

"It suffices to charge a person with liability for a negligent act if some injury to another ought reasonably to have been foreseen as the probable result thereof by the ordinarily intelligent and prudent person under the same circumstances, even though the specific injury might not be foreseeable." *Meyer v. Milwaukee E. R. & L. Co.*, 116 Wis. 336, 93 N. W. 6. "It is not essential that the negligence should be the direct cause of the injury. It suffices that it is the natural and probable cause. It is the natural

cause when either it acts directly in producing the injury, or sets in motion other causes so producing it and forming a continuous chain in natural sequence down to the injury; thus linking the negligence with the injury by a chain of natural and consequential causation, although the former may be neither the immediate nor the direct cause of the event." *Meyer v. Milwaukee E. R. & L. Co., supra.*

"The true rule, as we understand it, does not require that the defendant must have been able to foresee the precise injury which in fact resulted from the accident, or the particular, injurious result which might be inflicted upon person or property as the result thereof; on the other hand, the law only requires that he shall be able to understand and appreciate that results of some kind of injurious nature may be reasonably anticipated from the negligent act of omission or commission." *Burkland v. Oregon Short Line R. Co.*, 56 Idaho, 703, 58 Pac. (2d) 773.

"Whether or not an act of negligence is the proximate cause of an injury is determined by ascertaining whether or not, in the natural and continuous sequence of events, there was a causal connection between such negligence and the injury, without some efficient independent cause * * * that was disconnected from such negligence and self-operating, intervening to produce the injury. * * *

"The doer of an original wrongful act that should reasonably cause one to anticipate an injury therefrom is not relieved from liability for an injury immediately brought about by an intervening cause, wrongful or otherwise, that is set into operation by such original wrongful act, and that alone would not have caused the injury, but which with the aid of the original wrong does cause such injury." *Johnson v. Mallory*, 123 Neb. 706, 243 N. W. 872.

The case of *St. Joseph & G. I. R. Co. v. Hedge*, 44 Neb. 448, 62 N. W. 887, presented a difficult question of proximate cause and with reference to it the court said: "The question in all such cases is whether the facts shown constitute a continuous succession of events so linked together as to make a natural whole, or was there a new and in-

dependent cause intervening between the wrong and the injury. The intervening cause must be one not produced by the alleged wrongful act or omission, but independent of it, and adequate to produce the result in question. There may be, it is evident, a succession of intermediate causes, each dependent upon the one preceding it and all so connected with the primary cause as to be in legal contemplation the proximate result thereof. * * * Whether the natural connection of events is maintained or broken by the intervention of a new and independent cause is, according to the authorities cited, a question of fact."

"Otherwise stated, if the original negligence is of a character which, according to the usual experience of mankind, is calculated to invite or induce the intervention of some subsequent cause, the intervening cause will not excuse it, and the subsequent mischief will be held to be the result of the original negligence." 45 C. J. 933, Note 63 (a). See *St. Louis-San Francisco R. Co. v. Mills*, 3 Fed. (2d) 882; *Id.*, 271 U. S. 344, 46 S. Ct. 520.

" 'Where separate, independent acts of negligence by different persons combine to produce a single injury, each participant is liable for resulting damages, though one of them alone might not have caused the injury.' *Rogers v. Brown*, 129 Neb. 9, 260 N. W. 794." *Andrews v. Clapper*, 133 Neb. 110, 274 N. W. 209.

We think there will be no quarrel with the principles above stated and that they are all applicable to the case before us.

The case of *Paup v. American Telephone & Telegraph Co.*, 124 Neb. 550, 247 N. W. 411, is in point and involves some similarity of facts. In that case the court stated the rule of proximate cause as follows: "A tort-feasor is answerable for all the consequences that, in the natural course of events, flow from his unlawful or negligent acts, although those results are brought about by the intervening agency of others, provided the intervening agents were set in motion by the primary wrong-doer, or were the natural consequences of his orginal wrongful act."

With this situation before it the trial court withdrew from the consideration of the jury all charges of negligence made by the plaintiff except the one that defendant's agent was negligent in giving the signals which caused plaintiff to bring his car to a stop. More than this, the trial court gave the following instruction: "You are instructed that every automobile or bus, while in use on the public highways of this state during the daytime, has a right to stop upon the highway as long as they are visible, for a reasonable distance to an approaching vehicle, and in this case, the evidence shows that the buses of the defendant were visible for a reasonable distance to an approaching vehicle; and the fact that they were stopped upon the highway, as shown in the evidence, must not be considered by you as negligence on the part of the defendant."

Since buses Nos. 1 and 2 appear to have been in motion at the time of the collision, it is not clear whether the instruction applied to all four buses or only to Nos. 3 and 4. We pause here to express the view that the instruction was not justified by either the law or the facts. Section 39-1154, Comp. St. Supp. 1941, provides: "No person shall park or leave standing any vehicle * * * upon the paved or improved or main traveled portion of any highway * * * when it is practicable to park or leave such vehicle standing off the paved or improved or main traveled portion of such highway * * *." See, also, Comp. St. Supp. 1941, secs. 39-11,112 and 39-11,113. The record is silent as to the condition of the shoulders of the highway except that the driver of bus No. 1 testified that, after freeing his bus, he drove it off the highway and parked it on the shoulder. The question of negligence in parking the buses and compliance with the applicable statutes ought not to have been foreclosed as it was.

The instructions given by the trial court are the law of the case, even though they erroneously state the law itself. We must assume that juries apply the law as given in the instructions. To do otherwise would imply recog-

nition of verdicts based upon refusal to apply the law as stated in the court's instructions. Such verdicts, even though thought to be basicly correct, would none the less be verdicts against the law because unlawfully arrived at. Thus, in this case, we must assume that in response to the limitations of the court's instructions the jury limited its consideration of negligence on the part of the defendant's agents to the single issue of whether or not the acts of the driver of bus No. 4 in giving the signals constituted negligence. This presents squarely to this court the question of whether, as limited, the finding of the jury against the defendant can be sustained. The problem has caused us no inconsiderable amount of concern. We are reluctant to set aside this second verdict obtained by the plaintiff, but after repeated consultations have come to the conclusion that that must be the judgment of the court.

In view of the manner of submission, we are persuaded that, standing alone and removed from the background of the antecedent conduct of defendant's agents, the conduct of the one agent in giving the signals does not constitute a lawful basis for the verdict.

It will be apparent that, if the defendant was not negligent in blocking the highway, the standard for measuring the conduct in giving warning is entirely different from that to be applied if the defendant was negligent in creating the situation which prompted the giving of the signals.

Taking into account the character and condition of the highway, the day with its effect upon volume of traffic, the topography, the known difficulty of negotiating the turn from the west into the east entrance of the Town, the acknowledged anticipation of trouble in moving bus No. 1 because of low hanging equipment, the danger of blocking the passing lane at any time, and all the other facts and circumstances shown, we think the charges of negligence in blocking the highway should have been submitted to the jury, together with the question of whether under these circumstances the defendant's agent was negligent in the manner of giving the signals.

We have considered the cases cited by the defendant, including the case of *Steenbock v. Omaha Country Club*, 110 Neb. 794, 195 N. W. 117, as precedents for direction against the plaintiff. We think the facts serve to distinguish these cases from the principal case and that the principles therein applied are not applicable in the situation before us.

We think it desirable also to note the contention of the defendant that the emergency or sudden peril rule should be applied to relieve defendant from liability. In the first place this rule is not ordinarily considered or applied as an ultimate test to determine whether conduct is negligent or not. There are cases in which the courts have said that because of the time element involved the defendant was not negligent as a matter of law. As we view these cases, they do not involve so much an application of this rule as they do the basic rule that, where the minds of reasonable men could not differ on the issue of negligence, then the decision is for the court. The more general application of the emergency rule is that of an ancillary yardstick tempering the standard rule of due care. It was thus used by the trial court in its instructions to the jury, being limited, however, to the conduct of the defendant. Furthermore, an essential element of the rule is that the party claiming the benefit of it must not by his own negligence have created or contributed to create the emergency. See *Sheehy v. Abboud*, 126 Neb. 554, 253 N. W. 683. 1 Blashfield, Cyc. of Automobile Law and Practice (Perm. ed.) 480, sec. 669, states the qualification thus: "The rule of sudden emergency as above stated cannot be invoked by one who has brought that emergency upon himself by his own wrong or who has not used due care to avoid it." This qualification should be included in the statement of the rule.

The judgment will be reversed and the cause remanded for a new trial in accordance with the view herein expressed.

In consideration of the circumstances, the costs of this appeal will abide the result of the new trial ordered.

REVERSED.

EDNA MCCONNELL ET AL., EXECUTRIX AND EXECUTOR, APPELLANTS, V. MCCOOK NATIONAL BANK: MRS. C. T. RADER ET AL., INTERVENERS, APPELLEES.
6 N. W. (2d) 599

FILED DECEMBER 4, 1942. No. 31440.

1. **Joint Tenancy.** Section 8-164, Comp. St. 1929, dealing with the payment of deposits in banks in the name of two or more persons is intended for the protection of the bank.
2. ———. The statute also fixes the property rights of the persons named, unless the contrary appears from the terms of the deposit.
3. ———. Under the statute, when a deposit is made in a bank payable to either of two or more persons, either expressly as joint tenants with right of survivorship or without those qualifying words, upon the death of one of the payees the deposit is payable to the survivor or survivors of those named in the deposit.
4. ———. The statute is not limited in its application to payees of certain relationships. The legislature has left to the depositor the determination of who shall receive the benefits of the act.

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

O. B. Clark and *L. H. Cheney,* for appellants.

Joseph T. Callahan and *Cordeal, Colfer & Russell, contra.*

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

SIMMONS, C. J.

This is an action to determine who is entitled to the proceeds of a certificate of deposit issued by defendant bank. Mrs. C. T. Rader and Ernest Fowler were interpleaded on the application of the bank. At the close of all the evidence plaintiffs and interveners moved separately for a directed verdict. The trial court directed a verdict for the interpleaders. Plaintiffs appeal.

The plaintiffs are the executrix and executor of the estate of Maude McMillen. On October 1, 1940, the defend-

ant bank issued its certificate of deposit reciting that Mrs. Maude McMillen had deposited $1,000 in its bank, "Payable to the order of self or Mrs. C. T. Rader and Ernest Fowler," payable in six months after date on the return of the certificate properly indorsed. Mrs. McMillen died April 4, 1941. The certificate was found among her possessions. Plaintiffs demanded payment, and when it was refused, suit was brought. The bank took the position that it was only a stakeholder. The interveners took the position that from the issuance of the certificate they were joint tenants thereof with Mrs. McMillen with right of survivorship and that upon her death they became the owners of the certificate and entitled to the proceeds.

Plaintiffs' evidence was that the certificate was found in Mrs. McMillen's papers after her death, the demand for and the refusal of payment. Interveners offered evidence that they were niece and nephew of Mrs. McMillen; that Mrs. McMillen had had other certificates prior to this one with varying payee provisions which she indorsed and cashed. The president of the bank testified that where a certificate was issued payable to one person "or" another that either could properly indorse and cash it. He further testified, with reference to the certificate in suit, that the bank would not have paid it to Mrs. Rader or Mr. Fowler in Mrs. McMillen's lifetime except upon her request. Interveners also offered evidence, received over objection, to the effect that Mrs. McMillen had, shortly before her death, expressed a desire that the certificate be then given to Mrs. Rader expressing confidence that Mrs. Rader would give Mr. Fowler his share, but she issued no positive directions to that effect. In any event it was not done.

Are the interveners entitled to recover this fund?

Plaintiffs argue (1) that none of the conditions necessary to constitute or effectuate a gift are found in this record, (2) in the absence of statute the deposit by Mrs. McMillen of her own funds payable to herself or interveners was not sufficient to transfer to them any right or interest in the deposit where the interveners neither had

knowledge of or possssion of the certificate, (3) statutes providing that under certain terms of deposit the persons named as payees will hold by joint tenancy with rights of survivorship are in derogation of the common law and to be strictly construed, and (4) that a deposit payable to the depositor "or" another without provision for survivorship is not within the statute and title to the funds does not pass to the alternate payee.

Plaintiffs in support of their proposition refer to section 8-164, Comp. St. 1929, and cite many cases from other jurisdictions. Interveners rely on the statute and our decisions.

The statute is: "When a deposit in any bank in this state is made in the name of two or more persons, deliverable or payable to either or to their survivor or survivors, such deposit or any part thereof, or increase thereof, may be delivered or paid to either of said persons or to the survivor or survivors in due course of business." Comp. St. 1929, sec. 8-164.

In re Estate of Kamrath, 114 Neb. 230, 206 N. W. 770, involved a certificate payable to "Wilhelm Kamrath or Mary Hodges." The case was determined upon the issues and facts presented, one of which was the question of whether or not there had been a gift. The above statute was not considered nor construed in the opinion.

In re Estate of Johnson, 116 Neb. 686, 218 N. W. 739, involved certificates issued on deposits made by Carl M. Johnson, some of which were payable "to the order of self or Margaret E. Johnson." Margaret E. Johnson and Carl M. Johnson were wife and husband. There, as here, the contest was between the survivor and the estate of Johnson. The certificates were placed by Johnson in his safety deposit box where they remained until his death. His wife had access to the keys to the box but never entered it. Johnson told her of the certificates and where they were. We there considered whether the certificates belonged solely to Mrs. Johnson as survivor, either (1) by way of gift, or (2) as a joint tenant with right of survivorship, or (3)

by virtue of the provisions of section 8046, Comp. St. 1922 (now section 8-164, Comp. St. 1929). It was held as to (1) that there was "a completed, executed gift;" as to (2) that "an interest in the nature of a joint tenancy with the attendant right of survivorship" was created; as to (3) that, "when Johnson made the deposit payable to himself or to his wife, he must have known, and so he presumed, that the bank would pay the obligation to either himself or his wife, and to no other person. We must assume that he knew of the statute, and that the bank would follow its provisions. We think the legislature must also have had that exact thought in mind when it enacted the law. We, therefore, hold that the legal title to the funds is fixed in the persons named in the certificates, and that the survivor, if one dies, takes the whole legal title." Not discussed in the opinion, but based on propositions advanced in supplemental briefs, is the statement found in the fourth paragraph of the syllabus that the statute "not only is intended for the protection of the bank, but also fixed the property right of the persons named, unless the contrary appears from the terms of the deposit."

The statute was again considered by this court in *Kehl v. Omaha Nat. Bank,* 126 Neb. 695, 254 N. W. 397. In that case there was an agreement with reference to the deposit that the persons named (husband and wife) were the owners of the moneys deposited in the account "as joint tenants with the right of survivorship and not as tenants in common." We there reviewed the *Johnson* case, *supra,* stated we there held "a donative intent was presumed," and also incorporated in the opinion the syllabus statement above referred to from the Johnson opinion.

It is clear from our decisions in construing this statute that we have held: (1) The act is intended for the protection of the bank; (2) it fixes the property rights of the persons named, unless the contrary appears from the terms of the deposit; (3) that, when a deposit is made in a bank payable to either of two or more persons, either expressly as joint tenants with right of survivorship or without

those qualifying words, upon the death of one of the payees the deposit is payable to the survivor or survivors of those named in the deposit.

The two decided cases deal with named payees who are husband and wife. In the instant case it is aunt and niece and nephew. Certain parts of the discussion in the opinions cited might indicate that the close relationship of the payees was a determining element in the conclusion reached. The statute makes no such limitation and embraces in its terms two or more persons, without regard to their relationship. The legislature has left to the depositor the determination of who shall receive the benefits of the act.

This statute was originally passed as an independent act, the title being "An act to provide for the payment of money deposited in the name of two or more persons in any bank, to either of said persons or to the survivor or survivors and to repeal all conflicting acts." Laws 1909, ch. 9.

We have said that, "When the legislative intent is left in doubt by failure to clearly express it in the act, resort may be had to the title as an aid to the discovery of such intent." *Hansen v. Dakota County*, 135 Neb. 582, 283 N. W. 217. It is noted that the title of the act refers to "money deposited in the name of two or more persons" without qualifying words and provides for the payment of such money "to either of said persons or to the survivor or survivors."

The construction which we have placed upon the act appears to be entirely consistent with the legislative intent as expressed in the title of the act and the act itself.

We are now asked to modify our decisions and hold that a deposit payable to one person "or" another without words of joint tenancy or right of survivorship is not within the provisions of the statute. To so hold would require us to overrule the *Johnson* case.

In that case, decided 14 years ago, we expressed our views of the legislative intent. We reiterated that state-

ment in the *Kehl* case eight years ago. We see no error in the conclusions announced in those cases. We feel that the legislature intended by this act to get away from the "confusion, contradiction and perplexing distinctions" and the uncertainties, resulting in such transactions, occasioned by the judicial opinions in the various states on this subject. The legislature passed an act which we have construed. Our construction has not been since questioned by the legislature. The construction which we have placed upon the act has been accepted and followed by banks in their dealings with depositors and by depositors in their dealings with the banks, each other, and in their handling and disposing of their funds. That construction has become a rule of property in this state.

The judgment of the district court is affirmed.

AFFIRMED.

IN RE ESTATE OF FRANK SOUKUP, SR. MIKE F. SOUKUP, APPELLANT, V. ESTATE OF FRANK SOUKUP, SR., ET AL., APPELLEES.

6 N. W. (2d) 615

FILED DECEMBER 4, 1942. No. 31443.

1. **Limitation of Actions.** A payment on a note by the principal debtor without the authority or consent of the surety does not prevent the running of the statute of limitations as to the latter.
2. ———. A will which does not acknowledge as an existing liability a note executed by testator or make it a charge against his estate does not prevent the statute of limitations from running against the debt.
3. **Witnesses.** On an issue involving the allowance of a claim by the executor of a will against the estate of the deceased testator for the amount due on a note executed by the principal debtor and by the testator as surety, where the statute of limitations is pleaded as a defense, the principal debtor is, by statute, incompetent as a witness to testify to conversations between himself and the testator, showing that the latter consented to a payment

which prevented the barring of the claim. Comp. St. 1929, sec. 20-1202.

APPEAL from the district court for Saline county: CLOYDE B. ELLIS, JUDGE. *Affirmed.*

Waring & Waring, for appellant.

John E. Mekota, contra.

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

ROSE, J.

It is shown by the record in this proceeding that Mike F. Soukup presented to the county court of Saline county for allowance a claim against the estate of Frank Soukup, Sr., deceased, for the amount due on a promissory note for $4,000. The note was dated March 1, 1930, was payable to Mike F. Soukup one year after date with interest at the rate of 5 per cent. per annum and was executed by Joseph J. Soukup and Frank Soukup, Sr. On the back of the note the following payments were indorsed: Interest paid April 18, 1931; interest paid May 10, 1932; $50 paid on principal April 2, 1936. The claim was filed in the county court August 24, 1940.

James Soukup, executor of the will of Frank Soukup, Sr., deceased, admitted the execution of the note but objected to the allowance of the claim and alleged that Frank Soukup, Sr., did not receive any part of the consideration for the note but signed it as surety for the accommodation of his son, Joseph J. Soukup; that there was no payment of principal or interest by the makers of the note or with the knowledge or consent of either of them after May 10, 1932, and that thereafter more than five years elapsed before the claim was filed in the county court; that the claim was barred by the statute of limitations.

The county court sustained the objections and disallowed the claim. The claimant appealed to the district court where the claim was again disallowed. From the judg-

ment of the district court the claimant appealed to the supreme court.

Was the debt evidenced by the note barred by the statute of limitations when the claim of payee was filed August 24, 1940, in the county court against the estate of Frank Soukup, Sr., deceased, the cause of action having accrued March 1, 1931?

An action on a promissory note is barred by the statute of limitations unless brought within five years after the cause of action thereon accrued. Comp. St. 1929, secs. 20-204, 20-205. Claimant contends that the payment of $50, April 2, 1936, prevented the running of the statute until that date and that therefore the claim is not outlawed. This position does not seem to be tenable. Frank Soukup, Sr., was one of two signers of the note. The evidence shows that he did not receive any proceeds of the note; that the consideration therefor was paid to the other signer, his son, Joseph J. Soukup, the principal maker for whom the father was surety; that the payment on the debt was made by the son. The proof does not show that the payment on the debt was made with the authority, knowledge and consent of the surety. The following is well-settled law:

"The payment of interest or a part of the principal on a note by a principal debtor, without the authority or consent of the surety, will not stop the running of the statute of limitations as to the surety. * * *

"A payment by one of several joint debtors on a note, without the authority or consent of the others, will not toll the statute of limitations as to them." *Hall v. Rogers*, 113 Neb. 290, 202 N. W. 908. See, also, *Kuhse v. Luther*, 130 Neb. 623, 266 N. W. 66.

Claimant contends further that Frank Soukup, Sr., made a will in which he acknowledged the note as an existing obligation of testator and that this prevented the barring of the claim. The will was dated February 12, 1934, more than five years before the claim was filed in the county court. In addition the will itself does not acknowledge the

debt evidenced by the note as an existing liability of testator or make it a charge against his estate.

It is also argued by claimant that the trial court erred in excluding offers of proof that testator directed the 50-dollar payment of April 2, 1936, and that it was made at his request and with his consent. Questions eliciting such proof were directed to Joseph J. Soukup and, if answered, would have permitted him to testify to conversations between himself and his father, the deceased testator. Objections to the questions were made on the ground that the witness was incompetent to so testify under the statute providing that, "No person having a direct legal interest in the result of any civil action or proceeding, when the adverse party is the representative of a deceased person, shall be permitted to testify to any transaction or conversation had between the deceased person and the witness." Comp. St. 1929, sec. 20-1202. The objections were properly sustained. The witness had a direct legal interest in the result of the proceeding. He was the principal debtor and the purpose of the rejected testimony was to make his own debt a valid claim against the estate of his deceased father who signed the note as surety for the witness. A "direct legal interest" under the statute has been defined as follows:

"If a judgment pronounced in a pending action will be legal evidence for or against the witness in another action, then such witness has a direct legal interest in the result of the suit, which renders his testimony incompetent under the provisions of said section." *Tecumseh Nat. Bank v. McGee,* 61 Neb. 709, 85 N. W. 949.

In these views of the law and the facts, error does not affirmatively appear in the proceedings and judgment of the district court.

AFFIRMED.