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GEORGE EWERT IMPLEMENT COMPANY, A CORPORATION, APPELLANT, V. BOARD OF EQUALIZATION OF PLATTE COUNTY, NEBRASKA, APPELLEE.
70 N. W. 2d 397

Filed May 20, 1955. No. 33714.

1. **Statutes.** In construing a statute, effect must be given, if possible, to every word, clause, and sentence, so that no part of its provisions will be inoperative, superfluous, void, or insignificant.
2. **Taxation.** By section 77-1502, R. S. Supp., 1953, a county board of equalization is authorized to meet in special session at any time after the close of the annual meeting for the purpose of equalizing assessments of omitted and undervalued property.
3. ———. The holding of this court that the authority of a county board of equalization terminated on the date the county assessor was required to have the abstract of the assessment rolls completed and forwarded to the Tax Commissioner, has not been applicable since the 1947 amendment to section 77-1502, R. S. 1943.

APPEAL from the district court for Platte County: ROBERT D. FLORY, JUDGE. *Affirmed.*

Wagner, Wagner & Robak, for appellant.

Byron Reed, for appellee.

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

CARTER, J.

This is an appeal from the judgment of the district court for Platte County sustaining the action of the Platte County Board of Equalization in raising assessments of undervalued business inventories on September 24, 1953. It is the contention of the plaintiff-appellant that the county board of equalization was without power to increase the valuation of the property for assessment purposes on the date on which it was done. From an adverse judgment the plaintiff property owner appeals.

The appeal comes to this court in the form of a case stated. The facts agreed upon are as follows: Plaintiff filed its tax schedule on April 17, 1953, fixing the 50

percent tax value of its business inventory at $36,555. The county board of equalization convened on the first Monday in May 1953, and made no change in plaintiff's schedule prior to 40 days thereafter. On June 30, 1953, the county assessor certified the abstract of all property assessed in Platte County to the Tax Commissioner. On August 31, 1953, the county board of equalization met in special session for the purpose of equalizing assessments of omitted or undervalued property relating to the business inventories of 133 business firms in Platte County. On September 24, 1953, after notice and opportunity for hearing, the board of equalization raised the assessed value of plaintiff's property, designated as its business inventory, from $36,555 to $74,065, and the tax levied thereon appears as a lien on plaintiff's personal property. It is stipulated that the acts of the board of equalization in raising said value took place more than the 40 days it was authorized to regularly meet after the board convened, after the county assessor's abstract was made up for 1953, and after the abstract had been certified to the Tax Commissioner. The increase was not made by adding specific items of omitted property, but by raising the assessed value of the property. Neither party admits or denies the actual value of the merchandise. The issues are limited by agreement to the question of the jurisdiction of the county board of equalization to take the action it did on September 24, 1953.

The plaintiff relies on Hiller v. Unitt, 113 Neb. 612, 204 N. W. 208; State v. Odd Fellows Hall Assn., 123 Neb. 440, 243 N. W. 616; and similar cases. In these cases it was held that a county board of equalization was limited to a session of a designated number of days and that its powers ended, in any event, when the assessor's abstract was certified to the Tax Commissioner in the time and manner prescribed by statute. The period of time in which a county board of equalization could deal with omitted or undervalued property was limited, prior to the 1947 amendment, to the foregoing period. After

the adjournment of the county board of equalization, the authority to deal with omitted or undervalued property was lodged in the Tax Commissioner and the State Board of Equalization and Assessment. §§ 77-306 to 77-314, R. S. 1943. The cases cited by the plaintiff are not applicable since the 1947 amendment was adopted. Fromkin v. State, 158 Neb. 377, 63 N. W. 2d 332.

In 1947 the Legislature empowered a county board of equalization to meet at any time for purposes of reviewing and equalizing all assessments. Laws 1947, c. 251, § 36, p. 826. In 1949 this provision was limited by an amendment which empowered a county board of equalization to meet at any time for the purpose of equalizing assessments of any omitted or undervalued property. Laws 1949, c. 233, § 1, p. 644. In 1953 this section was again amended to read as follows: "The county board of equalization shall hold a session of not less than three and not more than forty days, for the purpose contemplated in sections 77-1502 to 77-1507, commencing on the third Monday of May each year. It shall be authorized and empowered to meet at any time upon the call of the chairman or any three members of the board for the purpose of equalizing assessments of any omitted or undervalued property. The board shall maintain a written record of all proceedings and actions taken, which shall be available for inspection in the office of the county assessor." § 77-1502, R. S. Supp., 1953. See, also, Fromkin v. State, *supra.*

It appears to us that the authorities cited by the plaintiff still apply to matters contemplated by the first sentence of section 77-1502, R. S. Supp., 1953. But as to the second sentence, the power of the county board of equalization to deal with omitted and undervalued property is greatly extended from what it was prior to 1947. The county board of equalization is authorized in terms by the second sentence of section 77-1502, R. S. Supp., 1953, to equalize assessments of omitted or undervalued property. It is clear therefore that the second sentence of

section 77-1502, R. S. Supp., 1953, was intended as an extension of the power of the county board of equalization. The use of the words "at any time" therein certainly means that the assessment of omitted or undervalued property may be dealt with after the expiration of the 40 days and after July 1, the date the county assessor is required to forward a certified copy of the abstract of the assessment rolls to the Tax Commissioner. The requirement that an assessment of any person may not be raised without notice, as contained in section 77-1506, R. R. S. 1943, is applicable to the proceeding. Such person may appeal from any such action taken by the county board of equalization as provided by section 77-1510, R. R. S. 1943.

The method of listing, assessing, and equalizing property for purposes of taxation is a legislative matter. The decisions of this court prior to 1947 deal with a statute which differs greatly from the one presently before the court. They are correct as to the statute then being considered. But to give the same meaning to the present statute would have the effect of rendering the second sentence of section 77-1502, R. S. Supp., 1953, completely nugatory. We have repeatedly adhered to the rule that in construing a statute effect must be given, if possible, to all its several parts, and no sentence, clause, or word therein should be rejected as meaningless or superfluous, if such construction can be avoided. Ledwith v. Bankers Life Ins. Co., 156 Neb. 107, 54 N. W. 2d 409; Nacke v. City of Hebron, 155 Neb. 739, 53 N. W. 2d 564. We must conclude, therefore, that the former rule limiting the exercise of the powers of a county board of equalization to the period prescribed for its annual meeting is no longer controlling. Fromkin v. State, *supra*. In addition to the limited powers it formerly had it is now given further powers relating to equalizing assessments of omitted or undervalued property. As to the latter, the county board of equalization has authority to act

at any time, subject to the statutory provisions for notice and the right of appeal.

We call attention to the fact that prior to 1947 it was the duty of the precinct assessor to list, value, assess, and return all property in the precinct subject to taxation. § 77-405, R. S. 1943. In 1947 the office of precinct assessor was abolished and the taxpayer was required to file his own schedules. § 77-405.01, R. R. S. 1943. An additional statute was enacted providing that the county assessor, with the aid of his deputies and assistants, shall check all returns. § 77-411, R. R. S. 1943. Additional power was given the county board of equalization to meet after its annual meeting to take action on situations where it could be shown that the taxpayer had failed to list or had undervalued some or all of his property. This authority was granted by the second sentence of section 77-1502, R. S. Supp., 1953. It was, in effect, a grant of the same power to the county board of equalization which may be exercised by the Tax Commissioner and the State Board of Equalization and Assessment under sections 77-306 to 77-314, R. R. S. 1943. It seems clear to us that under the first sentence of section 77-1502, R. S. Supp., 1953, the county board of equalization is required to hold an annual meeting to hear protests of taxpayers whose property is alleged to be overvalued and to perform its general function of equalization. After the close of the annual meeting, the jurisdiction of the county board of equalization is limited to the equalization of the assessments of omitted and undervalued property. The intent of the Legislature is plain that it did not intend that a taxpayer could reap the benefit of an incorrect or false valuation or listing of property simply because his tax schedules could not be checked and acted upon within the 40-day period to which the annual meeting of the county board of equalization was limited.

We think the position taken by the defendant county board of equalization as to the meaning of section 77-

1502, R. S. Supp., 1953, is the correct one. The judgment of the district court was in accord with this interpretation of the statutes. The judgment is correct and is affirmed.

AFFIRMED.

ELDON A. PETERSON, APPELLANT, V. JOE VAK ET AL., APPELLEES.
70 N. W. 2d 436

Filed May 20, 1955. No. 33742.

1. **Landlord and Tenant: Quieting Title.** A lessee of real estate may by virtue of section 25-21,112, R. R. S. 1943, maintain an action to quiet title to his leasehold.
2. **Landlord and Tenant: Trespass.** A tenant is entitled to the exclusive possession and use of the demised premises in the absence of reservations and restrictions in his lease and he may even maintain trespass against his landlord.
3. **Trespass: Injunction.** If the nature of a threatened trespass on real estate is such that it will, if accomplished, prevent a substantial enjoyment of property or the possession thereof the remedy of injunction is appropriate to forestall the wrongful act.

APPEAL from the district court for Perkins County: VICTOR WESTERMARK, JUDGE. *Reversed and remanded with directions.*

George B. Hastings, John E. Dougherty, and *John Brogan,* for appellant.

Marvin A. Romig and *Halligan & Mullikin,* for appellees.

Heard before SIMMONS, C. J., CARTER, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ., and KOKJER, District Judge.

BOSLAUGH, J.

The relief appellant sought by this action was that his leasehold of described land for a term of 3 years commencing with March 1, 1952, be quieted and con-

firmed in him free of adverse claim of appellees; that they be barred from asserting any interest or right in or to the land or the possession thereof adverse to the leasehold of appellant; and that appellees be enjoined from entering or being upon the land and from interfering with, cutting, or harvesting grain then growing or standing on the land. The district court heard the evidence of appellant, sustained a motion of appellees for dismissal, denied a motion of appellant for a new trial, and dismissed the case.

There is evidence of the following matters: Joe Vak, herein identified as appellee, was lessee of the land involved from the year 1918. He entered upon the land by virtue of an oral lease, the term of which was 1 year commencing with March 1. He became and was a tenant from year to year until March 1, 1952. The land involved is 160 acres. Appellee summer tilled 101 acres of it at proper times in the year 1951. The owner of the land on August 29, 1951, served a written notice on appellee terminating his tenancy of the land. The substance of the notice was that the owner of the land notified appellee to quit, vacate, and surrender to the owner the possession of the land on or before March 1, 1952; that the owner claimed the right to enter upon the land during the fall of 1951 to plant it to wheat; and that the notice was given for the purpose of terminating the tenancy of appellee of the land.

The owner of the land entered into a lease of it with appellant. It was reduced to writing, executed by the parties, and delivered September 1, 1951. This lease described the land involved herein and the term of it was 3 years commencing with March 1, 1952. Appellee disregarded the notice given him August 29, 1951, by the owner and on the 25th and 26th of September, 1951, appellee planted to winter wheat part of the land, about 101 acres, that had been summer tilled that year. Appellant knew after the wheat grown on the land in 1951 was harvested that the ground was disked twice

and one-wayed once. He did not discuss with appellee the fact that he was negotiating with the owner of the land for a lease of it until September 1, 1951, the day the written lease was delivered to him. Appellant then negotiated with appellee for immediate possession of the land but was advised by appellee that " 'I am keeping the land, I summer tilled it and I am keeping the land.' " A few days later appellee during another conversation said he was "keeping the summer till" but appellant could have 39 acres of stubble and could plant wheat on it, and that appellant could have the part of the land that had not been summer tilled. Appellant offered to pay appellee for the summer tilling that had been done in the summer of 1951 so that appellant could get possession then but appellee refused to negotiate on this basis and said he had no price for it. Appellant did nothing further about the land until March 1, 1952, on which date he went into possession of it, and about the first of April he plowed 39 acres that had not been plowed before and he broke some lagoon land. Later in the year 1952 appellee claimed the right to reenter the land to harvest the wheat he planted on the land after the notice terminating his tenancy was served by the owner, and he threatened to do so. This resulted in the pending litigation.

It is said by appellees that Joe Vak had possession of the 101 acres of the land which was planted to wheat in the fall of 1951 at the time this case was commenced; that appellant did not then have possession thereof; that the essence and effect of the action of appellant were to obtain possession of the real estate; that appellant had an adequate remedy at law; that the circumstances were such that the ordinary legal remedy available to him was adequate; and that the remedy of injunction could not be successfully invoked by appellant. If the premise of appellees is sustained the conclusion deduced therefrom is indisputable. Stahl v. Allchin, 155 Neb. 412, 52 N. W. 2d 251. However the

record disputes the factual matters upon which the conclusion of appellees in this regard is based. The evidence is that appellant went into possession of the land March 1, 1952, and that he thereafter performed affirmative acts indicative of his occupancy and use of it as tenant. He has not surrendered his claim of rightful possession and use of the land. He was supported in his conduct by a written lease from the owner of it. The tenancy of the land that Joe Vak had was terminated by the owner as of March 1, 1952. There is no claim that what the owner did in this respect was not legally effective to end the tenancy of Joe Vak. There is no claim or proof that James Vak ever had any right to or interest in the land, the occupancy, or the possession of it. The appellee Joe Vak alleged that after the notice to terminate his tenancy was served on him he talked with George Hastings, the agent of the owner of the land, and told him that the worth of the summer tilling done by appellee in 1951 was $1,800; that he would give appellant 10 days within which to pay that amount to him; that if that was not done within the time limited appellee would plant the summer tilled land to wheat; that he was not paid the amount demanded; that he afterwards planted the wheat; that because thereof appellee was then in legal possession of the premises; and that he "had a right to re-enter and harvest said wheat without committing a trespass on said land." It is a permissible inference from the allegation of appellee that he had a right to reenter the land and harvest the wheat, that he was not in the possession of it. This supports the proof of appellant that he had taken and had possession of the land. This action was not brought to secure possession of the land by appellant. He had right of possession, possession of, and actual dominion over the land when the suit was brought. It was to quiet and confirm the leasehold of appellant and to enjoin appellees from reentering and trespassing on the land.

A lessee may maintain an action to quiet his title to a leasehold of real estate. Whether he is in or out of possession thereof is not for the purposes of the action important. § 25-21,112, R. R. S. 1943. McDonald v. Early, 15 Neb. 63, 17 N. W. 257, was an action by a holder of a school land lease issued to him by the state to quiet title of his leasehold. A demurrer to the petition was sustained and the action was dismissed. A ground of the demurrer was that only the owner of a legal title to the land was a competent plaintiff in an action to quiet title and that a lease for a term of years was not sufficient. The court considered the statute on the subject as it then existed and concluded: "An action under section 57 of chap. 73, Compiled Statutes, may be maintained where the plaintiff's title to the lands in question is derived from the state, under the provisions of the statute providing for the sale and leasing of the educational lands of the state, by lease." The opinion in the case contains the following: "The object which the legislature had in passing the above provisions was to extend the benefit of the common law in actions of this character to persons claiming title to real property, though not in the possession thereof. * * * All that seems to have anciently been necessary was, that the plaintiff be possessed of or entitled to an estate, and the defendant was also possessed of the semblance of a right or title to the same estate, which, though imperfect and invalid as against the rights of the plaintiff, yet might * * * become the prevailing title. This estate need not necessarily be one of realty, but may consist of personal property of any description. * * * A leasehold estate, running for twenty-five years in a valuable piece of property, may be of vastly greater value than a fee simple title to another piece. Besides, as we have already seen, the remedy at common law is not confined to real property at all, and the statute is an enlarging rather than a restricting one." In Langstaff v. Mitchell, 119 Cal. App. 407, 6

P. 2d 546, the court considered a statute providing that an action may be brought by any person against another who claims an estate or interest in real or personal property adverse to him and held: "A leasehold interest against an adverse claim is sufficient interest in real property to maintain an action under said last-named section." See, also, Elk Fork Oil & Gas Co. v. Jennings, 84 F. 839; Cozart v. Crenshaw (Tex. Civ. App.), 299 S. W. 499; Carbon Black Co. v. Ferrell, 76 W. Va. 300, 85 S. E. 544; 74 C. J. S., Quieting Title, § 23, p. 50.

These matters are emphasized and confidently relied upon by appellees: That appellant was told by appellee in a conversation they had about September 1, 1951, that he had summer tilled part of the land; that appellee was entitled to the use of it and was going to keep it; that he advised and warned appellant to stay off the land; that appellant knew appellee was doing work in preparation for a crop of wheat which could not mature until the following summer and appellant did not advise appellee of the negotiations for a lease of the land to appellant; and that the owner of the land permitted appellee to do work thereon that could only be compensated for by his having the crop taken from the land the following year without informing him that his tenancy would be interrupted. The conversation between appellee and appellant was concerning efforts of the latter to secure an agreement for his immediate possession of the land so that appellant could plant a part of it to winter wheat during the fall of 1951. It was after notice to terminate the tenancy of appellee was served and before he planted wheat on the land in 1951 and while appellee was entitled to the exclusive possession and use of all the land but at a time after he had notice and was charged with knowledge that all his rights to the occupancy and use of the land would end not later than March 1, 1952. There was no relationship between appellant

and appellee. The former was under no legal duty to inform the latter of anything. Appellee had an absolute right to till, plant wheat, and use the land until March 1, 1952, but he was charged with knowledge that his status in reference to it would on that date completely and finally terminate and any crop planted that did not mature or was not disposed of by him before that date would be his loss. The matters relied upon by appellee as recited above are of no significance in this litigation. This court spoke of the unimportance of quite similar matters in Vance v. Henderson, 141 Neb. 766, 4 N. W. 2d 833, as follows: "In the absence of reservations or restrictions, a tenant is entitled to the exclusive possession and use of the demised premises and may even maintain trespass against his landlord. There is nothing in this record to create a bar to the defendant planting wheat on the premises if he saw fit to do so. If, as plaintiff contends, the defendant's lease expired on March 1, 1942, and he had not used or otherwise disposed of the wheat, he ran the risk of losing his labor and seed."

Fenster v. Isley, 143 Neb. 888, 11 N. W. 2d 822, concerned these facts: Appellant was a tenant of land from year to year. The owner of the land gave appellant notice terminating his tenancy on March 1, 1942, advised him that the land would be leased to appellee from that date to March 1, 1943, and requested appellant not to do any summer fallowing and not to plant wheat. Appellant summer tilled 60 acres of the real estate and planted it to winter wheat. Appellee was authorized by the lease given him by the owner to take and he took possession of the land March 1, 1942, and prepared and planted crops on the land not then in wheat. Appellant gave notice in June 1942, that he was going to enter the premises and harvest the 60 acres of wheat he planted in the fall of 1941. Appellee commenced and successfully prosecuted an action of injunction to prevent appellant from going upon the land, trespassing thereon, and from

harvesting the wheat. Therein it is said: "Appellee had a written lease from the owner from March 1, 1942, to March 1, 1943. More than six months prior to March 1, 1942, * * * the appellant, who was a tenant from year to year, was notified that his tenancy would be terminated on March 1, 1942. Pursuant thereto he relinquished his possession of the lands prior to March 1, 1942, and the appellee went into possession. * * * Therefore, after March 1, 1942, the appellant had no further right to the possession of the premises by reason of his tenancy from year to year and appellee was in possession under his lease and entitled to enjoin any trespass thereon during the terms thereof * * *."

Appellant is entitled to have his leasehold in the land involved quieted and confirmed in accordance with the terms of his written lease bearing date of September 1, 1951, against any and all claims of appellees or either of them adverse thereto, and to have an order of injunction barring appellees and each of them from entering or trespassing upon the land or in any manner interfering with the tenancy of appellant of it during the term of his lease. Fenster v. Isley, *supra.*

The judgment should be and it is reversed and the cause is remanded to the district court for Perkins County with directions to render and enter a judgment in the cause in harmony with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

IN RE APPLICATION OF EVERETT GORGEN FOR A WRIT OF HABEAS CORPUS.

EVERETT GORGEN, APPELLEE, V. LEO S. TOMJACK, APPELLANT.

70 N. W. 2d 514

Filed May 20, 1955. No. 33743.

1. **Habeas Corpus: Extradition.** In habeas corpus to release a prisoner detained under a warrant of extradition, the fact that a

complaint was filed against him in the demanding state is prima facie evidence that he was there charged with a crime.

2. **Extradition.** Where a prisoner detained under a writ of extradition regular on its face demands his freedom on the ground that the complaint against him does not charge a crime under the statutes of the demanding state, the burden is on him to maintain his position by producing the statute.
3. ———. In order that one be a fugitive from justice it is not necessary that he shall have left the demanding state for the purpose of avoiding prosecution, but that, having committed an act charged to be a crime under the laws of that state, he has left that jurisdiction and is found in another state.
4. ———. The issuance of a warrant of extradition creates a presumption that the prisoner detained under it is a fugitive from justice.
5. **Habeas Corpus: Extradition.** In an action to procure a writ of habeas corpus, the guilt or innocence, or probable cause to believe one guilty who is held under extradition as a fugitive from justice from another state, is a matter exclusively for the courts of the demanding state.
6. ———: ———. Evidence that the charge against one sought in extradition proceedings, which are in all respects regular, was made on improper motives and that he was not guilty of the crime charged will not justify his release from custody under a writ of habeas corpus.
7. ———: ———. If the Governor issues a warrant of extradition it is the general rule that, on the hearing of a habeas corpus sued out for the liberation of one who is sought to be extradited for the violation of the criminal laws of another state, it is not proper to hear evidence upon, or inquire into, the motives or purposes of the prosecution, or into the motives of the Governor of the demanding state.

APPEAL from the district court for Holt County: DAYTON R. MOUNTS, JUDGE. *Reversed and remanded with directions.*

William W. Griffin, for appellant.

Max G. Towle, John R. Gallagher, and *Thomas J. McManus,* for appellee.

Heard before SIMMONS, C. J., CARTER, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ., and KOKJER, District Judge.

CARTER, J.

This is a habeas corpus action instituted in the district court for Holt County by Everett Gorgen, petitioner, against Leo S. Tomjack, sheriff of Holt County, Nebraska, respondent. The action is in resistance of an effort to remove petitioner from the State of Nebraska to the State of Kansas by extradition to answer a charge of being in possession of stolen property pending against him in the justice court in and for the city of Great Bend, Barton County, Kansas. The trial court found that petitioner was unlawfully deprived of his liberty and discharged him from the custody of the sheriff. The respondent sheriff appeals.

The record discloses that a complaint was filed against the petitioner in the justice court in and for the city of Great Bend, Kansas, on September 8, 1954, in which it is charged that on or about May 1, 1954, in the county of Barton, State of Kansas, Everett Gorgen, then and there being, did then and there unlawfully, feloniously, and willfully, receive a 1953 G.M.C. tank truck of the value of more than $20, which had been taken, or secreted, from the Whiteman Motor Company used car lot in Hoisington, Kansas, he knowing the same to be so embezzled, taken, secreted, or stolen, in violation of section 21-549 of the General Statutes of Kansas for 1949.

The record shows that subsequent to the filing of the charge the Governor of Kansas made an executive requisition upon the Governor of Nebraska for the extradition of the petitioner from the State of Nebraska to the State of Kansas to answer said charge and that the requisition was honored and the Governor of Nebraska signed a warrant for the extradition of the petitioner under which he was arrested and detained by the respondent sheriff of Holt County, Nebraska, at the time this action was filed. No contention is here made that the complaint filed in Barton County, Kansas, did not charge a crime or that the extradition proceedings were in any respect irregular.

The petitioner asserts in his petition that his arrest and detention are unlawful for the following reasons: (1) That he is not a fugitive from justice from the State of Kansas; (2) that the attempt to remove this petitioner to the State of Kansas is for the sole purpose of attempting to extort money from him and not for the purpose of trying him for any crime in the State of Kansas; (3) that petitioner has legal title to the property in question; (4) that any claims or demands against petitioner are civil and not criminal in their nature; and (5) that the application for extradition is not made in good faith but for the purpose of collecting a debt.

The evidence shows that petitioner purchased a G.M.C. tank truck from the Whiteman Oil Company, Hoisington, Kansas, on April 23, 1953. The Securities Acceptance Corporation of Great Bend, Kansas, held a chattel mortgage on the truck for approximately $2,500. Petitioner brought the truck to O'Neill, Nebraska, where he secured a certificate of title, a registration certificate, and license plates for the truck. He made payments on the chattel mortgage for a time and then defaulted in his payments. The Securities Acceptance Corporation undertook to collect the amounts owing them. It eventually repossessed the truck and returned it to the Whiteman Motor Company at Hoisington, Kansas. Petitioner asserts that the agents of Securities Acceptance Corporation took possession of the truck without the knowledge of petitioner at a time when it was parked on the streets of O'Neill, Nebraska. An agent of the Securities Acceptance Corporation testifies that the matter was fully discussed with petitioner and that the truck was voluntarily delivered into the possession of the Securities Acceptance Corporation. On or about May 1, 1954, petitioner saw the truck in the Whiteman Motor Company used car lot in Hoisington, Kansas, and he admits driving it away without permission and retaining it in and around O'Neill, Nebraska.

Under the condition of the record it must be presumed

that the complaint filed in Barton County, Kansas, charges a crime. The fact that a complaint was filed against the petitioner in the demanding state is prima facie evidence that he was there charged with a crime, and, if he contends otherwise, the burden is on him to maintain his position by producing the statute of the demanding state. Chandler v. Sipes, 103 Neb. 111, 170 N. W. 604.

Petitioner contends that he is not a fugitive from justice. The rule is: It is not necessary, in order that one be a fugitive from justice, that he shall have left the demanding state for the purpose of avoiding prosecution, but simply that, having committed an act charged to be a crime under the laws of that state, he has left that jurisdiction and is found in another state. Finch v. West, 106 Neb. 45, 182 N. W. 565.

It is urged that petitioner is not guilty of the crime charged for the reason that he retained the title to the truck. This is clearly a matter of defense to be considered by the courts of the demanding state. The question of the guilt or innocence of the accused, or the question of whether or not there is probable cause to believe that the accused is guilty of the crime charged, cannot, in a case of this kind, be passed upon by the courts in a habeas corpus proceeding. Those questions are for the courts of the demanding state to decide. Finch v. West, *supra;* In re Application of Tail, 145 Neb. 268, 16 N. W. 2d 161; Hawk v. Olson, 145 Neb. 306, 16 N. W. 2d 181. The claim of innocence on the ground that he held the legal title to the truck may not be properly considered in a habeas corpus proceeding.

The petitioner contends the record shows that the application for his extradition was not made in good faith and that it was in fact made for the purpose of collecting a debt.

There is evidence in the record on the part of Don E. Ware, sheriff of Barton County, Kansas, to the following effect: While in O'Neill, Nebraska, on a prior occa-

sion, the witness asked the petitioner if he would voluntarily return to Kansas to face the charge. The petitioner refused to do so. The witness then inquired of the petitioner if he owed the debt to Whiteman. He said he did. The witness then asked petitioner if he would care to abate the action before the court. He said that he did not care to do so. In explaining what was meant by abating the action and if it meant the payment of the amount due, Sheriff Ware stated: "I didn't know for sure if that could be done; but I thought at that point it might be done; the court has the right to do that in Kansas, if he saw fit. I thought being I was here if the case could be disposed of in that manner it could be; that would be our advice to the court." On cross-examination on this subject the witness said: "Well, I said to different people, the county attorney, the sheriff and so on if the man paid the money that would be the best way to handle it. I was expressing my own opinion; not the opinion of the court."

We are in accord with the view that extradition proceedings should not be used at the instance of a private person to gratify his malice or to aid him in the collection of a debt. It is not a matter, however, which the courts of the asylum state may properly inquire into. The rule is stated in 22 Am. Jur., Extradition, § 15, p. 254, as follows: "Where a warrant of extradition is sought for some ulterior purpose, as, for instance, the collection of private debts or the gratification of personal malice, it is within the discretionary power of the governor of a state to refuse to issue it. * * * If the governor issues a warrant of rendition, it is the general, although not the universal, rule that on the hearing of a habeas corpus sued out for the liberation of one who is sought to be extradited for the violation of the criminal laws of another state, is not admissible to hear evidence upon, or inquire into, the motives or purpose of the prosecution, or into the motives of the governor of the demanding state." See, also, Chase v. State of

Florida, 93 Fla. 963, 113 So. 103, 54 A. L. R. 271. The cases on this subject have been collected and cited in an annotation in 94 A. L. R. 1493.

We point out, however, that there is no evidence in this record that the seller of the truck or the holder of the chattel mortgage thereon made any offer to compromise the prosecution of the crime charged. It is not asserted that the prosecuting witness had any part in the matter. The misconceptions and mistakes of administrative officers in carrying out the purposes of extradition proceedings do not constitute bad faith such as would warrant the release of one charged with crime in the demanding state. We do not think there is any merit to the contention, even if it was before us, that this record shows bad faith on the part of the prosecuting officials in the State of Kansas.

It is clear from the judgment entered by the district court that it released the petitioner on the theory that he was guilty of no crime. In so doing, error was committed. A crime was charged in Kansas and the extradition proceedings were regular. The merits of the charge may not properly be determined on habeas corpus. The judgment of the district court is reversed and the cause remanded with directions to enter an order holding that petitioner was not unlawfully held and detained by the respondent.

REVERSED AND REMANDED WITH DIRECTIONS.

IRENE M. MURRAY, APPELLANT, V. NATIONAL GYPSUM COMPANY ET AL., APPELLEES.
70 N. W. 2d 394

Filed May 20, 1955. No. 33767.

1. **Workmen's Compensation.** A compensable injury within the Workmen's Compensation Act is one caused by an accident arising out of and in the course of the employment.

2. ———. An accident within the Workmen's Compensation Act is an unexpected and unforeseen event happening suddenly and violently and producing at the time objective symptoms of injury.
3. ———. An employee claiming the benefit of the Workmen's Compensation Act must, to succeed, show by the greater weight of the evidence all the essential elements of an accident as that word is defined in the act.
4. ———. An award of compensation under the Workmen's Compensation Act may not be based on possibilities, probabilities, or speculative evidence.
5. ———. A mere exertion, which is not greater than that ordinarily incident to the employment, cannot of itself constitute an accident within the meaning of the Workmen's Compensation Act.
6. **Workmen's Compensation: Appeal and Error.** An appeal to this court in a workmen's compensation case is considered and determined de novo.

APPEAL from the district court for Saunders County: H. EMERSON KOKJER, JUDGE. *Affirmed.*

Bryant & Christensen, for appellant.

Cline, Williams, Wright & Johnson, for appellees.

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

BOSLAUGH, J.

The subject of this controversy is a claim for disability benefits by virtue of the Workmen's Compensation Act of Nebraska.

Appellant asserted that she was employed by the National Gypsum Company, hereinafter spoken of as appellee, as a rocket packer at Mead; that on or about December 27, 1952, she received an injury to her left shoulder in an accident arising out of and in the course of her employment; that the injury and disability caused thereby totally prevented her from performing any of the duties of her employment; and that she necessarily incurred liability for medical, surgical, and hospital services.

Appellees admitted the employment of appellant at

the time and in the capacity alleged by her, denied all other claims made by appellant, and specially denied that she sustained any accident, injury, or disability arising out of and in the course of her employment by the National Gypsum Company.

The compensation court denied the claim of appellant. A rehearing was waived and an appeal was taken by appellant to the district court. The trial in that court resulted in a finding that appellant had not established that she sustained an injury in an accident arising out of and in the course of her employment and an adjudication denying her any recovery. This appeal contests the correctness of the finding and judgment of the trial court.

The issue as the cause is submitted to this court is whether or not appellant sustained disability from an injury inflicted by an accident arising out of and in the course of her employment by appellee within the meaning of the Workmen's Compensation Act.

Appellant was employed by appellee for the period commencing March 6, 1952, through January 3, 1953. Her compensation was $1.68 an hour. The work week was 40 hours. Her physical condition was normal when she accepted the employment. She was then about 50 years of age. Appellant was assigned to work on what was designated line 4 in September 1952, and she continued to perform the duties of this assignment for a period of about 6 weeks until sometime in November 1952. She was stationed at a table where she performed her duties. She was classified as a rocket packer. The operation with which she was concerned consisted of stopping a box with its contents weighing about 30 pounds being transported on a conveyor belt to the table where she was located. The box had to be stopped while she put packing in it and a top on it. She then released the box and it moved forward down the line. There was no brake or other apparatus furnished to stop or release the box. The frequency of the arrival

of boxes was such that appellant could not complete her operation as to one of them before others arrived, and she stopped them by grasping the box nearest her and twisting it cornerwise in the trough along which it was moving until two of its corners would jam against the sides of the trough or she would stop the box with her shoulder and insert a stick of wood in front of it. Numerous boxes would frequently build up behind the one that had been stopped and anchored, and to release the jam appellant would push against them with her left shoulder or other parts of the left side of her body. There were jars and strains experienced in these contacts and black and blue marks appeared on her body. The presence of these were not all at one time but were from day to day in the early part of her labors in this capacity. The marks on her body disappeared after a period of about 10 days.

Appellant experienced pain in her left arm but the time of its origin is not established. It was not continuous but was described as something that built up and got worse with the passage of time. The boxes moved and were handled in the same manner each day during about 6 weeks from sometime in September until November 1952. The operations were routine. There was no unusual happening experienced in connection with or during any operation that appellant was concerned in during this period.

Appellant discontinued the duties as rocket packer on line 4 sometime in November 1952, and was given and she performed lighter work until December 27, 1952. That date she suffered severe pain in her left shoulder and arm. She had difficulty changing into her work clothes or uniform when she arrived at the location of her employment, but she worked a part of the day and then reported to first aid and later to the hospital on account of her acute condition. She has since been totally or partially disabled. Her employment with appellee was discontinued January 3, 1953.

When appellant was at the hospital December 27, 1952, she complained only of pain in her left shoulder and arm, and made no claim of having been injured in an accident or any unusual happening. An examination of her made by a doctor in the presence of a nurse did not discover any evidence of injury. There was no discoloration of her shoulder or body. Appellant could not move her shoulder or body without very severe pain. She thought then and now contends that the work she did involving the rocket boxes was the cause of her disability. She consulted Dr. C. Fred Ferciot of Lincoln on January 7, 1953. He saw and treated her until August 18 of that year. She gave him no history of an accident or injury. She told the doctor she did not have any acute disability until Saturday, December 27, 1952. He examined her January 7, 1953, and found no discoloration and no surface evidence of injury, abrasions, or contusions. There was an X-ray examination and it produced no indication of fracture or dislocation but it did show some decalcification at the upper end of the humerus that was localized in such a way as is often seen when any acute irritation is present in the region of the shoulder joint. The doctor said that no injury accounted for her condition at the time he first saw her but that repeated injuries as a result of strains, that could not be referred to as accidents but were actually things having to do with her occupation, did result in this type of development, and that her age of about 50 years was also a factor which could lead one to believe that repeated strain of the type she had experienced did probably cause the condition which she had. He said that appellant gave a history of acute irritation of the bursa or the bursas about the shoulder joint and he diagnosed her condition as acute bursitis.

Appellant testified that she had no accident on December 27, 1952. The substance of her testimony in this regard was that she had no accident at any other time

while she was employed by appellee that in any way or manner involved or affected her left arm or shoulder.

A compensable injury within the provisions of the Workmen's Compensation Act is one caused by an accident arising out of and in the course of the employment. An accident within the act is an unexpected or unforeseen event happening suddenly and violently and producing at the time objective symptoms of injury. An employee claiming the benefit of the act must, to succeed, show by the greater weight of the evidence that an accident occurred within the meaning of the act. Knudsen v. McNeely, 159 Neb. 227, 66 N. W. 2d 412; Seger v. Keating Implement Co., 157 Neb. 560, 60 N. W. 2d 598; Rahfeldt v. Swanson, 155 Neb. 482, 52 N. W. 2d 261; Ramsey v. Kramer Motors, Inc., 155 Neb. 584, 52 N. W. 2d 799; Beam v. Goodyear Tire & Rubber Co., 152 Neb. 663, 42 N. W. 2d 293.

An award of compensation under the Workmen's Compensation Act may not be based on possibilities, probabilities, or speculative evidence. An action for recovery of benefits by virtue of the Workmen's Compensation Act is on an appeal to this court tried de novo. Rahfeldt v. Swanson, *supra.*

There is an absence of proof that appellant received an injury resulting from an accident within the requirements of the Workmen's Compensation Act. There is no evidence tending to show that there was an unexpected and unforeseen event happening suddenly and violently that produced at the time objective symptoms of an injury. The proof is to the contrary that nothing unusual happened and that appellant performed her duties in the only way they could have been done. An injury resulting from exertion ordinarily incident to the employment is not sufficient to constitute an accident within the meaning of the Workmen's Compensation Act. Foster v. Atlas Lumber Co., 155 Neb. 129, 50 N. W. 2d 637; Anderson v. Cowger, 158 Neb. 772, 65 N. W. 2d 51. Appellant failed to establish the first requisite for

the recovery of benefits under the Workmen's Compensation Act.

The judgment should be and it is affirmed.

AFFIRMED.

J. W. O'NEAL, APPELLANT, V. THE FIRST TRUST COMPANY OF YORK, NEBRASKA, A CORPORATION, AS EXECUTOR OF THE LAST WILL AND TESTAMENT AND ESTATE OF IRVING H. LANYON, DECEASED, ET AL., APPELLEES, RONALD KENNETH LANYON, INTERVENER-APPELLEE.

70 N. W. 2d 466

Filed May 27, 1955. No. 33715.

1. **Pleading.** An admission in an answer does not extend beyond the intendment of the admission as clearly disclosed by its context.
2. **Witnesses: Depositions.** The taking of a deposition before trial by a representative of deceased, at which time he examined or cross-examined the witness, is not a waiver of disqualification within the meaning of section 25-1202, R. R. S. 1943, and appropriate objections thereto may still be raised at the trial.
3. **Frauds, Statute of: Specific Performance.** Where one is claiming the estate of a deceased person under an alleged oral contract, the evidence of such contract and the terms of it must be clear, satisfactory, and unequivocal.
4. ———: ———. Such contracts are on their face void as within the statute of frauds, because not in writing, and, even though proved by clear and satisfactory evidence, they are not enforceable unless there has been such performance as the law requires.
5. ———: ———. The thing done, constituting performance, must be such as is referable solely to the contract sought to be enforced, and not such as might be referable to some other and different contract—something that the claimant would not have done unless on account of the agreement and with the direct view to its performance—so that nonperformance by the other party would amount to fraud upon him.
6. ———: ———. The burden in the light of these rules has devolved upon the plaintiff to prove (1) an oral contract the terms of which are clear, satisfactory, and unequivocal, and (2) that his acts constituting performance were such as were refer-

able solely to the contract sought to be enforced, and not such as might have been referable to some other or different contract.

7. ———: ———. Evidence of declarations of a deceased person, concerning a parol contract, does not amount to direct proof of the facts claimed to have been admitted by those declarations. Such evidence, when not supported by other evidence, is generally entitled to but little weight.

8. ———: ———. Each case is to be determined from the facts, circumstances, and conditions as presented therein.

APPEAL from the district court for York County: ERNEST G. KROGER, JUDGE. *Affirmed.*

Philip A. Tomek, John G. Tomek, William E. Tomek, and *Harry W. Grimminger,* for appellant.

Hermann G. Wellensiek and *Kirkpatrick & Dougherty,* for appellees.

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

CHAPPELL, J.

Plaintiff, J. W. O'Neal, known generally as Walter or Walt J. O'Neal, brought this action in equity against defendants, The First Trust Company of York, Nebraska, a corporation, as the executor of the estate of Irving H. Lanyon, deceased, and Leroy Davis, trust officer of said corporation. He sought by the action to obtain specific performance of an alleged oral contract entered into by plaintiff and Irving H. Lanyon in the latter part of May 1939, whereby it was agreed that if plaintiff would furnish and supply Irving H. Lanyon with care, labor, services, attention, meals, hired help, transportation, and companionship during Irving H. Lanyon's lifetime, he would leave one-half of all his property to plaintiff. Plaintiff specifically alleged that he had duly performed, furnished, and supplied each and all of such alleged services during the lifetime of Irving H. Lanyon until his death August 23, 1949, and that plaintiff was never recompensed therefor by Irving H. Lanyon, although as indicated

by his last will, executed February 19, 1948, and a codicil thereto executed June 14, 1949, he intended to do so. Ronald Kenneth Lanyon, on behalf of himself and other beneficiaries named in the last will, was permitted to intervene. Insofar as important here, such intervener and defendants filed answers traversing the material allegations of plaintiff's petition, and plaintiff's replies thereto denied generally.

The cause then proceeded to trial of the issues presented, and at conclusion of plaintiff's evidence, defendants moved to dismiss plaintiff's petition because plaintiff had not sustained the burden of proof as required by law in such cases, and that the evidence was insufficient to sustain any judgment against defendants. Thereupon the trial court sustained defendants' motion, saying: "I think you have failed to sustain the burden to prove any contract and I think you have failed to prove by clear and convincing evidence that there was any agreement of any kind." Thereupon the court rendered judgment accordingly for defendants and dismissed plaintiff's petition at plaintiff's cost.

Plaintiff's motion for new trial was overruled and he appealed, assigning that: (1) The judgment was contrary to the evidence and law; and (2) the trial court erred in striking from the record all of the evidence of Nellie J. O'Neal, plaintiff's wife. We sustain the last assignment, but upon trial de novo, under elementary rules with relation thereto, conclude that the judgment should be affirmed.

At the outset plaintiff argued that by its answer defendants admitted the alleged contract, its terms included therein, and performance thereof. Such contention has no merit.

In that connection, defendants, among other things, denied generally, and then alleged in their answer: "For further and separate defense, these answering defendants aver that said *pretended* and *purported* contract is oral with no note or memorandum in writing

and by reason thereof is within the statute of frauds and void." (Italics supplied.)

In Barry v. Barry, 147 Neb. 1067, 26 N. W. 2d 1, this court held: "An admission in an answer does not extend beyond the intendment of the admission as clearly disclosed by its context." In Powell v. Yeazel, 46 Neb. 225, 64 N. W. 695, it is said: "The word 'pretended,' used in such connection, signifies something falsely assumed; something claimed contrary to the truth of the matter." Black's Law Dictionary (3d ed.), p. 1411, cites such latter case and others in defining "pretend" as: "To feign or simulate; to hold that out as real which is false or baseless." Also, as stated in General Talking Pictures Corp. v. Hyatt, 114 Utah 362, 199 P. 2d 147, with reference to a comparable context: "The implication of the word 'purported' is that something is deficient or amiss; everything is not as it is intended to be." See, also, 73 C. J. S., Purport, p. 1259. In the light of the foregoing, we conclude that defendants in their answer did not admit the alleged contract or the terms thereof.

We turn then to plaintiff's contention that under the statute and cited decisions of this court, defendants also admitted that plaintiff performed the terms of the contract. In that regard, he cites and relies upon section 25-836, R. R. S. 1943, Peters v. Wilks, 151 Neb. 861, 39 N. W. 2d 793, and other cases wherein plaintiffs pleaded performance in general terms and defendants relied upon a general denial. In such situations we have held that if defendant relies upon nonperformance as a defense he must allege that fact, and in pleading nonperformance he must allege the facts which constitute the condition and the breach in his answer. Such authorities are clearly distinguishable. Herein, plaintiff did not plead performance in general terms but specifically, item by item, and defendants did not admit the contract or its terms as in Cartwright & Wilson Construction Co. v. Smith, 155 Neb. 431, 52 N. W. 2d

274, and Morearty v. City of McCook, 117 Neb. 113, 219 N. W. 839, 119 Neb. 202, 228 N. W. 367, relied upon by plaintiff. We conclude that under the circumstances presented here, defendants did not admit performance.

The testimony of Nellie J. O'Neal, plaintiff's wife, regarding transactions and conversations with deceased, was stricken by the trial court upon the ground that it was barred by the provisions of section 25-1202, R. R. S. 1943. In doing so we believe the trial court erred. Concededly, all of the real estate belonging to the estate had been theretofore converted into money as provided in the will of deceased, and, as alleged by plaintiff, was held in trust by the executor for the benefit of creditors, legatees, and claimants. As a witness for plaintiff, she testified that deceased never promised to leave her any of his estate, and the record discloses without any fraud or mistake that she affirmatively disclaimed any interest in the subject matter or funds involved. She was not a party in the action and had no direct legal interest in the funds. We have held that even a party to an action adverse to the representative of a deceased person who, without fraud or mistake, disclaims all interest in the subject matter of the action and is thereby estopped from asserting any claim thereto, is a competent witness. Brooks v. Brooks, 105 Neb. 235, 180 N. W. 41; In re Estate of Tilton, 129 Neb. 872, 263 N. W. 217; Goodwin v. Freadrich, 135 Neb. 203, 280 N. W. 917. It is also the rule that a witness is not barred by section 25-1202, R. R. S. 1943, from testifying in such actions wherein the witness is not a party to the litigation and has no direct interest in and will not gain or lose by the result of the suit. Parker v. Wells, 68 Neb. 647, 94 N. W. 717; Nelson v. Nelson, 133 Neb. 458, 275 N. W. 829; Craig v. Seebecker, 135 Neb. 221, 280 N. W. 913. Therefore, in disposing of this case de novo, all competent evidence given by Nellie J. O'Neal will be considered in the same manner as all other such evidence.

We turn finally to the primary question of whether or not the evidence adduced by plaintiff was sufficient to sustain any judgment for plaintiff. We conclude that it was not. In that regard, as recently as Peterson v. Peterson, 158 Neb. 551, 63 N. W. 2d 858, this court, citing numerous cases beginning with Overlander v. Ware, 102 Neb. 216, 166 N. W. 611, held: "Where one is claiming the estate of a person deceased under an alleged oral contract, the evidence of such contract and the terms of it must be clear, satisfactory, and unequivocal.

"Such contracts are on their face void as within the statute of frauds, because not in writing, and, even though proved by clear and satisfactory evidence, they are not enforceable unless there has been such performance as the law requires.

"The thing done, constituting performance, must be such as is referable solely to the contract sought to be enforced, and not such as might be referable to some other and different contract—something that the claimant would not have done unless on account of the agreement and with the direct view to its performance —so that nonperformance by the other party would amount to fraud upon him.

"The burden in the light of this rule has devolved upon the plaintiff to prove (1) an oral contract the terms of which are clear, satisfactory, and unequivocal, and (2) that his acts constituting performance were such as were referable solely to the contract sought to be enforced, and not such as might have been referable to some other or different contract."

Further, as held in Overlander v. Ware, *supra:* "Evidence of declarations of a deceased person, concerning a parol contract, does not amount to direct proof of the facts claimed to have been admitted by those declarations. Such evidence, when not supported by other evidence, is generally entitled to but little weight." We reaffirmed such rule as late as Lunkwitz v. Guffey, 150

Neb. 247, 34 N. W. 2d 256, and therein also held that: "Each case is to be determined from the facts, circumstances, and conditions as presented therein." In the light of such evidence we measure the relevant and competent evidence adduced by plaintiff.

Plaintiff was 62 years old and lived in Grand Island at the time of trial. He had theretofore lived in or near Utica, Nebraska, all of his life while engaged in farming and the handling of livestock. He also sold used cars during 1945, 1946, and 1947. When plaintiff was 16 years old he first met deceased who was a bachelor living with a sister Dolly on his farm south of Gresham. Deceased was a farmer during his lifetime, who raised purebred stock, particularly Percheron horses and Shorthorn cattle. He also raised hogs and bought, marketed, and sold livestock generally. Plaintiff and deceased were good friends for many years. Plaintiff was casually employed by deceased upon several occasions. In the later years, they were partners in the farming and livestock business. They worked together as such, farming, raising, buying and selling crops and stock, keeping up the improvements on the farm owned by deceased, and sharing all expenses, income and profit, on a fifty-fifty basis. At times they had a hired man who "went ahead when we weren't over there, and Walt overseen and it started in '46." Deceased sometimes called plaintiff "the boss." The income from the partnership arrangement is not generally shown. However, it does appear that in 1947 plaintiff's share of the corn crop alone was $5,285.45, and that in 1949 plaintiff got credit at his bank for $4,000, representing his one-half of the corn crop. Deceased left an estate of about $100,000. Upon one occasion deceased, who was in a hospital for a few weeks before his death, gave plaintiff a present of $1,000. At another time deceased gave plaintiff a new Dodge truck. During the years that they worked together plaintiff was kind to and considerate of deceased, an older

partner, and did naturally, because of their friendly partnership relations, perform many favors and services for him, particularly after the death of the sister of deceased in 1945 or 1946, and during the last illness and disability of deceased, who died August 23, 1949.

The intervener took plaintiff's deposition after notice to all parties, and plaintiff offered it in evidence. Therein plaintiff was asked: "Q. During this time, was there any agreement between you and he as to what he was to pay you for those services? A. No. In the latter years, it was in about '44, '45 and '46, why he always said, 'Walt, you're the only one that helps me out, and if you help me out and when I am through with it, you will be more than paid.' Q. More than paid? A. Yeah. * * * Q. Did he say he would give you half of the land, and if so, which half? A. No, he never said half of the land." No objection thereto was interposed, but objections, in reliance upon section 25-1202, R. R. S. 1943, were interposed and sustained to other questions asked plaintiff with relation to transactions and conversations with deceased. The right to make objections at the trial was specifically reserved in the deposition. Plaintiff, who also appeared personally and testified, contended that the taking of the deposition by intervener was a waiver of section 25-1202, R. R. S. 1943. That contention has no merit.

Section 25-1267.06, R. S. Supp., 1953, provides in part: "A party shall not be deemed to make a person his own witness for any purpose by taking his deposition." In Anderson v. Benson, 117 F. Supp. 765, it is said: "Although in some jurisdictions it has been held that the mere taking of a deposition constitutes a waiver of the 'dead man's' statute, it is difficult to interpret the mere taking of a deposition as a waiver in Nebraska because of the clear words of the statute." In Pink v. Dempsey, 350 Ill. App. 405, 113 N. E. 2d 334, it is said, after citing authorities: "It is our conclusion that the incompetency of the claimant was not waived by the

taking of a discovery deposition." See, also, Bentley v. Estate of Bentley, 72 Neb. 803, 101 N. W. 976. We conclude that the taking of a deposition before trial by a representative of a deceased, at which time he examined or cross-examined the witness, is not a waiver of disqualification within the meaning of section 25-1202, R. R. S. 1943, and appropriate objections thereto may still be raised at the trial.

Mrs. Nellie J. O'Neal, plaintiff's wife, testified in person at the trial with regard to declarations allegedly made by deceased, who said "that Walter had always taken care of him and done things for him, and for him to go ahead and do the work, because after he was through that half of it would go to him * * * Half of the estate would go to Walter * * * that Walter was doing it, and when he was through with it, half of the estate was Walter's * * * That half of the estate would be Walter's * * * that Walter was the only one that would look after him, that half of the estate would be his after he was done with it." In a deposition offered by plaintiff, she testified that deceased said, when they were out on the farm working: " 'Walt' * * * 'My boy has been so good to me, this is all going to be his. He is fixing it up for himself. When I am through with it it will all be his.' * * * 'I am going to show my appreciation by leaving it to you. * * * I have nobody else to leave it to.' " After plaintiff had been ill in 1948 and wanted to farm the place for himself in 1949, deceased said: " 'No, you have got all you can do to take me where I want to go and look after me.' * * * 'You go ahead and do just like you did.' * * * 'You hire the help and oversee it, and I will give you half of the crop.' " On October 4, 1950, such witness admittedly gave counsel a complete statement, but never mentioned anything about having any alleged agreement with deceased, and she did not remember that at that time she and plaintiff said " 'Mr. Lanyon never talked about his estate, or his intentions with regard to his estate.' " For further an-

swer she said "We never knew how much Mr. Lanyon —he never told us how much money he had * * * He never did, never" tell them how much property he had. She was asked: "Q. You made no claim to the land. A. No sir, we never inquired a thing about it. * * * Q. At the time Mr. Lanyon died, was he indebted to you on anything, or Mr. O'Neal? A. No, sir. Q. He didn't owe you a dime, everything had been squared? * * * A. Uh-huh. * * * Q. By that you mean it was a settlement as to the partnership relationship, and the business relationship, isn't that right? A. That's right. * * * You and Walter didn't file any claim against the estate? A. That's right, we never. * * * Q. And when Mr. Lanyon was in the hospital, do you know whether he informed or apprized (sic) Walter that he made a will for him whereby he would be paid what he agreed to pay him? A. Yes, I think he made a remark that he would get well repaid for what he had done."

Plaintiff's sister and several friends of both plaintiff and deceased testified with regard to claimed generalized declarations, made by deceased to them and others during the last 10 years of his lifetime. However, generally speaking no definite times were actually fixed showing when such declarations were made. To repeat them here at length would serve no purpose. It is sufficient for us to say that they were simply evidence of testamentary intention, having no relation to any proved legal agreement which could be binding on deceased or his estate.

In the meantime, on February 19, 1948, after most or all of said declarations were allegedly made, deceased executed a last will and testament giving and bequeathing six cash legacies to named legatees. The plaintiff was not named therein as a legatee and no provision whatever was made therein for him. Paragraph X of the will provided: "All the rest, residue and remainder of my estate I bequeath to my *legatees aforesaid* to be divided among and between them *pro rate*, and if my

estate shall not be sufficient to pay all of said legacies in full, they shall in like manner be ratably diminished in amount." (Italics supplied.) On June 14, 1949, before his death August 23, 1949, deceased executed a codicil to his will, wherein he cancelled and revoked two such legacies provided for in his will. The codicil then said: "I give and bequeath to J. W. O'Neal a legacy of $4,000." Both the will and codicil were admitted to probate in the county court, but upon appeal therefrom to the district court and trial to a jury whereat contestants asserted want of mental capacity to make the will and codicil, the jury returned a verdict sustaining the will but finding against validity of the codicil because deceased lacked mental capacity to make it. The executor and plaintiff herein appealed from the finding and judgment that the codicil was invalid for want of mental capacity. We affirmed that judgment in First Trust Co. v. Lanyon, 156 Neb. 21, 54 N. W. 2d 262, primarily upon the ground, as claimed by contestants in their cross-appeal, that proponents of the codicil had not made a prima facie case within the meaning of the rule that a proponent is required to present all attesting witnesses if their testimony is available.

It is now contended by plaintiff that the legacy bequeathed to him in the codicil, when construed in the light of the residuary clause X in the will duly admitted to probate, is evidence that deceased contracted to give plaintiff at least four-ninths of the net value of his $100,000 estate. That contention has no merit.

As we view it, the codicil was of no force and effect for any purpose. It was as if it had never been made. Under the circumstances presented here, any failure of plaintiff to prove execution of the codicil and obtain its admission to probate was not a mistake which could permit him to now recover by virtue of any provision therein. 19 Am. Jur., Equity, § 72, p. 87. Further, assuming for purpose of argument only that it did have any force and effect as evidence, it simply indicated a testamen-

tary intention to bequeath plaintiff a legacy of only $4,000. Plaintiff was not one of the *legatees aforesaid* named in paragraph X of the will, which disposed of the residue to them, and the codicil did not by use of any language include plaintiff therein. The general rule is that dispositions of a will should not be disturbed by virtue of a codicil except insofar as it is necessary for the purpose of giving effect to the codicil within rules of law and that a codicil does not operate as a revocation of testamentary provisions beyond the clear import of its language. See, Lightfoot v. Beard, 230 Ky. 488, 20 S. W. 2d 90; Annotation, 123 A. L. R. 1404.

We conclude that plaintiff failed to prove the alleged oral contract by clear, satisfactory, and unequivocal evidence. The declarations of deceased were simply evidence of testamentary intention, having no relation to any proved legal contract. Further, we conclude that the alleged acts of performance were not such as were referable solely to the alleged contract. They were referable as well to the contractual partnership relation of plaintiff and deceased.

For reasons heretofore stated, the judgment of the trial court should be and hereby is affirmed. All costs are taxed to plaintiff.

AFFIRMED.

IN RE TAXATION OF ANNUITIES.
BANKERS LIFE INSURANCE COMPANY OF DES MOINES, IOWA, APPELLANT, V. LOREN H. LAUGHLIN, DIRECTOR OF INSURANCE, STATE OF NEBRASKA, ET AL., APPELLEES, AETNA LIFE INSURANCE COMPANY ET AL., INTERVENERS-APPELLANTS.

70 N. W. 2d 474

Filed May 27, 1955. No. 33718.

1. **Statutes: Officers.** The rulings of executive officers who have practically construed a law are not conclusive, nevertheless the

ruling of an executive officer upon a point where it is his sworn duty to act, especially where the rulings have been acquiesced in by those whose financial interests were involved, are always given considerable weight in the courts, and when the power is doubtful the uniform rulings in an executive office will ordinarily be followed.

2. ———: ———. The Legislature is presumed to know the construction of its statutes by the executive departments of the state.

3. **Insurance.** Considerations received for annuity contracts by life insurance companies licensed to do business in this state are included within the provisions of sections 77-908 and 77-909, R. S. Supp., 1953.

APPEAL from the district court for Lancaster County: PAUL WHITE, JUDGE. *Affirmed.*

Fraizer & Fraizer, for appellants.

Clarence S. Beck, Attorney General, and *Ralph D. Nelson,* for appellees.

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

SIMMONS, C. J.

This is an appeal from an order of the Director of Insurance holding that considerations received from annuities by life insurance companies licensed to do business in this state are to be reported and are subject to the tax provided in sections 77-908 and 77-909, R. S. Supp., 1953. The matter was appealed to the district court where the order was sustained. On appeal here, we affirm.

On March 10, 1952, the director issued an order that all life insurance companies licensed to do business in this state should compute and remit the premium tax based on considerations received from annuities on forms provided for that purpose. He set the matter for hearing so that all parties aggrieved could show cause why their licenses should not be rescinded or not be reissued if they failed to comply. A hearing was had and appearances were made by the Life Insurance As-

sociation of America and American Life Convention. These parties filed a written showing reciting the problem presented by the statutes involved, contending that there is a difference between annuity considerations and insurance premiums, and attacking the policy of such a tax.

After the hearing the director issued his final order requiring the computing and remitting of the tax; providing for the payment of the tax under protest; and providing for an appeal by one or more of the licensed companies on behalf of all such companies as a class. Bankers Life Insurance Company of Des Moines, Iowa, perfected the appeal under the authority of section 44-154, R. R. S. 1943. In the district court other life insurance companies intervened. All companies took the concluding position that they were entitled to a reissuance of their certificates of authority upon the payment of a tax upon the gross amount of direct writing premiums, excluding all annuity considerations. The appellant and interveners by supplemental pleadings show the payment of the tax under protest for the years 1952 and 1953.

A demurrer was filed on the ground that the petitions did not state a cause of action. The trial court sustained the demurrer. The insurance companies elected to stand upon their petitions. The action was dismissed, and this appeal followed.

The insurance companies do not plead the terms of their annuity contracts nor furnish the forms of those contracts. They rest their position on the broad base that considerations received for annuity contracts are not taxable under the statutes. This prevents our consideration of the terms of the contracts as was done by the courts in State ex rel. Gully v. Mutual Life Ins. Co. of New York, 189 Miss. 830, 196 So. 796; Equitable Life Assur. Soc. v. Johnson, 53 Cal. App. 2d 49, 127 P. 2d 95; and Northwestern Mutual Life Ins. Co. v. Murphy, 223 Iowa 333, 271 N. W. 899, 109 A. L. R. 1054.

In 1903 the Legislature, in a bill providing for the public revenues, provided that foreign life and accident insurance companies doing business in this state should pay into the state treasury "two per cent of the gross amount of premiums received by it * * * for business done in this state * * *." Laws 1903, c. 73, § 59, p. 404. In section 61, page 405, it provided that life and other companies organized under the laws of this state should be taxed "upon the gross amount of premiums received by it for all Nebraska business done within the state * * *," with exceptions not important here.

The Legislature in 1921 in an act relating to the public revenue (chapter 133, page 545) in article X, section 2, page 588, re-enacted substantially the provisions relating to foreign insurance companies above quoted, and then provided that insurance companies organized under the laws of this state (with exceptions not important here) should pay "four (4) mills upon the gross premiums collected in this state * * * less reinsurance paid on Nebraska business and dividends paid policyholders in Nebraska * * *." § 4, p. 589. This latter provision was amended in Laws 1933, c. 156, § 7, p. 597, and in Laws 1935, c. 154, § 3, p. 569. The amendments are not pertinent here.

The administrative construction of the acts prior to 1937 is not shown. It does appear in the showing made by the insurance companies before the director that, as a result of an opinion of the Attorney General, the Department of Insurance ruled that annuity considerations received after 1937 were subject to the premium tax, and that thereafter foreign life insurance companies doing business in Nebraska paid the tax upon annuity considerations. We find no statement as to what was done by domestic companies.

In this connection, consistent with our holdings (see 10 Nebraska Digest, Statutes, Key No. 219), we quote with approval from State v. Equitable Life Assur. Soc., 68 N. D. 641, 282 N. W. 411, as follows: "While it is

true that the rulings of executive officers who have practically construed a law are not conclusive, nevertheless 'the ruling of an executive officer upon a point where it is his sworn duty to act, especially where the rulings have been acquiesced in by those whose financial interests were involved, are always given considerable weight in the courts, and when the power is doubtful the uniform rulings in an executive office would be followed, and allowed to turn the scale. Cooley, Const. Lim. 3d. ed. marg. pp. 69, 70.' "

The Legislature is presumed to know the construction of its statutes by the executive departments of the state. John Hancock Mutual Life Ins. Co. v. Lookingbill, 218 Iowa 373, 253 N. W. 604; State v. Equitable Life Assur. Soc., *supra.*

The provisions of the 1921 act above cited became section 77-902, R. S. 1943.

In 1949 the Legislature enacted Laws 1949, c. 228, p. 633. This act was an amendment of section 77-902, R. S. 1943, and was entitled an act "to provide which insurance companies shall pay the tax as provided in this section * * *." It provided that every insurance company organized under the laws of any other state or country and transacting business in Nebraska "as defined in subsections (2) or (3) of section 44-201" or both shall pay "two per cent of the gross amount of premiums received by it during the preceding calendar year for business done in this state * * *." Subsection (2) of section 44-201, R. S. 1943, provided: "LIFE INSURANCE—Upon lives of persons, including endowments and annuities, and every insurance pertaining thereto and disability benefits." The 1949 Legislature re-enacted that provision also. See Laws 1949, c. 138, § 1, p. 358.

This appears to be a clear legislative recognition that the "business" of foreign life insurance companies done in this state, upon which the two percent of the gross premiums was to be paid, included the business of "en-

dowments and annuities." The showing here is that the foreign companies so accepted the construction of the act and paid the tax.

It should also be pointed out that in 1913 the Legislature adopted a comprehensive insurance code (Laws 1913, c. 154, p. 393), in which it was provided that "No policy of life or endowment insurance * * * shall be issued or delivered in this state unless it contains in substance the following provisions: * * * Thirteenth—In case the proceeds of a policy are payable in installments or as an annuity a table showing the amounts of the installments or annuity payments * * *." § 101, p. 446. This provision became section 44-602, Comp. St. 1929; section 44-502, R. S. 1943; and is now section 44-502, R. R. S. 1943. It is clear that the Legislature has considered that annuities were a part of a life insurance policy and business.

That conclusion does not appear to have been questioned by the insurance industry doing business in this state subsequent to 1938 and prior to the 1951 amendments that produced this controversy.

When the 1951 Legislature convened, Chapter 77, article 9, page 86, R. R. S. 1943, contained six sections: Section 77-901 provided for a tax on foreign fire insurance companies based on gross premiums (less certain items), and as tangible property. Section 77-902 was the 1949 act, above discussed, dealing with foreign life and accident companies. Section 77-903 provided for a tax on foreign insurance companies doing lines of insurance business not involved here, and provided for the payment "as a tax on such business, two per cent of such gross receipts," less the tax, if any, on workmen's compensation insurance. Section 77-904 provided that domestic insurance companies other than fire and certain fraternal and mutual companies "shall pay four mills upon the gross premiums collected in this state * * * less reinsurance paid on Nebraska business and dividends paid policyholders in Nebraska

* * *." Section 77-905 provided for the taxation of domestic fire insurance companies upon gross premiums and as tangible property. Section 77-906 applied to foreign and domestic writers of workmen's compensation insurance and provided a tax on foreign writers of 2 percent of gross premiums and, on domestic writers, 4 mills on gross premiums.

Then came the act of 1951 (Laws 1951, c. 256, p. 877, now sections 77-907 to 77-914, R. S. Supp., 1953), upon which the appellants here rest their cause. It repealed Chapter 77, article 9, R. R. S. 1943.

Section 1 of the 1951 act contained definitions to which we shall refer later.

Section 2 of the 1951 act related to "Every foreign or alien insurance company * * * except fraternal beneficiary associations" and required the payment of a tax "of two per cent of the gross amount of direct writing premiums received * * * for business done in this state." The previous provision in the 1949 act relating to life insurance companies had been "two per cent of the gross amount of premiums received * * * for business done in this state," and also as it had been in section 77-902, R. S. 1943. The change here was between "gross amount of premiums" and "direct writing premiums."

Section 3 of the 1951 act related to domestic insurance companies and here it was provided that the tax was to be based on "the gross amount of direct writing premiums received * * * for business done in this state." This is the language contained also in section 2 of the 1951 act. It is a change from the language of section 77-904, R. S. 1943, relating to domestic companies which provided for a four mill payment "upon gross premiums collected in this state * * * less reinsurance * * *." § 77-904, R. R. S. 1943. Here the 1951 Legislature included the phrase "for business done" as it had been in the previous acts and continued to be in the act relating to foreign companies. Sections 4, 5, 6, and 7 of

the 1951 act do not relate to the matters here involved.

It will thus be seen that throughout the Legislature has used business done as the base element upon which the premium tax is calculated.

It appears that the Legislature in 1951 intended to provide generally for one tax rate on foreign insurance companies and a lesser tax rate on domestic companies based on premiums received for business done in this state. The Legislature obviously likewise intended to exempt from the tax premiums received on reinsurance, for it defined direct writing to mean "insurance as defined in section 44-102, but shall not include reinsurance as defined in section 44-103." § 77-907 (5), R. S. Supp., 1953; Laws 1951, c. 256, § 1 (5), p. 878. This exception appeared in the earlier acts.

The definitions referred to are: " 'Insurance' is a contract whereby one party, called the 'insurer,' for a consideration, undertakes to pay money or its equivalent, or to do an act valuable to another party, called the 'insured,' or to his 'beneficiary,' upon the happening of the hazard or peril insured against whereby the party insured or his beneficiary suffers loss or injury." § 44-102, R. R. S. 1943.

" 'Reinsurance' means a contract by which an insurer procures a third party to insure it against loss or liability by reason of such original insurance." § 44-103 (16), R. R. S. 1943.

These definitions were obviously included in the 1951 act for the purpose of showing the legislative intent that "reinsurance" premiums should not be included. There is no indication of a legislative intent to otherwise restrict or change the base coverage of the tax.

The words "direct writing premiums received * * * for business done in this state" must be construed together, and not separately, as appellants would have us do.

The word "premiums" is a word the meaning of which must be determined by its use.

It is defined in the 1951 act as: "Premiums shall mean

the consideration paid to insurance companies for insurance and shall include policy fees, assessments, dues, or other similar payments." Laws 1951, c. 256, § 1, p. 878; § 77-907, R. S. Supp., 1953.

Appellants contend that because of the definitions, the word "premiums" is limited to payments made for insurance and hence does not include payments made for annuities. We have heretofore pointed out the administrative and legislative construction of the word "premiums" in these acts, at least insofar as it relates to foreign companies. Likewise we have pointed out that the Legislature in the 1951 act made the provision as to domestic companies conform to that theretofore made as to foreign companies.

The Supreme Court of Iowa in Northwestern Mutual Life Ins. Co. v. Murphy, *supra,* said: "* * * a mere definition is not always a safe foundation for correct conclusions. One reason is that, except in mathematics, it is difficult to frame exhaustive definitions of words." The court considered the use of the word "premiums" in the contracts before it, and concluded that the word "premiums" was not necessarily inapplicable to annuity contracts. In fact our Legislature has used the word "premiums" as descriptive of the payment on annuity contracts, for it has provided: "Any policy containing a provision for a deferred annuity on the life of the insured only, unless paid for by a single premium, shall provide that in the event of the nonpayment of any premium after three full years' premium shall have been paid, the annuity shall automatically become converted into a paid-up annuity for such proportion of the original annuity as the number of completed years' premiums paid bears to the total number of premiums required under the contract." § 44-372, R. R. S. 1943.

It is pointed out in New York Life Ins. Co. v. Sullivan, 89 N. H. 21, 192 A. 297, that the use of the word "premium" to describe the consideration of an annuity contract is technically correct and recognized by Black-

stone in his Commentaries, Book II, page 461, who referred to the practice of purchasing annuities for lives at a certain price or premium.

The Legislature did not impose a tax upon the premium for insurance written, but upon "business done." We have heretofore pointed out that the writing of annuity contracts has clearly been included in the business of life insurance companies. This distinction is made clear by the Supreme Court of Iowa in Northwestern Life Ins. Co. v. Murphy, *supra.* The court there held: "It is contended, however, by plaintiff throughout its argument that this conclusion is too broad and that because of the use of the word 'premiums' in the statute the expression 'business done in this state' should be construed as meaning 'insurance business done in this state.' In way of comment as to the reasonableness of such construction, it would cause the result that if a foreign insurance company engaged only in the annuity business, it would not only be exempt from taxes but would become a source of loss to the state to the extent of the expense of its supervision."

We turn to a consideration of the decisions of other states that deal with taxes levied on premiums received on business done. It is agreed in substantially all of the cases that there is a difference between insurance contracts as such and annuity contracts as such. The question, however, is whether or not the Legislatures intended to include or exclude annuity contracts within the term business done.

In Northwestern Mutual Life Ins. Co. v. Murphy, *supra,* the court had a statute that levied a tax on "gross amount of premiums received * * * for business done * * *." There it was held that the Legislature had recognized that the selling of annuities was a part of the business permitted and anticipated to be done by insurance companies as a part of their business. It was held that the considerations received for annuities were premiums and taxable.

Missouri had a statute that authorized life insurance companies to be formed "for the purpose of making insurance upon the lives of individuals, * * * and to grant, purchase and dispose of annuities and endowments * * * and to provide * * * for disability occasioned by accident or sickness * * *." This may be compared with our "LIFE INSURANCE—Upon lives of persons, including endowments and annuities, and every insurance pertaining thereto and disability benefits." § 44-201 (2), R. R. S. 1943.

The Missouri Supreme Court held: "The life insurance business is a matter of public concern. For that reason the section above set forth was enacted. The Legislature knew that annuities were sold by life insurance companies. It knew that accident insurance and health insurance were sold by life insurance companies. It knew that annuities and accident and health insurance were not life insurance. For these reasons it separately authorized life insurance companies to engage in the business of selling annuities and in the business of selling accident and health insurance. It did so for the purpose of supervision, regulation and taxation. There could have been no other purpose. The section presents no ambiguity. In other words, the Legislature classified annuities and accident and health insurance as life insurance solely for the purpose of supervision, regulation and taxation. If so, the money collected on an annuity policy sold in this State is a life insurance premium within the meaning of Sec. 5979, R. S. 1929, which follows: 'Every insurance company * * * not organized under the laws of this state, shall * * * annually pay tax upon the premiums received * * * in this state, or on account of business done in this state, for insurance of life, property or interest in this state at a rate of two per cent per annum in lieu of all other taxes * * *.'" State ex rel. Aetna Life Ins. Co. v. Lucas, 348 Mo. 286, 153 S. W. 2d 10.

Massachusetts had a statute that levied an excise

tax upon a company "in the business of life insurance * * * upon the net value of all policies in force * * *." Their statute also provided that "All corporations * * * doing business * * * involving the payment of money * * * conditioned upon the continuance or cessation of human life, or involving an insurance guaranty, contract or pledge for the payment of endowments or annuities, shall be deemed to be life insurance companies * * *." See our section 44-201 (2), R. R. S. 1943. The court held: "And the conclusion is irresistible that if the petitioner had issued only contracts for the payment of annuities, it must be deemed to be a life insurance company. If so it would be accurately described as in 'the business of life insurance.' It is none the less so engaged because it also issues policies of life insurance. * * * While language more technically appropriate might have been used, the business of issuing contracts for annuities is under the statute 'the business of life insurance,' and if the word 'policy' ordinarily imports that at death a certain sum will be payable by the insurer, yet a 'policy' is a contract, and 'each policy of ordinary business' where the insurer engages solely in providing such security would cover the business of issuing contracts of annuity." Mutual Benefit Life Ins. Co. v. Commonwealth, 227 Mass. 63, 116 N. E. 469.

New Hampshire had a statute that levied a tax "upon the gross premiums received by it upon business done within the state * * *." Later the words "from residents of" was substituted for "business done within." They also had a statute which authorized the formation of corporations "for the purpose of conducting the following kinds of insurance business: * * * On the lives of persons and every insurance pertaining thereto or connected therewith, including endowments, and to grant, purchase or dispose of annuities." See our section 44-201 (2), R. R. S. 1943. The court considered the "practical construction" of the statutes that had been followed. The court held that receipts for annuity con-

tracts were taxable. New York Life Ins. Co. v. Sullivan, *supra.*

Arkansas had a statute which imposed a tax upon every life insurance company doing business in the state which required a statement of "gross premium receipts" and levied a tax on "such gross receipts." The court held that sums of money paid for annuity insurance were taxable under the statute. State v. New York Life Ins. Co., 198 Ark. 820, 131 S. W. 2d 639.

Kansas had a statute which levied a tax "upon all premiums received" less premiums returned and premiums received for reinsurance. It also had a statute authorizing the organization of insurance companies "to make insurance upon the lives of persons and every insurance appertaining thereto or connected therewith, and to grant, purchase or dispose of annuities: * * *." See our section 44-201 (2), R. R. S. 1943. The plaintiff admitted that its survivorship annuity contracts were life insurance contracts and that the considerations received from such policies were taxable but contended that its annuity contracts otherwise were not insurance contracts and the consideration was not taxable. The court could reach no conclusion as to prior "operative interpretation." It held that the word "premium" included consideration for annuity contracts. Equitable Life Assur. Soc. v. Hobbs, 154 Kan. 1, 114 P. 2d 871, 135 A. L. R. 1234.

California had a constitutional provision providing that: " 'Every insurance company * * * shall * * * pay * * * a tax * * * upon the amount of gross premiums received upon its business done * * *,' " less return premiums and reinsurance. The question was whether considerations received on annuity contracts were taxable. That state had a statute providing that " 'Life insurance includes insurance upon the lives of persons or appertaining thereto, and the granting, purchasing, or disposing of annuities.' " See our section 44-201 (2), R. R. S. 1943. The court, as did others cited, considered

at length the meaning of the term "premiums" and discussed the prior administrative construction. The court held: "It follows, from an analysis of the California constitutional and statutory provisions, from an analysis of the proper meaning of the term 'premium,' and from the weight of authority outside the state, that considerations received upon the sale of annuities are 'premiums' and are taxable as such, and that the position taken by plaintiff on its appeal is unsound." Equitable Life Assur. Soc. v. Johnson, *supra.*

Mississippi had a statute which levied a 2¼ percent tax upon "the gross amount of premium receipts * * *" less reinsurance and other items, and providing that the tax assessed should not be less than 2 percent of the "gross premiums received by it upon the business done * * *." The question was whether the writing of annuity contracts was life insurance business. It also had a statute providing among other things that " 'an insurance, guaranty, contract or pledge for the payment of endowments for annuities,' shall constitute insurance business." Prior to the litigation, the Attorney General ruled that the statute did not cover premiums on annuity contracts. The court put aside the departmental ruling on the ground that the statute was "plain and unambiguous." (This conclusion was the subject matter of a dissent.) The court held that the considerations received on annuity contracts were taxable. State ex rel. Gully v. Mutual Life Ins. Co. of New York, *supra.*

Other courts have reached contrary conclusions.

Pennsylvania had a statute that imposed a tax upon the entire amount of premiums "received from business transacted." It also had a statute authorizing the organization of companies "* * * To make insurance either upon the stock or mutual principle upon the lives of individuals, and every insurance appertaining thereto or connected therewith, and to grant and purchase annuities." See our section 44-201 (2), R. R. S. 1943. The court held that the statute did not impose a tax on the

consideration paid for the granting of annuities. Commonwealth v. Metropolitan Life Ins. Co., 254 Pa. 510, 98 A. 1072.

New York had a statute which levied a tax on "the gross amount of premiums received * * * for business done * * *." They also had a statute which authorized the formation of an insurance corporation to write insurance "upon the lives or the health of persons and every insurance appertaining thereto, and to grant, purchase or dispose of annuities." It was held that premiums paid did not include the sums representing annuity purchases. People ex rel. Metropolitan Life Ins. Co. v. Knapp, 193 App. Div. 413, 184 N. Y. S. 345, affirmed in 231 N. Y. 630, 132 N. E. 916.

These Pennsylvania and New York cases are extentively reviewed, analyzed, weighed, and not followed by the courts for reasons stated in the following opinions previously referred to herein: Northwestern Mutual Life Ins. Co. v. Murphy, *supra;* Equitable Life Assur. Soc. v. Johnson, *supra;* Equitable Life Assur. Soc. v. Hobbs, *supra;* State v. New York Life Ins. Co., *supra;* and New York Life Ins. Co. v. Sullivan, *supra.*

Four other cases are cited by appellants to which we now refer and which are distinguishable from the instant case.

Texas had a statute which levied a tax on the "gross amount of premiums collected * * * upon policies of insurance" which is to be distinguished from "business done," as made in the foregoing cases. Texas followed the New York and Pennsylvania cases above discussed, and held that premiums on policies of insurance did not include considerations paid for annuity contracts. Daniel v. Life Ins. Co. of Virginia (Tex. Civ. App.), 102 S. W. 2d 256.

The North Dakota statute levied the tax on the "gross amount of premiums received." Here it was shown that the departmental construction was that premiums on annuity contracts were not within the contemplation

of the Legislature when it used the words "gross premiums." The court gave weight to that departmental construction. It discussed Northwestern Mutual Life Ins. Co. v. Murphy, *supra,* and pointed out (as in the instant case) the tax was on premiums "for business done." It followed the New York and Pennsylvania cases. State v. Equitable Life Assur. Soc., *supra.*

Wyoming had a statute that levied the tax upon "gross premiums" received "for insurance." There the executive department for some years had not demanded a tax on considerations paid for annuities. The court considered that fact. The court held that the considerations paid for annuity contracts were not premiums for insurance and hence were not taxable under the act. State ex rel. Equitable Life Assur. Soc. v. Ham, 54 Wyo. 148, 88 P. 2d 484.

Arizona had a statute that provided for a tax on "the gross amount of all permiums received on policies and contracts of insurance * * *." It also had a statute as follows: "Life insurance, which includes insurance upon the lives of persons or appertaining thereto, *and* the granting, purchasing, or disposing of annuities." The statute had previously been "Life Insurance including endowments or annuities." The court said: "It is significant that the language was changed from *including* annuities within the term 'life insurance' to a separate classification using the conjunction *'and'* in the amendment." It was conceded "by the company that in those states where a tax is imposed upon premiums received 'for business done', the tax is properly applied to 'considerations for annuities'." The court cited for that distinction Northwestern Mutual Life Ins. Co. v. Murphy, *supra,* and Equitable Life Assur. Soc. v. Johnson, *supra,* and distinguished Northwestern Mutual Life Ins. Co. v. Murphy, *supra,* from State v. Equitable Life Assur. Soc., *supra,* and State ex rel. Equitable Life Assur. Soc. v. Ham, *supra,* and Daniel v. Life Ins. Co. of Virginia, *supra.* The distinction pointed out is that

between premiums on insurance and premiums on business done. The court held that the Legislature did not intend to include considerations for annuities in the term "premiums" but limited it to policies and contracts of insurance. Corporation Commission v. Equitable Life Assur. Soc., 73 Ariz. 171, 239 P. 2d 360.

As we have heretofore pointed out, no such limitation appears in our statute.

Accordingly, we hold that considerations received for annuity contracts by life insurance companies licensed to do business in this state are included within the provisions of sections 77-908 and 77-909, R. S. Supp., 1953.

The judgment of the trial court is affirmed.

AFFIRMED.

THIRTY MILE CANAL COMPANY, A CORPORATION, APPELLANT, V. CLAY B. CARSKADON ET AL., APPELLEES.
70 N. W. 2d 432

Filed May 27, 1955. No. 33740.

1. **Waters: Statutes.** A mutual canal company organized under section 46-269, R. R. S. 1943, is a creature of statute and possesses only those powers expressly or impliedly granted to it by such statute.
2. ———: ———. Where the Legislature has prescribed how assessments may be levied and collected by a mutual canal company, the method is exclusive and such company is without authority to prescribe other methods in its articles of incorporation and by-laws.

APPEAL from the district court for Dawson County: JOHN H. KUNS, JUDGE. *Affirmed.*

W. A. Stewart, for appellant.

Beatty, Clarke, Murphy & Morgan, for appellees.

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

CARTER, J.

This is a suit by the Thirty Mile Canal Company, a

corporation, to foreclose certain liens against 100 acres of the lands of the defendants for maintenance and storage water charges for the years 1946 to 1952, inclusive, in the total amount of $1,350 and interest. The defendants denied the authority of the canal company to make valid levies and assessments against their lands, or that it acquired any lien on their lands in any amount. The trial court found for defendants and the plaintiff canal company appeals.

The canal company came into existence by the adoption of articles of incorporation on October 22, 1926. It is a mutual irrigation company organized under the provisions of sections 46-269 to 46-271, R. R. S. 1943. It derives no revenue from its operation and conducts its business solely for the purpose of irrigating the lands of its members and stockholders. Section 46-269, R. R. S. 1943, provides: "Any corporation or association organized under the laws of this state for the purpose of constructing and operating canals, reservoirs, and other works for irrigation purposes, and deriving no revenue from their operation, shall be termed a mutual irrigation company, and any by-laws adopted by such company, not in conflict herewith, shall be deemed lawful and so recognized by the courts of this state; Provided, such by-laws do not impair the rights of one shareholder over another."

Article III of the articles of incorporation provides as follows insofar as it relates to the issue before us: "Shares of stock, water rights or right to use water from any canal or canals owned or operated by the Corporation shall be sold only to owners of land to which the water of such canal or canals can be applied, * * *. The shares of stock shall be represented by Certificates * * * and shall designate the number of shares of stock to which the holder of the certificate is entitled, and the correct description of the land to which such water shall be applied, and the certificate and rights of the holder thereunder shall not be transfered (trans-

ferred) to anyone not the owner of the land described in said certificate. * * * The failure or refusal of such a purchaser of land described in an outstanding certificate to have the shares of stock in such certificate represented, transferred to him, shall not deprive the corporation of its authority to make levies for the maintenance of the canals and works and enforce payment of the same as hereinafter provided, nor shall such failure or refusal prevent such levies from becoming liens upon said lands, it being thereby definitely and distinctly declared and understood and agreed that the ownership of stock shall follow the ownership of the land described in the certificate, and shall pass by deed, mortgage or other conveyance, voluntary or otherwise, to the grantee therein named, without mention of that fact or reference thereto, in the conveyance, provided, however than (that) an owner of land shall not be entitled to have such stock certificate transferred to him, so long as there shall remain unpaid any levy for maintenance made as hereinafter provided against the land described in his certificate of stock which is sought to be transferred."

In Article IV of its articles of incorporation it is provided in part: "The Board of Directors shall at its first regular meeting in each year * * * make an estimate of the amount of money necessary for the maintaining, operating and keeping in repair all of its works for one year following * * * and after such estimate shall have been entered upon the record book of the corporation, the Board of Directors shall make and enter upon its record book a levy upon lands described in each certificiate (certificate) of stock outstanding * * * considering the number of acres of land described in such certificates, and the total number of acres described in all certificates outstanding; * * * and such annual levies and interest so made upon the lands under the provisions of these Articles, shall be and constitute separately and severally perpetual liens upon the lands

against which the same are levied to secure the payment of the same, * * * and may foreclose the same in the same manner as mortgages are foreclosed under the laws of this State, and shall also constitute a personal debt against the owner of the land * * *; and such annual levies are to be made against the lands described in outstanding certificates and the payment thereof enforced as herein provided, whether the owner of the lands take water from the canal or not; nor can the owner of such lands surrender his stock or sell or dispose of the same and thereby divest the land of the lien for levies made hereunder against it."

The defendants urge that the foregoing provisions of plaintiff's articles of incorporation as they relate to the creation of liens on the land and the personal obligation of the landowner to pay assessments for necessary running expenses is in conflict with section 46-271, R. R. S. 1943, and therefore of no force and effect. The latter statute provides: "Any corporation or association organized under the laws of this state for the purpose of constructing or operating canals, reservoirs or other works for irrigation purposes may, through its board of directors or trustees, assess the shares, stock or interest of the stockholders thereof for the purpose of obtaining funds to defray the necessary running expenses. Any assessments levied under the provisions of this section shall become and be a lien upon the stock or interest so assessed. Such assessments shall, if not paid, become delinquent at the expiration of sixty days, and the stock or interest may be sold at public sale to satisfy such lien. Notice of such sale shall be published for four consecutive weeks prior thereto, in some newspaper published and of general circulation in the county where the office of the company is located. Upon the date mentioned in the advertisement, or upon the date to which the sale may have been adjourned, such stock, or interest, or so much thereof as may be

necessary to satisfy such lien and costs, shall be sold to the highest bidder for cash."

It is the contention of the defendants that section 46-271, R. R. S. 1943, provides the only method to enforce the collection of assessments levied for necessary running expenses, and that the attempt to create personal liability for such assessments and to make them a lien upon the lands of the stockholders by suitable language in the articles of incorporation of the canal company is wholly ineffectual to accomplish that purpose. In this respect we point out that the plaintiff is a private corporation existing at the will of the Legislature and having only such powers as are conferred upon it by statute. The statute authorizes a mutual canal company to levy assessments for the purpose of operating a canal or other works for irrigation purposes, and to assess the shares, stock, or interest of the stockholders to defray the cost thereof. Any assessments so levied become a lien upon the stock or interest assessed. Provision is made for the foreclosure of the lien thus provided. No other method of enforcement is provided by the statute. We are in accord with the contentions of the defendants that section 46-271, R. R. S. 1943, provides the exclusive method of raising money and enforcing its payment for the operation of the company. The attempt on the part of the company through its articles of incorporation to create and enforce a lien against the lands of a water user constitutes the exercise of a power not granted by statute and, necessarily, is in conflict with the statute providing the method of enforcing payment.

In Omaha Nat. Bank v. West Lawn Mausoleum Assn., 158 Neb. 412, 63 N. W. 2d 504, we said: "The powers of a corporation organized under legislative statutes are such, and such only, as the statutes confer. The charter of a corporation is a measure of its powers, and the enumeration of these powers implies exclusion of all others." This means that a corporation has only

such powers as the statute gives it, and these to the extent they have not been limited by its articles of incorporation. But the attempt to provide in its articles of incorporation for the exercise of a power not authorized by the statute under which it is organized is ineffectual for any purpose. In Laier v. South Side Irr. Co., 130 Neb. 713, 266 N. W. 428, we held: "The Constitution and laws of the state relating to irrigation and the use of the water of the streams for that purpose form a part of a contract for the use of such water and the maintenance of irrigation works." This principle has application to the present case.

It seems clear to us that the Legislature never intended that a mutual canal company should have the right to a lien for delinquent water and maintenance assessments upon the lands of the stockholder and be entitled to sell such lands to collect delinquent assessments; nor does it appear to have intended that personal liability should exist for their payment. It is clear that the canal company was limited to a lien on the shares, stock, or interest of the delinquent stockholder in the corporation for the collection of delinquent assessments. This is not, however, in contravention of the right of the canal company to provide in its articles of incorporation or by-laws that water and maintenance assessments must be paid as a condition precedent to the right of a stockholder to receive water to irrigate his lands. Swanger v. Porter, 87 Neb. 764, 128 N. W. 516.

The same principle appears to have been followed in Payette-Oregon Slope Irr. Dist. v. Coughanour, 162 Ore. 458, 91 P. 2d 526. While that case involved the statutory powers of an irrigation district as distinguished from a private mutual canal company, the rules of statutory construction are the same. The court there said: "The plaintiff irrigation district, a quasi-municipal corporation, is a creature of the statute and possesses only those powers expressly or impliedly granted to it by

the legislature. It is also fundamental that the powers thus granted must be exercised in substantial compliance with the mode specified in the statute. The legislature having prescribed the method and manner of levying assessments, it follows that it must not be exercised in any other manner. As stated * * * 'when the mode of the exercise of the power is prescribed, and the same is a condition precedent to the exercise of the particular power, the mode becomes the measure of the power, and any essential deviation therefrom renders the act void and ineffectual.' "

In Rogers v. Thomas, 38 Idaho 802, 226 P. 165, the same principle was applied, the court using the following language: "It had no other powers than those given it by law. The law permitted it to dispose of rights in and to the state's water, gave it a lien on the water rights to recompense it for its outlay in the construction of the enterprise, and provided a remedy by which it could enforce payments for water rights. In the Adams case this court held that the remedy provided by law was exclusive. No valid reason has been suggested why the same rule should not apply to the enforcement of payments for a water right for school lands within the project."

It will be observed that section 46-269, R. R. S. 1943, provides in part that "any by-laws adopted by such company, not in conflict herewith, shall be deemed lawful and so recognized by the courts of this state." It seems to us that this evidences a legislative intent that the remedy provided therein was to be exclusive, and not cumulative; otherwise there would have been no reason to expressly use the words "not in conflict herewith." The right to levy assessments against the shares, stock, or interest of the stockholders of the corporation to obtain funds to defray necessary running expenses is a right clearly authorized by the statute and any other method materially different from that

set forth in the statute is in conflict with it and outside the powers of the corporation.

We necessarily conclude that the plaintiff was without authority to make such assessments a lien on a stockholder's lands, or to impose personal liability for their payment. The suit to foreclose the lien against the lands of the defendants must necessarily fail. The trial court was correct in dismissing plaintiff's suit and each cause of action thereof. The judgment is therefore affirmed.

AFFIRMED.

ERNEST G. BAHM ET AL., APPELLEES, V. RALPH RAIKES, APPELLANT.

70 N. W. 2d 507

Filed June 3, 1955. No. 33659.

1. Waters. Water flowing in a well-defined watercourse may not be diverted and cast upon the land of another where it would not go according to natural drainage.
2. ———. The rule is that overflow waters flowing in the natural flood channel of a running stream are a part of the stream and are governed by the running water rule.
3. ———. Surface water is such as is carried off by surface drainage that is independent of a watercourse.
4. ———. The flood plane of a live stream is the adjacent land overflowed in times of high water from which floodwaters return to the channel of the stream at lower points. The plane is regarded as part of the channel and the water flowing in the channel or its flood plane is floodwater.
5. ———. The flood plane is a part of the channel of the stream and no obstruction can legally be erected in or along it the effect of which is to divert or interfere with the flow of water in the natural course of drainage.
6. ———. The owners of lands bordering upon either the normal or flood channels of a natural watercourse are entitled to have its water, whether within its banks or in its flood channel, run as it is wont to run according to natural drainage, and no one has the lawful right by diversions or obstructions to interfere with its accustomed flow to the damage of another.

APPEAL from the district court for Saunders County: H. EMERSON KOKJER, JUDGE. *Affirmed.*

Bryant & Christensen, Kennedy, Holland, DeLacy & Svoboda, and *Gross, Welch, Vinardi & Kauffman,* for appellant.

Myrl D. Edstrom, John J. Edstrom, Claude D. Lutton, Jr., and *Ralph D. Nelson,* for appellees.

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

BOSLAUGH, J.

The land of appellant concerned in this litigation is parts of Sections 17 and 18, Township 13 North, Range 9 East, of the 6th P. M., Saunders County, Nebraska. He purchased the southeast quarter of Section 18, the northwest quarter of the southwest quarter, and the part of the south half of the northwest quarter of Section 17 south and west of the railroad right-of-way, referred to in the record as the Heldt land in 1936. He bought the northeast quarter of Section 18 except a small part thereof north and east of the railroad right-of-way and the part of the north half of the northwest quarter of Section 17 south and west of the railroad right-of-way, known as the DeFoil land, the northwest quarter and the northeast quarter of the southwest quarter of Section 18, described as the Grebenicek land, and the southwest quarter of the southwest quarter and all of the east half of the southwest quarter of Section 17 south of the railroad right-of-way, spoken of as the Gilkeson or Owen land. The title of the land was conveyed to appellant by deeds dated in the period of March 18, 1941, through July 14, 1943.

Mosquito Creek, which drained an area of about 14 square miles to the southwest of the land of appellant, at the time he acquired his land entered it at the southwest corner of the northwest quarter of Section 18 and proceeded along the west section line until it joined

Wahoo Creek about 650 feet south and approximately 100 feet east of the northwest corner of the section. The creek had formerly entered Section 18 a short distance east of the southwest corner thereof, meandered in a northwesterly direction through land to the west of Section 18, and joined Wahoo Creek west and slightly south of the confluence of the creeks at the time appellant acquired the land. A ditch had been excavated about the year 1928 along the west line of Section 18 and it became and has since been the channel of Mosquito Creek in that location. A small dike was erected on the east bank of the channel.

Wahoo Creek, a constantly running stream, the drainage area of which is about 500 square miles to the west and northwest, then entered the land of appellant about 650 feet south of the northwest corner of Section 18, proceeded generally east but somewhat southward to near the center of the northeast quarter of Section 18 where it made a large hairpin curve with the apex thereof to the northeast. Its course from there was irregular and meandering to the south into and across the northeasterly part of the southeast quarter of Section 18, and into and across the northwest quarter of the southwest quarter of Section 17 and thence southeasterly where it crossed the south line of Section 17 a short distance east of the southwest corner of the southeast quarter of the southwest quarter of the section.

Silver Creek, a running stream, with a drainage area of about 83 square miles to the northwest of the land of appellant, intersected the north line of Section 18 about 500 feet east of the northwest corner of the northeast quarter of the section and proceeded with frequent and great irregularity to the southeast through the land of appellant between Wahoo Creek and the railroad right-of-way to the north thereof until it reached and emptied into Wahoo Creek near the northeast corner of the southwest quarter of the southwest quarter of Section 17.

Mosquito Creek in its natural condition frequently overflowed. The floodwater therefrom flowed across Section 18 toward the southeast. The slope of the land from Mosquito Creek was south and east. There were low areas on the section toward the south and east part of it. These were exhibited by a drawing of the land made by an engineer after a survey as sloughs. The area of the larger of these was given as about 50 acres. The size of the smaller was not established. There was a ditch through about the center of the large slough from the northwest to the southeast. The smaller one was connected by a drain with the ditch. The water from the ditch flowed upon and over a part of the southwest quarter of Section 17 and across the road about 550 feet west of the Wahoo Creek bridge on the highway south of the section. There was a concrete spillway about 400 feet in length constructed about the year 1928 across the east and west highway along the south of Sections 17 and 18 at the place where the floodwater came to and crossed the highway as above stated for the purpose of accommodating and accelerating the flow of the water from the road and the land of appellant and others. The floodwater of Wahoo Creek as early as 1918 and thereafter passed to the south and west of the creek over land now owned by appellant to the spillway above described and onto Section 20 south of Section 17. There were times when there was floodwater on the west and south of Wahoo Creek and there was none on the opposite side thereof. Appellant conceded that before he had made any changes in Mosquito Creek or Wahoo Creek he had on several occasions seen floodwater flow over the road south of Section 17 and west of the bridge over Wahoo Creek. These creeks at times of heavy rainfall or large run-off discharged large volumes of water. The area involved is quite low level land with a slightly declining elevation to the southeast from the creeks. The land has been subject to multiple floods. There is mention in the proof that in

one year there were nine floods of varying intensity, another year experienced four floods, and quite generally each year produced at least one flood.

Appellant was in possession of the Heldt land in 1937. The southeast quarter of Section 18 was the principal part of it. The water came out of Mosquito Creek that year and passed down over the Heldt farm. Appellant participated in repairing and restoring the dike on the east side of the creek. There were breaks in the dike at various times thereafter through 1943 and appellant restored it each time a defect appeared. In 1943 he had title to all the land he owns that is concerned in this case. He had by 1944 equipped himself with a Caterpillar tractor and a bulldozer, and later a dragline and dirt-moving equipment. In times of high water it would back up in Mosquito Creek from Wahoo Creek and delay or stop the flow of water in the former. The dike would become watersoaked and holes would develop therein. The water would seep at first and then the break would develop and enlarge, and the water would come out of the creek onto and over the land of appellant. The water in Wahoo Creek at high stages was 2 or 3 feet above the top of the Mosquito Creek dike. Appellant thought it was necessary to make the east dike along the creek wider so that there would be more capacity in the creek and more resistance in the dike. During 1944 he took dirt from inside the dike and made a new dike along the east of the creek that had three or four times the amount of material of the former one. It was wider, stronger, and a foot or more higher than the first one. This was effective for a time but in 1947 there was a severe flood and the dike gave way. In 1948 appellant procured a dragline, and repaired the dike, strengthened, widened, and elevated it along the west line of his land. There were holes made in the dike in 1950 and they were repaired. There was overflow of the creek in 1951 and work was done on it by appellant to accomplish his determination to

prevent water flowing upon and over his land from Mosquito Creek. When there was run-off in the drainage area of Wahoo Creek it raised and flowed upstream in Mosquito Creek. The work done on Mosquito Creek increased its capacity 10 or 15 times from what it was before appellant acquired his land. The water backed up in the creek from Wahoo Creek and it served as a reservoir until its capacity was exhausted or the dikes gave way. The appellant obstructed and changed the action and course of the floodwater of Mosquito Creek and of the flood plane thereof.

Appellant in 1944 entered upon the execution of a plan to straighten the channel of Wahoo Creek. He made an excavation for a new channel of the creek from about the northeast corner of the southwest quarter of the southwest quarter of Section 17 to the west side of the large hairpin curve in Wahoo Creek as it then existed a short distance northwest of the center of the northeast quarter of Section 18. This was completed in the late fall of that year. It was a pilot ditch so that it would widen and deepen by the action of the water flowing through it and this result has been accomplished. He put a dike on each side of the excavation. He continued to straighten the channel of the creek and to erect dikes on either side of the channel until substantially all of the curves, bends, and irregularities in the channel of the creek across his land were eliminated, and there were continuous dikes on either side of the creek. This work was pursued almost continuously from 1943 through 1952. When floodwater destroyed parts of the dikes they were restored. There was a break in the dike on the southwest side of the channel in 1952. The dike on the opposite side was unharmed. This break in the dike was about 40 feet long. The dike was 4 or 5 feet high and it was cut down to the level of the land. Appellant owned appropriate machinery for excavating, moving dirt, and constructing dikes. He had at times had an employee whose primary

assignment was to keep the equipment engaged doing needed work on the dikes and to repair, strengthen, widen, and elevate them. This was the execution of a plan of appellant to prevent floodwater coming on and flowing across his land. The fact that water from Wahoo Creek did get upon the land of appellant south and west of it is evidenced by his act of intentionally not erecting a dike along a part of the south and west side of the creek so that the water would overflow on a low part of his land, deposit silt, and build up the low land. This existed from 1945 to 1948. Appellant said the low places were silted up until they were nearly level with the surrounding land. There were flood conditions created along Wahoo Creek by heavy run-off north and northwest of the land of appellant when there was no local precipitation. The dikes referred to were intended to keep this water out of the creek and off the land of appellant. It is obvious that he obstructed the flood plane of Wahoo Creek and interfered with the action and course of water therein.

The proof is convincing that Silver Creek joined and flowed into Wahoo Creek at about the place indicated herein as early as 1893 and thereafter until about 1944. There was a change in its course about that year. Since then the water of Silver Creek at a place where it is nearest the railroad right-of-way on the land of appellant has flowed north into the ditch referred to in the record as the borrow pit on the south side of the railroad right-of-way, from there south and southeast to and through Ab's Lake, and southeast to and through the lands of appellees. The assertion of appellant that the change in the flow of Silver Creek was not caused by him but was the result of natural causes such as silting in of its confluence with Wahoo Creek is not convincing in view of the statement of appellant that he had no personal knowledge from 1937 to 1944 that Silver Creek joined Wahoo Creek, notwithstanding in 1936 he bought the land adjacent to the place where the

creeks came together and was in possession of and used the land from March 1, 1937. A witness who had lived in Memphis, which is a short distance from where the creeks converge, for 50 years and was during his residence there familiar with Wahoo Creek, Silver Creek, and the other locations important to this case gave information that Silver Creek emptied into Wahoo Creek near the house built on the Owen land by Mr. Owen in the vicinity of the Wahoo bridge on the road running east and west south of Memphis; that Silver Creek continued to empty into Wahoo Creek at that place from the time he came to Memphis until about the year 1945 when the water of the creek went north to the borrow pit or ditch along the south part of the railroad right-of-way and thence southeasterly; that the location where the water was diverted from the channel of Silver Creek was northwest a considerable distance from Memphis, which was near Ab's Lake; that the witness was there about a day after Silver Creek started to flow into the borrow pit; that he saw the drain that had been cut through blue grass sod from the creek to the railroad ditch; that it was about 5 feet wide, about 7 feet long, and quite shallow; that it was at the closest point of the creek to the railroad ditch; that something had to be done before the water would have gone from the creek into the ditch; that there was no evidence that any implement had been used but spade marks were visible where the drain had been made; and that in a later conversation between the witness and appellant he asked the witness "* * * if the railroad ever mentioned about Silver Creek being turned into the borrow pit." The history of Silver Creek flowing into Wahoo Creek at the same location for more than 50 years indicates there was no natural reason why Silver Creek should change its course and seek a new channel. The record does not show any demonstration of nature that had that result.

Appellant constructed a dike in 1947 from the old

channel of Silver Creek east and slightly south to Ab's Lake. This was southwest of the railroad in the northern part of the west half of the northeast quarter of the southwest quarter of Section 17. In 1950 he erected another dike along the south and west of Ab's Lake and westward to the east dike along Wahoo Creek. In 1951 and 1952 he made an excavation in the ditch to the southwest of the railroad and north of Silver Creek commencing about 700 feet southeast of the north line of the southwest quarter of the northwest quarter of Section 17 and continuing northwesterly to the north line of the land of appellant, and thence west until it intersected Silver Creek where it entered the land of appellant. The effect of this was to divert water that would have gone down Silver Creek before appellant had made transformations in the area and to conduct and force it toward the southeast north of the land of appellant through Ab's Lake and on to the east. This was a clear diversion of the water of Silver Creek from the course of its natural flow.

The flood plane of Mosquito Creek over the land of appellant according to the proof is the area from a line coming out of the creek about 900 feet south of Wahoo Creek and extending generally in a southerly and easterly direction to a line a distance of about 1,000 feet in a southerly and easterly direction. The opinion of the engineer was that the construction of a dike along the east bank of the creek has forced the floodwater thereof over into the Wahoo Creek area and has diverted it from the flood plane of Mosquito Creek. The remedy he said is to restore the condition as it was before the dike was erected.

There is a flood plane south of Wahoo Creek extending to the southwest corner of Section 17. The engineer testified that the dikes constructed by appellant have forced the floodwater which normally flowed on the south and west sides of Wahoo Creek over to the north and east of the creek; that the flood plane of the

creek has been effectively obstructed by the dikes; and that it is not possible to confine the floodwater of the creek in the channel the appellant has excavated. The opinion of the engineer was that the condition existing before changes were made in the channel and dikes were erected should be restored by removing the dikes on Wahoo Creek to at least the west line of Section 17.

The engineer stated that appellant had changed the course of Silver Creek so that instead of flowing into Wahoo Creek its water goes down along the railroad to Ab's Lake and on to the east; and that Silver Creek as it exists on the land of appellant carries about 15 or 20 percent of the floodwater of an extreme flood. He said the creek should be restored to its natural condition by requiring the construction of a channel to the place where it formerly emptied into Wahoo Creek and by effectively blocking the borrow pit ditch.

Willie Wischmann, one of the appellees, became the owner in 1939 of the northeast quarter and the north half of the southeast quarter of Section 21, Township 13, Range 9, in Saunders County. He moved onto it in 1940. There was a flood that year. He could see Wahoo Creek from his land looking southwesterly. There was floodwater on the south side of the creek. There was a railroad bridge near the southwest corner of his land. During the flood the water came through under the bridge and gradually and slowly moved upon his land from the southwest. In about 1944 there was a change in the flow of floodwater in that it came on the north side of the railroad grade and traveled straight east onto his land. There is now a continuously flowing stream thereon. It started with the flood of 1944. It leaves his place directly to the south. The water comes through Ab's Lake and easterly north of the railroad to his farm. The channel on his land is more than 30 feet wide. The water therein at the time of the trial was from 15 to 20 feet wide and from 1 to

2 feet deep. This stream remains within its banks except during highwater stages. He farmed and got a crop from his land each year before 1944. His land has been substantially made unfit for cultivation and production.

Ernest G. Bahm, an appellee, purchased the northwest quarter of the northwest quarter of Section 21, Township 13, Range 9, in Saunders County, in 1943. There was then no flowing stream thereon. There was water in a low place on the land. There was wheat growing on part of the land and the remainder was pasture and hay meadow. In May 1944 he saw water flowing under the bridge west of his land and willows floating in the water. He had not experienced this before. He went to Ab's Lake and saw water flowing into it from the northwest through a channel 10 to 12 feet wide and about 2 feet deep. It passed through Ab's Lake and east across his farm. Appellee at the time of trial had a constantly flowing stream through his land. He cannot raise grain or produce hay on his farm.

Appellant had seen his land flooded on several occasions before he did any work on the creeks or dikes. In 1943 he decided upon a plan to keep all floodwater off his land. He then committed himself to do what was required to stop the water that came from the north and northwest from going across any of his land. He said with evident satisfaction at the trial that he came pretty close to doing it in 1951 and that he even came closer in 1952. It is a fair inference that he pursued his predetermined plan relentlessly. If he considered what the result would be to other landowners he did not permit it to interfere with the complete execution of his plan. Hence this litigation.

The relief appellees sought herein was an injunction, preventive and mandatory, to prevent appellant from diverting the natural flow of Silver Creek, from diverting the flow of floodwater of Mosquito, Wahoo, and Silver

Creeks upon the land of appellees, and from maintaining the dikes erected along or near the streams by appellant; to compel appellant to remove the dikes; to restore Silver Creek as it was before appellant purchased his land affected by this case; and to restore the conditions on his land as they were then. Appellant contested the claims made by the appellees as a basis of the relief they sought by a denial thereof and of the right of appellees to any relief they asked. The trial court made specific and general findings in favor of appellees and adjudicated them substantially the relief they asked.

The acts of appellant disregarded the law concerning the subject of water flowing in defined watercourses. The doctrine is firmly established in this jurisdiction that water flowing in a well-defined watercourse may not be diverted and cast upon the lands of another landowner where it would not go according to natural drainage. In Andersen v. Town of Maple, 151 Neb. 103, 36 N. W. 2d 620, the court said: "Water flowing in a well-defined watercourse may not lawfully be diverted and cast upon the lands of adjoining landowners where it was not wont to run according to natural drainage." See, also, Purdy v. County of Madison, 156 Neb. 212, 55 N. W. 2d 617.

This case does not concern surface water as distinguished from floodwater. The rule in reference to floodwaters is applicable and controlling of the present case. It is said in Cooper v. Sanitary District No. 1, 146 Neb. 412, 19 N. W. 2d 619: "However, there is a clear distinction in the rules of law governing surface waters and floodwaters flowing as a part of a natural stream during flood season. We are committed to the rule that overflow waters flowing in the natural flood channel of a running stream are a part of the stream and are governed by the running water rule." In Mader v. Mettenbrink, 159 Neb. 118, 65 N. W. 2d 334, it is said: "The term 'surface water' includes such as is

carried off by surface drainage, that is, drainage independent of a watercourse. * * * The flood plane of a live stream is the adjacent lands overflowed in times of high water from which floodwaters return to the channel of the stream at lower points. This plane is regarded as a part of the channel and the water flowing within the channel or its flood plane is characterized as floodwater." In Ballmer v. Smith, 158 Neb. 495, 63 N. W. 2d 862, the court said: "The owners or proprietors of lands bordering upon either the normal or flood channels of a natural watercourse are entitled to have its water, whether within its banks or in its flood channel, run as it is wont to run according to natural drainage, and no one has the lawful right by diversions or obstructions to interfere with its accustomed flow to the damage of another."

It is beyond the area of argument in this state that a riparian owner may not dam, obstruct, or dike against floodwaters of a running stream to the injury of a lower landowner. Ballmer v. Smith, *supra;* Frese v. Michalec, 148 Neb. 567, 28 N. W. 2d 197.

This is an equity case. The evidence is in some respects irreconcilably conflicting. The trial court viewed the premises involved. The manner of the trial de novo of such an action in this court has too often been stated to permit its repetition. Likewise the consideration that may be given by this court on a trial de novo of an equity case of the fact that the trial court inspected the premises involved has often been expressed and was recently repeated. Keim v. Downing, 157 Neb. 481, 59 N. W. 2d 602; Shepardson v. Chicago, B. & Q. R. R. Co., *ante* p. 127, 69 N. W. 2d 376.

The judgment should be and it is affirmed.

AFFIRMED.

IN RE APPLICATION OF DALTON.
JAMES DALTON, APPELLEE, V. BUREL F. KINNEY, APPELLANT, IMPLEADED WITH W. T. ELLIS ET AL., INTERVENERS-APPELLEES.

70 N. W. 2d 464

Filed June 3, 1955. No. 33735.

Public Service Commissions. Courts are without authority to interfere with the findings and orders of the Nebraska State Railway Commission except where it exceeds its jurisdiction or acts arbitrarily.

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

J. Max Harding, for appellant.

James L. Thorpe and *Heaton & Heaton,* for appellee.

Heard before SIMMONS, C. J., CARTER, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ., and KOKJER, District Judge.

SIMMONS, C. J.

This is an appeal from an order of the Nebraska State Railway Commission, hereinafter called the commission, granting a certificate of public convenience and necessity to applicant, James Dalton, authorizing the transportation of water and crude oil for drilling purposes only between all points and places in Kimball County, over irregular routes, by motor vehicle in intrastate commerce. The application originally was for a certificate for Cheyenne, Banner, Kimball, and Scotts Bluff Counties.

The matter was set and heard December 2, 1953, before an examiner. The commission acted on the transcript of that hearing and the examiner's report. The interveners in opposition were largely competing certificate holders.

The challenge here, although specifically stated, goes to the sufficiency of the evidence to sustain the order entered. We affirm the order of the commission.

There is ample evidence in the record to sustain a finding of the following factual situation:

Kimball County, in the extreme southwest part of Nebraska's "panhandle," has had a substantial discovery and development of oil. There are now over 100 producing wells. Several companies are drilling and prospecting for oil in the county. It is, as described by the witnesses, a "boom" condition.

The city of Kimball is the county seat of Kimball County where water for drilling is obtainable to be hauled to the wells. There is also an oil development in Cheyenne County, where the city of Sidney is the county seat. There is also a development in Banner County and drilling service, at least, operating out of Scotts Bluff County toward the south.

Large quantities of water and, at times, crude oil are necessarily used in the drilling of wells. A shortage of water or crude oil delays or stops drilling operations. Water is hauled to the drilling operations from water holes, streams, or in Kimball County from the city wells at Kimball. Crude oil is secured at producing wells. Both water and crude oil are hauled in tanks mounted on motor vehicles. The water hauling involved is a highly competitive business.

There is one certificate holder operating out of Kimball. His equipment, service, and insurance qualifications are not satisfactory to the shippers.

The applicant proposes to operate out of Kimball in this business.

There are several intervener certificate holders operating out of Sidney, Nebraska. These certificate holders also operate in Colorado and Wyoming, and at the time of the hearing had a major part of their vehicles either in those states or elsewhere where they could conduct profitable operations.

At least one of the opposing certificate holders has adequate equipment at Sidney and would answer calls for carrier service in Kimball County. However, the

charge for this service is based on an hourly rate, chargeable from Sidney. It consumes about an hour's time at a cost of $10 to operate out of Sidney in excess of time and cost of operation out of Kimball. The delay and added expense element render that service unsatisfactory to drillers.

Objecting certificate holders offered to bring equipment to Kimball from distant points and have it available in 10 hours. Obviously for one common carrier haul, the delay and cost would be unsatisfactory.

They likewise offered to establish a base at Kimball but quite obviously were unwilling to do so unless there was to be a profitable operation there. It could properly be found that the objecting interveners offered common carrier service in Kimball County subject to inconvenience and delay, and in accord with tariff rates from their base at Sidney or elsewhere until such time as they were able to anticipate a profitable operation out of Kimball at tariff rates applicable to the point of origin of the commodity to be carried.

The policy of the state as to common carrier motor transportation as declared by the Legislature, among other things, is to "promote adequate, economical and efficient service by motor carriers, and reasonable charges therefor, without unjust discrimination, undue preferences or advantages, and unfair or destructive competitive practices" and to "develop and preserve a highway transportation system properly adapted to the needs of the commerce of Nebraska." § 75-222, R. R. S. 1943.

The ultimate question for the decision of the commission was whether or not the proposed service is or will be required by the present or future public convenience and necessity. § 75-230, R. R. S. 1943.

In In re Application of Effenberger, 150 Neb. 13, 33 N. W. 2d 296, we held: "Certain duties are imposed upon established carriers to provide service to all the public. This requires service to be rendered where it is

unprofitable as well as where it is profitable. * * * The determination of these questions rests with the railway commission, and its findings and orders will not be interfered with on appeal if any reasonable basis exists upon which they can be supported."

We there stated the rule: "Courts are without authority to interfere with the findings and orders of the railway commission except where it exceeds its jurisdiction or acts arbitrarily."

In the Effenberger case we also held: "Competitive routes will ordinarily be authorized only where the existing carrier refuses or has failed to provide adequate service upon the order of the railway commission. Where the evidence does not show that such a situation exists, the established carrier may properly resist invasion of its field before the commission."

In this instance there appears no order of the commission requiring the existing carriers to provide adequate service. Such an order was not required for here the certified carriers able to render adequate service clearly indicated an unwillingness to furnish the required service except under conditions as to time of service, cost, and adequacy which the carriers desired to control or unless otherwise they could find assurance of profitable operations. The commission accepted the alternative and issued a certificate to an applicant found, and shown without dispute, to be fit, willing, and able properly to perform the service required by the shipping public. Its decision in this regard cannot be held to be unreasonable or arbitrary.

As appellant points out we held in In re Application of Canada, 154 Neb. 256, 47 N. W. 2d 507: "The question of the adequacy of service of existing carriers is implicit in the issue of whether or not convenience and necessity demand the service of an additional carrier in the field." That question the commission resolved in favor of the applicant.

We also held in In re Application of Richling, 154 Neb.

108, 47 N. W. 2d 413: "Furthermore, the statute requires that the finding that applicant is fit, willing, and able to perform the proposed service, and that such service is or will be required by the present or future public convenience and necessity, must be sustained by evidence showing that the granting of the certificate was not arbitrary or unreasonable." The evidence here meets that test.

The order of the commission is affirmed.

AFFIRMED.

IN RE APPLICATION OF HILL.

RUTH G. HILL, ADMINISTRATRIX OF THE GEORGE SAUNDERS ESTATE, APPELLANT, V. MARY LEE SWANSON, APPELLEE.

70 N. W. 2d 503

Filed June 3, 1955. No. 33753.

1. **Appeal and Error.** The transcript of the district court on appeal to the Supreme Court imports absolute verity.
2. **Executors and Administrators.** In the conduct of proceedings for the sale of real estate for the payment of debts of a deceased person, the principal duty of a district court is to conserve the estate.
3. ———. Section 30-1109, R. R. S. 1943, requires that the proceeds of any real estate sold for the payment of debts shall be deemed assets in the hands of the executor or administrator.

APPEAL from the district court for Lancaster County: HARRY ANKENY, JUDGE. *Reversed and remanded with directions.*

Pierson & Blue, for appellant.

William L. Walker and *Earl Ludlam*, for appellee.

Heard before SIMMONS, C. J., CARTER, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ., and KOKJER, District Judge.

SIMMONS, C. J.

This is an appeal by the administratrix from an

order of the district court affirming the sale of real estate. The purchaser is appellee. We reverse the judgment and remand the cause with directions.

The real estate involved is a residence property. The administratrix filed her petition for leave to sell real estate to pay debts of the estate and expenses of administration.

She alleged that there were debts in excess of $5,000 consisting of old age assistance liens and claims, exclusive of court costs, and administrator and attorney's fees.

The trial court licensed the sale "in manner required by law * * * subject * * * to whatever incumbrances existed at the time of the death of" deceased. The license required a sale for cash with 15 percent to be paid at the conclusion of the sale, and the balance upon confirmation. The notice for the sale provided that the property would be sold at public auction "to the highest bidder for cash, subject to all encumbrances thereon," and "At least twenty percent of the purchase price must be paid in cash on the date of sale * * *." The date of the sale was fixed for September 2, 1954.

October 22, 1954, the Northeast Realty, Inc. (hereinafter called the realty company) moved to set aside the sale and order another sale on the ground that the highest bid was $1,900; that it was disproportionate to the value of the real estate; and offered to bid $2,100 for the premises. To guarantee the bid it attached to its motion a certified check for $420 payable to the administratrix, "to be applied to the purchase price" of the premises if it were a successful bidder at a new sale.

November 2, 1954, the administratrix filed her report reciting that she had offered the real estate for sale to the highest bidder for cash and that it was sold to Mary Lee Swanson (hereinafter called the purchaser) for the sum of $900; that subsequent to the sale two parties had filed their written offers to increase the

amount of the bid to $2,100; and that it was to the best interest of the estate that a further sale be held. She moved for a new sale for the reason that the amount obtained did not reflect the true value of the real estate. The report does not show that any part of the bid was paid at the time of sale.

November 2, 1954, the purchaser moved for an order confirming the sale. She recited that she bid $900 "for said equity in said property, if any, at the time of said sale." It was further stated that the upset bids were not received until it was apparent that a large old age assistance lien could be compromised so that a "merchantable title could be obtained."

The matter was set for hearing before the trial court on the motion of the realty company to vacate the sale, on the motion of the administratrix for a new sale, and on the motion of the purchaser to confirm. The journal entry recites that one Johnson offered to bid $2,205 as purchase price, one Lotman offered to bid $2,300 as purchase price, and that Johnson then withdrew his offer and the realty company secured leave and amended its offer to bid $2,200. The trial court denied the motions of the realty company and the administratrix; sustained the motion of the purchaser; and confirmed the sale to the purchaser "for $900.00 subject to all encumbrances." The court ordered the administratrix to deliver a deed to the purchaser upon payment of the purchase price in full.

The transcript of the district court on appeal to the Supreme Court imports absolute verity. Zabloudil v. Lane, 159 Neb. 547, 68 N. W. 2d 193.

Section 30-1120, R. R. S. 1943, provides: "The executor or administrator making any sale shall immediately make a return of his proceedings upon the order of the sale in pursuance of which it is made, to the judge of the district court granting the same, who shall examine the proceedings, and may also examine such executor or administrator, or any other person on oath,

touching the same; and if he shall be of opinion that the proceedings were unfair, or that the sum bid is disproportionate to the value, and that a sum exceeding such bid at least ten per cent, exclusive of the expenses of a new sale, may be obtained, he shall vacate such sale and direct another to be had, of which notice shall be given; and the sale shall be in all respects as if no previous sale had taken place."

Section 30-1121, R. R. S. 1943, provides: "If it shall appear to the district judge that the sale was legally made and fairly conducted, and that the sum bid was not disproportionate to the value of the property sold, or if disproportionate, that a greater sum than specified in section 30-1120 cannot be obtained, he shall make an order confirming such sale, and directing conveyances to be executed."

According to the transcript, a sale was made and confirmed, subject to all encumbrances, for $900, and that done after there was a bid, supported by a deposit of $420, for $2,100, raised at the time of the hearing to $2,200 and without conditions recited in the offer, and an offer made in open court to bid $2,300.

We held in In re Estate of Parker, 72 Neb. 601, 101 N. W. 233: "In the conduct of proceedings for the sale of real estate for the payment of debts of a deceased person, the principal duty of a district court is to conserve the estate * * *."

In Rohlff v. Estate of Snyder, 73 Neb. 524, 103 N. W. 49, property was sold for $3,625. A responsible bidder, supporting his bid by a deposit agreed to bid $4,000. It was argued that the property was not worth more than the bid; and that the bid was not disproportionate to the value of the property sold. We held: "The evidence shows it will sell for $4,000 at a resale, hence, for the purpose of this controversy, that sum is its actual value."

Here, according to the transcript, the trial court had a bid of at least 233% more than that bid by the purchaser.

It was supported by a deposit, while it is not shown that the purchaser made any deposit to support the confirmed bid. We think it manifest that under the provisions of section 30-1120, R. R. S. 1943, the sum bid was disproportionate to the value. It also appears that a sum exceeding the bid made, at least 10 percent, exclusive of the expenses of a new sale, may be obtained. The estimates as to the cost of a new sale were from $20 to about $100. The confirming of the sale under such circumstances was an abuse of judicial discretion, requiring that the order of confirmation be reversed.

The bill of exceptions relates a different story. It goes to the question of value and the requirement of a "legally made and fairly conducted" sale, and to the requirement that if the sale proceedings are "unfair" the sale shall be vacated and another sale had.

The party who conducted the sale testified that he announced at the opening of the sale the property was being sold subject to encumbrances; that the first mortgage lien was $1,000; that old age assistance liens were about $4,200; and that he would accept bids for any amount over the $1,000 first mortgage and would attempt to compromise the old age assistance liens "for the amount remaining after the expenses of sale and fees had been paid." The witnesses throughout refer to old age assistance liens of $4,200. An exhibit shows that the county filed a claim with the estate for $3,739.59, "of which $2015.74 is a lien on the real estate herein."

A bid of $775 was received "over and above * * * the first mortgage of $1000." The attorney for the bidder and the attorney for the administratrix conferred and decided that $900 was required to meet the items that they deemed had to be paid, so the purchaser raised her bid to $900. The items that it was thought had to be paid were administrator and attorney's fees, burial and probate expenses, and $300 to the county to

satisfy the old age assistance lien. On that basis the $900 bid was made and reported.

The evidence is that the attorney for the administratrix with an attorney for the county then went to the county court and secured an understanding as to the allowance of fees, amount of claims that had to be paid, etc. They then went to the county commissioners and secured an agreement that the county would compromise the old age assistance lien for $300 but that if a greater amount was received from the sale that then the county should benefit. It was found that the $900 was not enough, so the purchaser agreed to pay $65 more.

These arrangements were party made and obviously were not in accord with the terms of the trial court license to sell, to which it appears no one paid particular attention.

Section 30-1109, R. R. S. 1943, requires that the proceeds of any real estate sold for the payment of debts shall be deemed assets in the hands of the executor or administrator. That provision appears to have been overlooked in this instance.

It is quite apparent that the parties contemplated that a substantial part of the proceeds of the sale, made subject to encumbrances, would be used to secure a release of the encumbrances, and that instead of the proceeds of the sale being deemed assets of the estate they were in effect to become assets of the purchaser to be used to release encumbrances.

At the time of the hearing, the realty company learned of the compromise that had been worked out with the county, and accordingly raised its bid to $2,200 stating "* * * I think that goes in the regular procedure that when a man buys a property he gets good title to it, especially where you are dealing with the court." The realty company witness stated that the "property was worth more money" and that the market value "might be $2500."

Looking at this situation from the party-made terms of sale, it appears that the parties, with approval of their counsel, were bidding on the basis of securing what they expected would be a clear title to the real estate rather than one subject to encumbrances, and that the sale was not to be subject to encumbrances but rather that the proceeds of the sale were to be used to pay and otherwise satisfy encumbrances.

Even on that basis it is obvious that the property was sold for an amount disproportionate to its value and that a sum exceeding the 10 percent requirement of the statute, exclusive of the expenses of a new sale, might be obtained.

It is argued that under no circumstances can the estate be the beneficiary of a new sale. It is obvious that under the terms of the sale fixed by the court and the bids made, as appearing in the transcript, that the estate and its creditors would be substantial beneficiaries of the sale of this property, either at the bid which the court confirmed, or at the bid made by the realty company. It is likewise obvious that, under the party-made terms of sale, that the county might well be a substantial beneficiary of a new sale.

It is also obvious that the parties here were in good faith bidding under a complete misapprehension of the terms of the sale and the obligations as to encumbrances that their bids entailed. No one appears to have advised them otherwise. The statute requires that sales of this character be "legally made and fairly conducted" and that if the proceedings are "unfair" the court "shall vacate such sale and direct another to be had, of which notice shall be given; and the sale shall be in all respects as if no previous sale had taken place."

We think this sale as conducted and the proceedings subsequent to it manifestly come within the broad terms of an unfair sale.

The judgment of the trial court is accordingly reversed

and the cause remanded with directions to vacate the sale and direct another sale to be had according to law.

REVERSED AND REMANDED WITH DIRECTIONS.

KOKJER, District Judge, concurs in result.

HOWARD E. CRANE, APPELLEE, V. CHARLES W. WHITCOMB, APPELLEE, IMPLEADED WITH MRS. NEVILLE WHITCOMB, APPELLANT.

70 N. W. 2d 496

Filed June 3, 1955. No. 33761.

1. **Trial.** A motion for directed verdict or for judgment notwithstanding the verdict must, for the purpose of decision thereon, be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor, and to have the benefit of every inference that can reasonably be deduced from the evidence.
2. **Principal and Agent.** Generally a principal is not liable for physical harm caused by the negligent physical conduct of an agent who is not a servant, during the performance of the principal's business, unless the act was done in the manner directed or authorized by the principal or the result was one intended or authorized by the principal.
3. **Master and Servant.** The relation of master and servant does not render the master liable for the torts of the servant, unless connected with his duties as such servant or within the scope of his employment.
4. **Negligence.** The proprietor of a place of business who holds it out to the public for entry for his business purposes is subject to liability to members of the public while upon the premises for such a purpose for bodily harm caused to them by the accidental, negligent, or intentionally harmful acts of third persons, if the proprietor by the exercise of reasonable care could have discovered that such acts were being done or were about to be done, and could have protected the members of the public by controlling the conduct of the third persons or by giving a warning adequate to enable them to avoid harm.
5. **Trial.** When the evidence viewed in the light most favorable to plaintiff fails to establish actionable negligence, it is the duty

of the trial court to direct a verdict for defendant or render a judgment notwithstanding the verdict if motions therefor are timely and appropriately made.

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

Kennedy, Holland, DeLacy & Svoboda and *Lawrence J. Tierney,* for appellant.

James J. Fitzgerald and *Mathews, Kelley, Fitzgerald & Delehant,* for appellee Crane.

Caniglia & Inserra, for appellee Whitcomb.

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

CHAPPELL, J.

Plaintiff, Howard E. Crane, known to some as "Bud," brought this action against defendants Charles W. Whitcomb and Mrs. Neville Whitcomb, seeking damages resulting from an assault upon plaintiff by defendant Charles W. Whitcomb with a loaded revolver, which occurred about 11 p. m., July 4, 1951, in the street outside of a tavern owned and operated by defendant, Mrs. Neville Whitcomb. Defendants were husband and wife. Plaintiff's amended petition originally sought recovery from defendant, Mrs. Neville Whitcomb, hereinafter generally called defendant, upon the theory of respondeat superior. Thereto she answered, denying generally and specifically plaintiff's allegations with relation to that theory. The pleas of defendant Charles W. Whitcomb, hereinafter generally called Whitcomb, are of no importance here because he took no appeal from a verdict and judgment rendered thereon against him. The cause proceeded to trial to a jury, and at conclusion of plaintiff's evidence, defendant's motion to direct a verdict or dismiss plaintiff's action against her for insufficiency of the evidence was overruled. At conclusion

of all the evidence the trial court, over appropriate objections made by defendant, sustained plaintiff's motion to amend his amended petition purportedly to conform to the proof and predicate his cause of action against defendant for alleged negligence by her, proximately causing plaintiff's injuries, rather than respondeat superior. The trial court then overruled defendant's motions for mistrial or new trial, or to direct a verdict or dismiss plaintiff's action against defendant for want of sufficient evidence. Defendant then filed an answer preserving her objection to plaintiff's permitted amendment, denying that she was negligent in any manner as alleged by plaintiff, and alleging that negligence of plaintiff, more than slight, was the proximate cause of his injuries. As to such defendant, the issues were then submitted to the jury upon plaintiff's amended theory of negligence and defendant's answer thereto, including plaintiff's alleged contributory negligence pleaded by her.

With regard to defendant Whitcomb, the court directed a verdict for plaintiff and submitted to the jury only the issue of the amount of damages. The verdict of the jury assessed "plaintiff's damages at $10000.00 of which amount both defendant's are jointly liable for $7000.00 and for the remainder of $3000.00 the defendant Charles W. Whitcomb is individually and alone liable," and judgment was accordingly rendered thereon. Defendant Whitcomb's motion for new trial was overruled, but he did not appeal. Defendant Mrs. Neville Whitcomb's motion for judgment notwithstanding the verdict or in the alternative for new trial, was also overruled, but she appealed. Insofar as important here, she assigned that the trial court erred in failing to direct a verdict at conclusion of all the evidence and in overruling defendant's motion for judgment notwithstanding the verdict. We sustain the assignment. In doing so, we are not required to discuss whether or not the trial court erred in permitting plaintiff to amend as aforesaid.

This is true because, as hereinafter observed, the evidence was insufficient in any event to permit any recovery from defendant, Mrs. Neville Whitcomb.

In Umberger v. Sankey, 151 Neb. 488, 38 N. W. 2d 21, we held: "A motion for a directed verdict or for judgment notwithstanding the verdict must, for the purpose of decision thereon, be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor, and to have the benefit of every inference that can reasonably be deduced from the evidence."

In plaintiff's brief it is said: "We make no contention that Mr. Whitcomb was an 'employee'; we say that he was an agent and that he had the right to and did participate in maintaining good order on the premises." In that connection, as said in Restatement, Agency, § 250, p. 559: "Except as stated in § 251, a principal is not liable for physical harm caused by the negligent physical conduct of an agent, who is not a servant, during the performance of the principal's business, unless the act was done in the manner directed or authorized by the principal or the result was one intended or authorized by the principal." In Nebraska Annotations thereto, § 250, p. 111, it is said: "This section states the Nebraska law. Omaha Bridge & Term. Ry. v. Hargadine, 5 Neb. Unof. 418, 98 N. W. 1071." Section 251, p. 560, reads in part: "A principal is subject to liability for physical harm to the person or the tangible things of another caused by the negligence of an agent who is not a servant: (a) in the performance of an act which the principal is under a duty to have performed with care under the rule stated in § 214; * * *." Nebraska Annotations thereto, § 251, p. 111, says: "This section states the Nebraska law so far as the first clause is concerned. See cases cited in annotation to § 214." Section 214, p. 471, reads: "A master or other principal who is under

a duty to provide protection for or to have care used to protect others or their property and who confides the performance of such duty to a servant or other agent is subject to liability to such others for harm caused to them by the failure of such agent to perform the duty." Nebraska Annotations thereto, § 214, p. 98, reads: "This section is in accord with the Nebraska law. Clancy v. Barker, 71 Neb. 83, 98 N. W. 440, 103 N. W. 446, 69 L. R. A. 642, 115 Am. St. Rep. 559, 8 Ann. Cas. 682 * * *." In such case, on rehearing at 71 Neb. 91, 103 N. W. 446, 115 Am. S. R. 559, 69 L. R. A. 642, adhering to the former judgment, it is held: "The relation of master and servant does not render the master liable for the torts of the servant, unless connected with his duties as such servant or within the scope of his employment."

As held in Davis v. Houghtellin, 33 Neb. 582, 50 N. W. 765, 14 L. R. A. 737: "A master is liable to third persons for damages resulting from the negligence of his servants only when the latter is acting within the scope of his employment." In the opinion, quoting from Morier v. St. Paul, M. & M. Ry. Co., 31 Minn. 351, 17 N. W. 952, 47 Am. R. 793, with approval, and citing other authorities, it is said: " 'Beyond the scope of his employment the servant is as much a stranger to his master as any third person. The master is only responsible so long as the servant can be said to be doing the act, in the doing of which he is guilty of negligence, in the course of his employment. A master is not responsible for any act of omission of his servant which is not connected with the business in which he serves him, and does not happen in the course of his employment. And in determining whether a particular act is done in the course of the servant's employment, it is proper first to inquire whether the servant was at the time engaged in serving his master. If the act be done while the servant is at liberty from the service and pursuing his own ends exclusively, the master is not responsible. If the

servant was, at the time when the injury was inflicted, acting for himself and as his own master, pro tempore, the master is not liable. If the servant step aside from his master's business, for however short a time, to do an act not connected with such business, the relation of master and servant is for the time suspended. Such, variously expressed, is the uniform doctrine laid down by all authorities.' "

Such Nebraska case is cited with approval in Rich v. Dugan, 135 Neb. 63, 280 N. W. 225, along with other authorities from this and other jurisdictions. See, also, Allertz v. Hankins, 102 Neb. 202, 166 N. W. 608, L. R. A. 1918F 534.

In that connection, we may assume for purpose of argument only, that defendant Whitcomb was an agent or servant of defendant, and under the circumstances in this case there could still, as a matter of law, be no recovery from defendant Mrs. Neville Whitcomb.

On the other hand, if Whitcomb was not an agent or servant of defendant but simply a third person or patron in defendant's tavern, there could be no recovery from defendant. In Hughes v. Coniglio, 147 Neb. 829, 25 N. W. 2d 405, citing authorities, we said: "The modern general rule, summarized in its simplest terms, is that the proprietor of a place of business who holds it out to the public for entry for his business purposes, is subject to liability to members of the public *while upon the premises for such a purpose* for bodily harm caused to them by the accidental, negligent, or intentionally harmful acts of third persons, if the proprietor by the exercise of reasonable care could have discovered that such acts were being done or were about to be done, and could have protected the members of the public by controlling the conduct of the third persons or *by giving a warning adequate to enable them to avoid harm.*" (Italics supplied.) See, also, Fimple v. Archer Ballroom Co., 150 Neb. 681, 35 N. W. 2d 680. In that connection, it was also held that when the evidence viewed in the light

most favorable to plaintiff fails to establish actionable negligence, it is the duty of the trial court to direct a verdict for defendant or render a judgment notwithstanding the verdict if motions therefor are timely and appropriately made.

In the light of such rules, we have examined the record. It discloses as follows: Plaintiff was a self-employed sign painter in Omaha. He was 35 years old, 6 feet tall, and weighed 205 pounds. Whitcomb was 53 years old, 5 feet 8 inches tall, and weighed 140 or 145 pounds. Defendant was not quite 5 feet tall and weighed 135 pounds. In the evening of July 4, 1951, plaintiff, his wife, and some relatives watched the fireworks at Fontenelle Park. They got home about 10:30 p. m. It was hot and plaintiff wanted a glass of beer, so he got in his truck alone and drove over to Whitcomb's Halfway Tavern, located a little over a block and a half away from his home. He got there about 10:35 or 10:40 p. m., parked his truck in front of the tavern, went in, walked up to the east end of the bar, ordered a glass of beer, and was served.

The tavern building, owned entirely by defendant, is about 50 feet long and 25 feet wide. It faces east and extends to the west, with a front entrance on the northeast corner. There is quite a large adjacent back yard with a lawn west of the building. The bar extends along the south side of the tavern room. Rest rooms are located at the west or back end of the room, and nearby is a stairway going downstairs where defendant and Whitcomb lived. Two lines of tables, with about six in each line, were scattered along the tavern room. Defendant was also the sole owner of the tavern and all its equipment. The Class "C" license therefor was in her name and she had operated the tavern entirely as her own separate business, with her own separate bank account, since May 1945. She employed three bartenders part time, who took their turns working. The tavern operated on week days from 7 a. m. to 1 a. m.,

and on Sundays from 1 p. m. to 1 a. m. Defendant supervised it, and visited with and served customers. Whitcomb owned and operated his own separate automobile brake repair business some distance away, and had no interest whatever in the tavern business. He was not an employee of defendant but about every 2 weeks or a month, defendant, who had her own separate lunch counter business in the tavern, would season and prepare ribs to be barbecued and Whitcomb would barbecue them for her in a pit out in the yard back of the tavern. Sometimes when in the tavern Whitcomb would carry cases of beer for defendant from a back storage room to the bar, or when they were busy he would sometimes carry drinks from the bar to customers at the tables when asked by the bartenders to do so. He had been seen to serve customers at the bar upon one or more occasions. When Whitcomb and defendant were alone he usually locked the front door at closing time while defendant checked out. Sometimes he carried the gun up with him at closing time for fear of a stick-up, but there was no evidence that defendant knew about it, and it was not closing time when the shooting occurred.

Whitcomb did none of the foregoing things on July 4, 1951. On that day, he got up about 10 a. m., had breakfast, mowed the lawn, helped defendant pick cherries in the back yard, and worked around outside during the afternoon until evening. He drank one bottle of beer during the day. He then went back to their living quarters until about 8 p. m. when he came up to the tavern in his work clothes. Defendant was not working that night unless the tavern was crowded.

There had never theretofore, since July 1945, been any disorder or trouble in the tavern. After 9 p. m. three people, one of whom was Robert E. Carroll, known as Bob, were sitting at a table near the middle, about two tables from the front door. Whitcomb came over and sat down with them. They were drinking pepper-

mint schnapps and a glass of beer. Whitcomb was seen to drink two such drinks during about 30 or 40 minutes. Whether or not he became intoxicated is in dispute. Some witnesses said that he was, but a police officer who came to the tavern right after the shooting about 11 p. m. testified that Whitcomb was not intoxicated. Another witness verified that. Defendant testified that Whitcomb had three or four beers that evening, but she saw no peppermint schnapps.

While sitting at the table Whitcomb got into an argument with Carroll, and told him "he was not wanted and to take his money and spend it someplace else," or "to get out and stay out." Plaintiff walked from the back of the room where he had been watching T. V. as he usually did there on Wednesday and Friday nights, and going up to the bar, ordered another glass of beer. He heard the argument between Carroll and Whitcomb and saw defendant come up and say something to Whitcomb, who pushed her in the stomach with the back of his hand and said "get away from there." Plaintiff and Whitcomb had been good friends for a long time, so plaintiff said to Whitcomb, "Bill, why don't you behave yourself," or "simmer down," "Bill, why don't you act your age." To that Whitcomb replied, "That goes for you, too, Bud, you don't have to come around here either." Plaintiff then said, "Bill, don't talk to me like that." Thereupon Whitcomb got up and plaintiff grabbed him, pinned his arms down in a bearhug, and took him over to set him down in a chair. However, plaintiff pulled Whitcomb's arm too hard, whereupon Whitcomb broke away and was pushed or thrown into a chair and slid under the table, spilling beer. Defendant, who was at the back near the lunch counter, then called police. In the meantime, Whitcomb got up and, moving very agilely, went back to the washroom where someone said, "Where are you going now?" and he replied, "I'm going into the toilet." He did so but came out again, saying, "No one is going to throw me down. I'm

going to get a gun." Thereupon the party who had so talked with him started outside and said to plaintiff and all others in the tavern, "He went to get a gun and I think everybody should leave to avoid trouble." All of them, including plaintiff, then went outside where plaintiff got in his truck, called to Carroll, "Come on, Bob, I'll take you home," and Carroll also got into plaintiff's truck. Plaintiff then saw Whitcomb come up from the basement and start to drink a beer at the bar, so plaintiff backed out into the middle of the street or farther to the north and turned west to leave when Whitcomb came out the front door and called, "Come here, Bud." Plaintiff then drove his truck back into the curb, put on the brakes, and turned off the motor, at which time Whitcomb came around to the side of the truck and plaintiff started to get out. He then saw a gun come out of Whitcomb's pocket, and plaintiff lunged for it, but before he could reach it the gun went off, striking plaintiff in the stomach. Plaintiff immediately got hold of the gun, took it away, gave it to another man standing nearby, and knocked Whitcomb down. Plaintiff then went back inside the tavern and said to defendant, "I'm shot," whereupon she called an ambulance and again called police. It was then about 11 p. m. The police came as did an ambulance, whereat plaintiff was taken to a hospital and Whitcomb was taken to the police station.

However, no information charging Whitcomb with the crime of shooting plaintiff with intent to wound or maim was filed until January 22, 1952, when he pleaded guilty and was put on probation for 2 years. He had been discharged therefrom before the trial. The .38 caliber revolver belonged to Whitcomb and was registered in his name with the police in 1945 or 1946. It was kept loaded in a dresser drawer in their home. Defendant knew that he owned the gun but did not know whether or not it was loaded, and she never had it at

the bar and never authorized Whitcomb to be there with it.

Defendant was up in the tavern nearly all evening from 8 or 9 p. m., working and visiting with customers. There is evidence that she was back of the bar when Whitcomb went downstairs. She did not see him go to the basement. She took an empty case to the garage at the back and when she returned the place was empty and she wondered why. She heard no warning that people should leave, did not know that Whitcomb had the gun, and heard no shot. She looked up just as he went out the door and when she started toward the door plaintiff came inside the tavern again.

It will be observed from the foregoing that defendant was not guilty of any negligence proximately causing plaintiff's injuries, and if she were, plaintiff had ample warning of danger which enabled him to be in a place of safety and to have avoided harm had he driven his truck away from the premises instead of parking it at the curb again. Further, under the evidence in this record, defendant owed plaintiff no duty where his injuries occurred off the premises in the street, when he voluntarily so returned for his own purposes and not for any business purpose in or with the tavern. In so doing, we conclude that he was guilty of negligence more than slight as a matter of law, which barred any recovery from defendant, Mrs. Neville Whitcomb.

For reasons heretofore stated, we conclude that the judgment against defendant, Mrs. Neville Whitcomb, should be and hereby is reversed and the cause is remanded with directions to render a judgment for such defendant, notwithstanding the verdict of the jury, and absolve her of all liability for any costs in the district court. All costs in this court are taxed to plaintiff.

REVERSED AND REMANDED WITH DIRECTIONS.

PAUL BEADS, ALIAS PAUL BEADES, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.

71 N. W. 2d 86

Filed June 10, 1955. No. 33656.

1. **Criminal Law: Trial.** A party may not complain of misconduct of counsel if, with knowledge of such misconduct, he does not ask for a mistrial, but consents to take the chance of a favorable verdict.
2. ———: ———. Where no objection is made or exceptions taken to remarks of the trial judge made during the course of the trial, a complaint with respect thereto cannot be reviewed on appeal.
3. **Criminal Law: Evidence.** A photograph proved to be a true representation of the person, place, or thing which it purports to represent is proper evidence of anything of which it is competent and relevant for a witness to give a verbal description.

ERROR to the district court for Douglas County: JAMES T. ENGLISH, JUDGE. *Affirmed.*

Joseph M. Lovely, Adolph Q. Wolf, and *Thomas J. Walsh,* for plaintiff in error.

Clarence S. Beck, Attorney General, *Clarence A. H. Meyer,* and *Homer G. Hamilton,* for defendant in error.

Heard before SIMMONS, C. J., CARTER, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ., and KOKJER, District Judge.

CARTER, J.

The plaintiff in error was charged with holding up Robert O. L. Sutherland with a gun on December 15, 1953, and forcibly taking money from him, which belonged to Miller and Holmes, Inc., with the intent to rob and steal. The jury returned a verdict of guilty, and a sentence of 12 years in the Nebraska State Penitentiary was imposed. Plaintiff in error, whom we shall hereafter refer to as the defendant, brings the case to this court on error.

The evidence of the State shows that Robert Suther-

land was employed as a service station attendant at the M & H Gasoline Station at Fortieth and Dodge Streets in Omaha, Douglas County, Nebraska, on December 15, 1953. On or about 6 a. m. of that day while he was alone at the station, two men drove up in a dark colored automobile. As he walked out of the office and around the front of the car the man who had been seated on the right side of the front seat pulled a gun and ordered him to hand over all the money he had on him, which he did. He was ordered to open the cash box in the station and all the cash was taken therefrom by the two men. In excess of $100 was taken. The two men then drove away. Sutherland immediately called the police and in a matter of minutes two detectives were at the scene of the holdup. He described the two holdup men to the police. One of the two detectives went to the police station and returned with the photographs of seven men. Defendant identified the two men from this group. He also identified the two men at the police station the next morning as the two who held him up and identified the defendant as the man who held the gun on him at the time of the robbery. Neither of the men wore masks. The station was well lighted, and the defendant was positively identified by Sutherland.

As a defense defendant attempted to prove an alibi and mistaken identity. Defendant testified that he had lived with his mother for some months prior to December 15, 1953. He testified that at 11 p. m. on the night of December 14, 1953, he was drinking beer in the Royal Flush Bar at Sixteenth and California Streets in Omaha, in the company of Gloria Jenkins, Gladys Ramsey, Joe Bevins, and George Bevins, the latter being his alleged accomplice, until about 1 a. m. They left and went to the Junior Bar for one drink and then proceeded to the Town House Cafe in East Omaha where they ate and drank until about 5 a. m. He claims he was let out at his mother's apartment about 5:25 a. m.,

that a roomer answered the bell and let him in the front door, and that his mother then admitted him to her apartment. He says he remained there until shortly before he was picked up by Lieutenant Pike of the police force about 9:30 a. m. He testified also that his hair was black, that he had it dyed in August 1953, and that it had streaks of yellow, red, and orange through it at the time of his arrest. That his hair had dye streaks in it is corroborated and not questioned in the evidence. The purpose of this evidence was to impeach the testimony of Sutherland that his hair was dark. The defendant admitted on direct examination that he had twice previously been convicted of a felony.

The State on rebuttal produced Lieutenant Pike who testified that after arresting and interviewing defendant he went to the home of defendant's mother. He testified that she told him defendant had not been to her place since the Saturday before. This evidence directly contradicted that of the defendant's mother who had corroborated his story that he was at her home during the time of the robbery.

The statements in the evidence of defendant and his witness Gloria Jenkins who was with him at the Town House Cafe as to the time he left them were approximations. The jury could have found from their evidence, as it evidently did, that there was ample time thereafter for defendant and George Bevins to have driven to the scene of the holdup. The evidence of defendant and his mother as to his whereabouts at 6 a. m. was positively disputed by Sutherland. The evidence of defendant's mother was impeached by Lieutenant Pike. There was sufficient evidence to go to the jury on the matter of defendant's guilt or innocence. The defendant assigns as error certain matters which occurred at the trial which are alleged to have been prejudicial to the rights of the defendant.

The defendant assigns misconduct on the part of the prosecuting attorney as a ground for reversal. The

alleged misconduct consists of two separate acts on the part of the prosecutor. It is claimed to be misconduct of counsel when the State offered in evidence a flashlight and a jumper wire found on the defendant when he was arrested. The flashlight was admitted in evidence and objections to the jumper wire were sustained. The admission of the flashlight in evidence was not prejudicial to the defendant, although it did not tend to prove an issue in the case. No objection to the conduct of the prosecutor is shown by the record on this point. The second claim of misconduct is grounded on an incomplete answer to a question asked of the chief of police. He was asked if pictures were taken of every suspect taken to the police station. The answer was in the negative. This question was then asked: "What particular ones do you take?" Objection was made and overruled. The answer was: "We take those of outstanding criminals and the ones that are most likely to be ——." The answer was interrupted by defense counsel, who moved that the answer be stricken. The prosecutor consented. The court sustained the objection and struck the answer. Another counsel for the defendant then moved for a mistrial because of the incomplete statement made by the chief of police. The court overruled the motion. Defense counsel then moved "that not only the answer be stricken out but that the jury be instructed to disregard it." The court sustained the motion and instructed the jury to disregard the incompleted answer of the chief of police. We find nothing in the recited incident amounting to misconduct of counsel. No objection was made on that ground. The trial court did not err in denying a mistrial. The motion to strike was sustained and the jury was directed by the trial court to disregard the statement as requested by defendant's counsel. The trial court correctly ruled on the matters presented and properly complied with defendant's request that the jury be instructed to disregard the statement of the chief of police. The rights of

the defendant were fully protected by the remedial action taken by the trial court. Defendant asserts that the prosecuting attorney was guilty of misconduct in his argument of the case to the jury. The record discloses that defendant made an objection at the time. The objection was overruled. Defendant did not ask for a mistrial. He accepted the ruling and proceeded to take his chances with the jury on the outcome.

The rule governing misconduct of counsel is: One may not complain of misconduct of adverse counsel if, with knowledge of that misconduct, he does not ask for a mistrial but consents to take the chances of a favorable verdict. Sedlacek v. State, 147 Neb. 834, 25 N. W. 2d 533, 169 A. L. R. 868; Millslagle v. State, 138 Neb. 778, 295 N. W. 394.

The defendant assigns as error certain remarks made by the trial judge during the trial. No objection was made thereto at the trial. It is the rule that unless the record discloses an objection or an exception to remarks of a trial judge a complaint with regard thereto cannot be reviewed on appeal. Morrow v. State, 146 Neb. 601, 20 N. W. 2d 602; Hyslop v. State, 159 Neb. 802, 68 N. W. 2d 698.

The defendant assigns as error the admission of a colored transparency of the defendant into evidence, which was taken of the defendant after he was taken into custody. Sutherland testified that the man who held the gun on him had black hair. Defendant testified that he had dyed his hair in August and that there were red streaks in it at the time of his arrest. The chief of police saw the red streaks in defendant's hair and also testified when the transparency was exhibited to the jury that they could not be seen in the picture. Many pages of evidence were put in the record concerning the technical processes of colored photography, evidently for the purpose of showing that it did not accurately reproduce the color streaks in his hair; this, even though it had been admitted by the identifying

witness that the exhibit did not show the streaks. The picture was admitted for the purpose of showing the appearance of the defendant when he was taken into custody. It gave the jury an opportunity to compare defendant's appearance with the description given by Sutherland of the man who robbed him. There was no error in the admission of the transparency.

We have examined the other assignments of error made by the defendant and we find them to be without merit. We find no error prejudicial to the defendant in the record. The case appears to have been fairly and impartially tried. The judgment of the district court is affirmed.

AFFIRMED.

GEORGE OLSEN ET AL., APPELLANTS, V. IRMA GROSSHANS, SUPERINTENDENT OF SCHOOLS OF KIMBALL COUNTY, NEBRASKA, APPELLEE.

71 N. W. 2d 90

Filed June 10, 1955. No. 33701.

1. **Appeal and Error.** In an error proceeding in the district court, that court, and this court on appeal therefrom, must look to the transcript of the proceedings of the inferior court or tribunal filed with the petition in error to ascertain what happened there. Such proceeding is ordinarily tried on the appropriate and relevant questions of law set out in the petition in error and appearing in the transcript.
2. ———. In an error proceeding from an inferior court or tribunal to the district court and on appeal therefrom to this court, error cannot be predicated on sufficiency or insufficiency of the evidence as a matter of law to affirm or reverse the findings and judgment of the court or tribunal from which error was prosecuted, unless all of the material relevant evidence is properly presented in a bill of exceptions.
3. ———. When a question of the sufficiency of the evidence is involved in an error proceeding, the findings and judgment of the lower court or tribunal should be affirmed by the district court and by this court upon appeal therefrom, when all of the

material and relevant evidence with reference thereto is not contained in a bill of exceptions and the transcript fails to disclose any error prejudicial to the party prosecuting the error proceeding.

4. ———. In such case nothing can be added to or taken from the record by simple averment in a petition in error, and extrinsic facts presented therein do not form part of the record in which an order is sought to be reversed.

5. **Courts.** The doctrine of presumptions in favor of the regularity of proceedings in courts of general jurisdiction does not apply to courts or tribunals of inferior or limited jurisdiction who act in a judicial capacity, but as to such courts or tribunals the facts necessary to confer jurisdiction must affirmatively appear upon the face of the record.

6. **Schools and School Districts.** When proper petitions are filed with the several county superintendents of schools requesting creation of a new district from other districts, or a change of boundaries of school districts across county lines under the provisions of section 79-402, R. S. Supp., 1951, it is the duty of the superintendents to give proper notice of and hold a multilateral hearing, and at or after such hearing to factually determine whether or not such districts have lawfully petitioned the same, and such action is judicial in nature.

7. ———. When the record of the proceedings before such county superintendents in a proper hearing by them upon petitions filed under section 79-402, R. S. Supp., 1951, discloses that the districts involved have severally signed and filed proper petitions requesting creation of a new district from other districts or a change of boundaries thereof, such superintendents, acting multilaterally and not unilaterally, have jurisdiction and the mandatory duty to order the changes requested by such petitions, which order may be reviewed by petition in error, thereby providing an adequate remedy. Conversely, they have no jurisdiction and mandatory duty to order the changes requested.

8. ———. Section 79-402, R. S. Supp., 1951, which authorizes creation of a new school district from other districts or a change in the boundaries thereof, contemplates mutuality of action by the districts affected, and requires a concurrence of the respective petitions filed therefor in all material respects with regard to the changes requested therein, and unless the petitions of the several districts affected concur in substantially the identical action requested, the county superintendent or superintendents are without jurisdiction or authority to act thereon.

APPEAL from the district court for Kimball County: JOHN H. KUNS, JUDGE. *Affirmed.*

Torgeson, Halcomb & O'Brien, for appellants.

Beatty, Clarke, Murphy & Morgan, John P. O'Brien, and *J. H. Myers,* for appellee.

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

CHAPPELL, J.

Plaintiffs, George Olsen and others, as legal voters of School District No. 17 in Kimball County, appealed from a judgment of the district court assigning that such court erred in dismissing their amended petition in error which sought to reverse orders of defendant, Irma Grosshans, superintendent of schools of Kimball County. Such orders denied petitions requesting the attachment of all of School District No. 17 to School District No. 9, which includes the village of Potter in Cheyenne County, under the provisions of section 79-402, R. S. Supp., 1951, and statutes in pari materia therewith, which were then applicable and controlling. We conclude that the assignment should not be sustained.

Section 79-402, R. S. Supp., 1951, provides: "The county superintendent shall create a new district from other districts, or change the boundaries of any district upon petitions signed by fifty-five per cent of the legal voters of each district affected. Such officer shall have the discretionary power to annex any territory, not organized into districts, to any existing district; Provided, changes affecting cities or villages shall be made upon the petition of the school board or the board of education of the district or districts affected. Before the county superintendent authorizes any changes as provided in this section, the county superintendent must fix a date for hearing and give all interested parties an opportunity to be heard at such hearing. Territory

may be annexed to a district from adjoining county when approved by the county superintendent of the counties involved. A newly enlarged district shall assume any indebtedness previously incurred by any one or more districts annexed, unless otherwise specified in the petitions." The second sentence thereof is not involved herein.

Also, section 79-404, R. R. S. 1943, provides: "A list or lists of all the legal voters in each district or territory affected, made under the oath of a resident of each district or territory, shall be given to the county superintendent when the petition is presented."

It is generally the rule that in an error proceeding in the district court, that court, and this court upon appeal therefrom, must look to the transcript of the proceedings of the inferior court or tribunal filed with the petition in error to ascertain what happened there. Such proceeding is ordinarily tried on the appropriate and relevant questions of law set out in the petition in error, and appearing in the transcript. Also, in an error proceeding from an inferior court or tribunal to the district court, and on appeal therefrom to this court, error cannot be predicated on sufficiency or insufficiency of the evidence as a matter of law to affirm or reverse the finding and judgment of the court or tribunal from which error was prosecuted, unless all of the material evidence is properly presented in a bill of exceptions. Furthermore, when a question of the sufficiency of the evidence is involved in an error proceeding, the findings and judgment of the lower court should be affirmed by the district court and by this court upon appeal therefrom when all of the material and relevant evidence with reference thereto is not contained in a bill of exceptions and the transcript fails to disclose any error prejudicial to the party prosecuting the error proceeding. In re Estate of Vance, 149 Neb. 220, 30 N. W. 2d 677.

Also, in such cases, as conceded by plaintiffs, nothing

can be added to or taken from the record by simple averment in a petition in error, and extrinsic facts pleaded therein do not form part of the record in which an order is sought to be reversed. In that regard, the stenographically reported and transcribed record of the hearing involved herein was certified and allowed by defendant and attached to the end of the transcript. It consisted of eight pages of evidence, statements of counsel, legal voters, and the two county superintendents involved, given and made at the hearing. However, such reported and certified record, not supporting plaintiffs' contentions in any event, was never offered in evidence and there is no bill of exceptions before this court. Therefore, any discussion of its contents would serve no purpose.

It is generally the rule that the doctrine of presumptions in favor of the regularity of proceedings in courts of general jurisdiction does not apply to courts or tribunals of inferior and limited jurisdiction who act in a judicial capacity, but as to such courts or tribunals the facts necessary to confer jurisdiction must fairly appear from the record. In other words, jurisdictional facts will not be presumed in order to affirm or reverse the final orders of such tribunals. Such facts must affirmatively appear upon the face of the record. Shambaugh v. Buffalo County, 133 Neb. 46, 274 N. W. 207. In Proudfit v. School District, 109 Neb. 173, 190 N. W. 874, referring to a transcript of the proceedings to change the boundary lines of school districts located partly in two different counties, it is said: "All jurisdictional facts should appear on the face of the record. This being a direct attack upon the proceedings, all steps necessary to confer jurisdiction on the superintendent must be shown to have been taken. Dooley v. Meese, 31 Neb. 424." In Dooley v. Meese, 31 Neb. 424, 48 N. W. 143, it is said: "In controversies in regard to the boundaries of school districts, where it is sought to change the same, it must appear that the preliminary steps were not

taken only by the presentation of the proper petitions, but by notice of the time and place of presenting the same."

Also, in State ex rel. McLane v. Compton, 28 Neb. 485, 44 N. W. 660, it is said: "A petition for changing the boundaries of a school district must be in writing, as it becomes a matter of record and the groundwork for the exercise of jurisdiction by the superintendent. * * * Therefore, in order to secure a change in the boundaries of a district a petition duly signed by the requisite number of persons must be presented to the superintendent, and without such petition he has no authority to act." See, also, 56 C. J., Schools and School Districts, § 66, p. 215; 78 C. J. S., Schools and School Districts, § 37, p. 696. As stated in such latter section at page 703: "The character and qualifications of the persons by whom a petition is to be signed, and the number or proportion of such persons whose signatures must be attached to the position (petition), ordinarily are prescribed by the statutes which provide for the presentation of the petition, and compliance with such requirements is essential to the validity of the petition." Also, as said on page 702: "It has been held that, where the statute requires that the petition be accompanied by a list of taxpayers or residents of the district, failure to attach such list renders the petition ineffective."

In Cacek v. Munson, *ante* p. 187, 69 N. W. 2d 692, we concluded that when proper petitions are filed with the county superintendent of schools requesting creation of a new district from other districts, or a change of boundaries of school districts under the provisions of section 79-402, R. S. Supp., 1951 (now section 79-402, R. S. Supp., 1953, as amended in other particulars not applicable here), it is his duty to give proper notice of and hold a hearing thereon, and at or after such hearing to factually determine whether or not 55 percent or more of the legal voters affected have lawfully petitioned the same, and such action is judicial in nature. Also, where

the record of the proceedings before the county superintendent of schools in a proper hearing upon petitions filed under section 79-402, R. S. Supp., 1951, discloses that 55 percent or more of the legal voters of each school district affected have signed and filed proper petitions requesting creation of a new district from other districts or a change of boundaries thereof, the county superintendent has jurisdiction and the mandatory duty to order the changes requested by such petitions, which order may be reviewed by petition in error, thereby providing an adequate remedy. Conversely, if no proper petitions are filed or if such proceedings disclose that less than 55 percent of the legal voters of either or both districts have signed and filed petitions, then the county superintendent has no jurisdiction and mandatory duty to order the boundary changes requested. State ex rel. Larson v. Morrison, 155 Neb. 309, 51 N. W. 2d 626.

Section 79-109, R. S. 1943, originally provided: "The county superintendent shall not refuse to change the boundary line of any district or to organize a new district when he shall be asked to do so by a petition from each school district affected, signed by two thirds of all the legal voters in such district. * * * Provided, changes affecting cities shall be made upon the petition of the board of education of the district or districts affected." In that connection, the proviso of section 79-402, R. S. Supp., 1951, to wit: "Provided, changes affecting cities or villages shall be made upon the petition of the school board or the board of education of the district or districts affected," was lifted from section 79-109, R. S. 1943, with "villages" included therein. In that connection, the proviso relates not merely to the clause which now immediately precedes it, but is applicable in every such instance where changes in boundaries of school districts are proposed under section 79-402, R. S. Supp., 1951. School District No. 10 of Polk County v. Coleman, 39 Neb. 391, 58 N. W. 146.

The word "provided" bears, as it did in section 79-

109, R. S. 1943, the meaning of "and" or "but," within the rules stated in State ex rel. Higgs v. Summers, 118 Neb. 189, 223 N. W. 957, and a petition must be properly signed, authorized, and filed by the school board or board of education and not by the legal voters of such a district affected. Thus, in determining the sufficiency of such petition, the county superintendent must necessarily be satisfied that a majority of the board properly authorized the signing and filing of the petition. In that regard, a transcript of so much of the minutes of the board with relation thereto, duly certified to be true and correct by the secretary, should be given to the county superintendent when the petition is presented, as was done in the case at bar. By analogy, in such situation the school board and board of education represent all of the legal voters of such a district and it will not be necessary to also give the county superintendent a sworn list of all the legal voters in the district in order to give the county superintendent jurisdiction and authority to act.

It appears that section 79-135, R. S. 1943, relating to and authorizing the formation of school districts across county lines, was inadvertently repealed as an incident to recodification. Such section originally provided that: "When persons living in two or more counties desire to form a school district, *it shall be the duty of the superintendents of the respective counties* to authorize the persons to organize such district * * *." (Italics supplied.) To correct such error or omission, the following language was inserted by amendment in section 79-402, R. S. Supp., 1951: "Territory may be annexed to a district from adjoining county *when approved by the county superintendent of the counties involved.*" (Italics supplied.) Thus, legislative permission to cross county lines was restored and the legislative intent, notwithstanding a variance from the original language of section 79-135, R. S. 1943, was to affirm that there shall be no doubt of the right of petitioners to cross county lines

in the formation of districts and in changing boundaries thereof when petitions therefor are approved by the county superintendents of the counties involved. The words "county superintendent" are singular, but the words "of the counties involved" are plural, meaning that multilateral judicial action of the county superintendents of all counties involved is required, and that unilateral action by any one of them is insufficient.

The word "approved" we conclude has the connotation of adjudication and not an exercise of discretion or a ministerial act. State ex rel. Johnson v. Tilley, 137 Neb. 173, 288 N. W. 521. Thus, if the creation of a new district from other districts, or the making of boundary changes thereof across county lines is requested in the manner provided by section 79-402, R. S. Supp., 1951, then the scope of action by the county superintendents of the counties involved is a multilateral mandatory duty, judicial in nature, as distinguished from discretionary authority. This is true because a statutorily defined group of persons, "the petitioners," have an interest in having the act done, or a claim de jure that the approval shall be given only if the petitions filed with each county superintendent of the counties involved are judicially found and determined after notice and hearing to be sufficient by all of such county superintendents concurrently acting multilaterally. Conversely, they have no jurisdiction and mandatory duty to grant the changes requested.

In Report of Attorney General, Nebraska, 1951-1952, p. 595, will be found a comprehensive legislative history of the provisions of section 79-402, R. S. Supp., 1951, and statutes in pari materia therewith, together with administrative and judicial construction thereof, since 1869. Numerous statutes and authorities are cited and discussed therein, which require no repetition here.

In the light of the foregoing discussion and authorities, we have examined the transcript presented herein. Summarized, it discloses as follows: The petition of

School District No. 17, filed with the county superintendents involved on June 26, 1952, unconditionally requested that it be attached to School District No. 9. It contained the names of eight purportedly "qualified school electors and legal voters" of the district. The signatures of Delton Meyer and Clodio B. Aragon, hereinafter mentioned, were included. All of the signatures were verified. However, the petition does not show upon its face by any allegation or language that the eight signatures constituted 55 percent or more of the legal voters of the district. "A LIST (Not signatures) OF THE LEGAL VOTERS IN SCHOOL DISTRICT NO. 17, KIMBALL COUNTY, NEBRASKA" consisting of 14 names, was presented to the superintendents, but the attached oath simply swore that such "named persons are all legal and qualified school electors in School District No. 17, * * * as I verily believe," and did not swear under oath that it was a "list * * * of all the legal voters" in the district, as required by section 79-404, R. R. S. 1943. The insufficiency of such petition and oath is apparent upon its face.

The petition of the board of education of School District No. 9 was not filed with the county superintendents involved until September 17, 1952. Further, such petition was simply a new conditional proposal and not an acceptance of the unconditional petition filed by School District No. 17. Therein, the attachment of School District No. 17 to School District No. 9 was made dependent upon the acceptance of two conditions, to wit: (1) That School District No. 17 should be required to continue its corporate existence and continue its own school program at its own expense until June 1, 1953; and (2) that School District No. 9 contemplated the holding of an election to determine whether or not bonds of indebtedness should be issued, which bonds of indebtedness might be authorized and issued prior to June 1, 1953, in which event School District No. 17 and its included properties should be required to have the same relation to

and bear the same responsibilities and liabilities with respect to all the indebtedness of School District No. 9 which exists June 1, 1953, as if it existed prior to September 17, 1952, or was incurred after June 1, 1953.

In that regard, section 79-402, R. S. Supp., 1951, does provide that: "A newly enlarged district shall assume any indebtedness *previously incurred* by any one or more districts annexed, *unless otherwise specified in the petitions.*" (Italics supplied.) However, the proposed bonded indebtedness here involved is not an indebtedness previously incurred, and the petition of School District No. 17 did not mutually accept or specify that it would assume its share of such subsequent bonded indebtedness. It cannot be assumed from the record before us that the signers of the petition in School District No. 17 did or would have signed the same or did or would have consented thereto had they known that the indebtedness for additional school bonds was proposed to be subsequently voted by School District No. 9 and imposed upon School District No. 17 without the legal voters thereof having any voice in the matter, or that annexation was proposed to be delayed for another school year at their expense.

Such question has not been previously raised or adjudicated in this jurisdiction. However, there are authorities from other jurisdictions. As we view it, section 79-402, R. S. Supp., 1951, which authorizes creation of a new school district from other districts or a change in the boundaries of any district, contemplates mutuality of action by the districts affected and requires a concurrence of the respective petitions filed therefor in all material respects with regard to the changes requested therein, and unless the petitions of the separate districts affected concur in substantially the identical action requested, the county superintendent or superintendents are without jurisdiction or authority to act thereon. Smith v. State ex rel. Cole, 47 Okl. 682, 149 P. 884; Hopkins v. Lee, 217 Miss. 624, 64 So. 2d 759.

The insufficiency of the petition of School District No. 9 is apparent upon its face.

In the case at bar, notice was duly given, and a hearing was had on October 29, 1952, at Kimball, before the county superintendents of Kimball and Cheyenne counties, acting multilaterally. Thereafter, on November 20, 1952, a written record of the proceedings and statements of findings by them was signed by such superintendents. It recited, among other things, that a legal voter had challenged the right of Delton Meyer and Clodio B. Aragon to sign the petition of School District No. 17 as legal voters therein. The county superintendent of Cheyenne County stated it was her opinion that in view of the fact that the challenged signers on the petition of School District No. 17 had subscribed to the oath of qualifications required by section 79-428, R. R. S. 1943 (relating to school district elections), the required 55 percent of the electors of School District No. 17 had signed the petition and "the request of the petitions should be granted and she will sign an order approving the petitions." However, she never did sign such an order. A situation comparable in material respects arose in School District v. Elliott, 90 Neb. 89, 132 N. W. 922, wherein it is said: "Assuming that the petition was a sufficient compliance with the law to give the board jurisdiction it is very clear that the board took no such action as would lay the foundation for review. * * * They found the petition was 'correct,' and made a 'request' that the change in the district be made, but took no action making it. * * * There was no kind of order made from which any appeal or proceeding in error could be taken. No action is shown to have been taken by the superintendent, and the boundary lines of the districts were left as they had before that time existed."

On the other hand, the defendant, county superintendent of Kimball County, expressed her belief that next to the last sentence of section 79-402, R. S. Supp.,

1951, was not mandatory but discretionary, and further stated "that in her opinion said districts should not be merged and the request of the petitions should be denied and * * * that she would not approve the petitions and that she would not enter any order providing for alteration of the existing District 17 of Kimball County, Nebraska and District 9 of Cheyenne County, Nebraska."

In that regard, as stated in 56 C. J., Schools and School Districts, § 73, p. 238: "The recital, in an order otherwise valid, of incorrect reasons for making it does not render it void. The making of an order or passage of a resolution to create or alter a district, which is ineffective on account of formal defects therein, does not prevent the board from entering a proper order or passing a proper resolution at a subsequent time." See, also, 78 C. J. S., Schools and School Districts, § 44, p. 733, where it is said: "It has been held that an order may be amended to speak the truth, and that an order which is deficient or defective may be amended, completed, and perfected, even after a suit attacking the order has been instituted." The latter situation actually arose in this case.

In that connection, on August 7, 1953, after plaintiffs had filed their original petition in error on November 26, 1952, defendant, county superintendent of Kimball County, prepared and filed a complete, perfected, and final order denying the relief requested in the respective petitions. The county superintendent of Cheyenne County never signed such order. Thereafter, on August 14, 1953, the trial court sustained defendant's demurrer to plaintiffs' original petition, and gave plaintiffs 30 days to file an amended petition, which they did without objection on August 24, 1953, praying that the orders of November 20, 1952, and August 7, 1953, should be reversed.

In the order of August 7, 1953, it was found and adjudged by defendant herein that the petition of School

District No. 17 was insufficient to give the county superintendents jurisdiction for the reasons that no list of all the legal voters of such district under oath, as required by section 79-404, R. R. S. 1943, was ever presented to the county superintendents, and the petition did not allege and in any event was not signed by 55 percent or more of the legal voters of School District No. 17, because Delton Meyer and Clodio B. Aragon were not legal voters of School District No. 17. It found and adjudged that the petition of School District No. 17 was unconditional, but the petition of School District No. 9, filed long after the petition of School District No. 17, was insufficient because it was not unconditional but was predicated on conditions prejudicial to the rights of the legal voters of School District No. 17 who never accepted the conditional proposals made in the petition of School District No. 9. She erroneously found and adjudged that School District No. 9 was required to give the superintendents a sworn list of the legal voters of such district and that next to the last sentence of section 79-402, R. S. Supp., 1951 was discretionary and not mandatory, but such conclusions did not make the order void.

Defendant's demurrer to plaintiffs' amended petition, and defendant's motion to dismiss were overruled, and defendant answered, relying among other defenses upon the alleged lack of jurisdiction of the county superintendents, as disclosed by the transcript, and praying for dismissal of plaintiffs' amended petition. After a hearing, the trial court found that the amended petition of plaintiffs in error was not well taken and rendered judgment dismissing same at plaintiffs' cost.

For reasons heretofore stated, we conclude that the judgment of the trial court should be and hereby is affirmed. All costs are taxed to plaintiffs.

AFFIRMED.

MORRIS JESSEN ET AL., APPELLEES, V. MARY BEARD BLACKARD, TRUSTEE, APPELLANT.
71 N. W. 2d 100

Filed June 17, 1955. No. 33566.

1. **Public Lands: Landlord and Tenant.** A tenant holding over after the invalidation of a lease of school lands becomes a tenant at sufferance.
2. ———: ———. A tenant at sufferance on school lands is the owner of crops planted on such lands during the continuance of the tenancy.
3. **Constitutional Law: Statutes.** An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; and it is, in legal contemplation, as inoperative as though it had never been passed.
4. ———: ———. In an action wherein relief is sought pursuant to the terms of a statute which has been declared unconstitutional this court is required to regard the statute as nonexistent and to deny relief whether or not unconstitutionality of the act has been pleaded as a defense.

APPEAL from the district court for Garden County: CLAIBOURNE G. PERRY, JUDGE. *Reversed and remanded with directions.*

Torgeson, Halcomb & O'Brien, for appellant.

Clarence M. Miller and *Robert A. Nelson,* for appellees.

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

YEAGER, J.

In this case an opinion was previously adopted which appears at 159 Neb. 103, 65 N. W. 2d 345. After rehearing and on further consideration it has been concluded that the determination therein is incorrect. The opinion is therefore withdrawn.

The action, as it comes to this court, is by Morris Jessen and Ilse Jessen, plaintiffs and appellees, against Mary Beard Blackard, Trustee, defendant and appellant, to recover damages in the amount of $50,000 for conversion of a crop of wheat grown and harvested by de-

fendant on described school lands of which the defendant had been lessee and of which the plaintiffs were at the time lessees. In the action the defendant filed a cross-petition in which she claimed a right of recovery of money against the plaintiffs on account of their failure to pay the appraised value of improvements on the land which belonged to the defendant. Issues were joined on the petition and cross-petition and a trial was had to the court, a jury having been waived.

At the conclusion of the trial a judgment was rendered in favor of plaintiffs and against the defendant, including interest, in the amount of $20,253.71, and costs.

A motion for new trial was duly filed and overruled after which the defendant appealed from the judgment and the ruling on the motion.

There are numerous assignments of error as grounds for reversal but the question which is basic in the determination of this appeal is that of ownership of improvements placed on school lands by a lessee which remain thereon after the lands have been leased by the Board of Educational Lands and Funds to a later lessee and which have not been paid for by the later lessee, and as incidents of this the questions of whether or not plaintiffs were entitled to the judgment in their favor, and whether or not the defendant was entitled to a judgment on her cross-petition.

The pertinent facts upon which the adjudication must depend are not in substantial dispute. They are as follows: The defendant had been the owner of a school land lease on the lands in question which expired on December 31, 1950. On July 11, 1950, she applied for a new lease. Pursuant to the application she was granted a new lease for 12 years with the term beginning January 1, 1951. This lease was ineffective. It was ineffective for the reason that the statute under which it was issued was declared unconstitutional by the decision of this court rendered in State ex rel. Ebke v. Board of Educational Lands & Funds, 154 Neb. 244,

47 N. W. 2d 520. On August 27, 1951, the defendant was notified that her lease was void and that it had been cancelled. Thereafter, but before a new lease was issued upon the lands, the defendant summer-fallowed the land and planted winter wheat thereon. On the 3rd, 10th, and 17th of April 1952, notice was published that a lease on the land would be sold at public auction on April 25, 1952. The sale was held and the plaintiffs made the highest bid. On that date the plaintiffs made application for lease in accordance with their bid and paid their bid, a lease fee, and the rental for the year beginning January 1, 1952, and ending December 31, 1952. In the application which was in writing the plaintiffs agreed to pay for the improvements as provided by law. Thereafter on April 28, 1952, a lease was issued to the plaintiffs for a 12-year period beginning as of January 1, 1952.

On June 13, 1952, no appraisement having been made of improvements on the land and no payment having been made therefor by plaintiffs, the defendant requested that an appraisement be made. In response thereto the county commissioners did on June 24, 1952, make an appraisement. The wheat crop was appraised at $53,750. From this was deducted as costs of harvesting $3,750 leaving a net appraisement of wheat of $50,000. The other improvements were valued at $1,526. From the total net appraisment of $51,526 they deducted $7,500 for insurance. In this wise the net value of improvements was fixed at $44,026. By stipulation evidence was adduced that the wheat which had been planted on the land was of the value of $7,500 as of January 1, 1952. This was objected to by the defendant on the ground that it was irrelevant, immaterial, incompetent, and not in proof of any issue in the case.

The plaintiffs not having paid or tendered payment in accordance with the appraisement, the defendant on July 11, 1952, proceeded to and did harvest the wheat. She harvested 14,853 bushels and 20 pounds of No. 2

wheat which she sold at the market price of $1.89 a bushel receiving therefor $28,072.80. After deducting the cost of harvesting she had net $23,682.20.

On July 17, 1952, still without having paid or tendered payment for improvements, plaintiffs demanded delivery by August 1, 1952, of 25,000 bushels of No. 1 wheat and a bill of sale of all improvements listed in the appraisement whereupon they offered to pay to defendant $44,026, the appraised value of wheat, plus $3,750 which the defendant had paid, for harvesting the wheat crop. Apparently the defendant failed to respond to this offer. On August 4, 1952, plaintiffs paid to the county treasurer for the benefit of defendant $1,526, that being the appraised value of all improvements except the wheat. There is no information as to whether or not the defendant accepted this $1,526.

The claim of plaintiffs by their petition is for the reasonable value of the wheat which was harvested by the defendant. There is no offer or tender of set-off against this value of the amount of the appraisement.

The defendant by answer denied the claim of plaintiffs. By her answer and cross-petition she asserted substantially that she was entitled to receive payment pursuant to the terms of the appraisement. The response of plaintiffs to this was a general denial.

It appears that all points necessary to be considered in the determination of the rights of parties under both the action and the cross-action inhere in and flow from the question of whether or not the plaintiffs under the facts and applicable law may maintain their action for conversion.

A premise pertinent in this determination is that after her lease was invalidated the defendant became a tenant at sufferance. State v. Cooley, 156 Neb. 330, 56 N. W. 2d 129; Watkins v. Dodson, 159 Neb. 745, 68 N. W. 2d 508.

Another premise is that being a tenant at sufferance on the land in question she was the owner of the crops

which she had planted thereon. Sornberger v. Berggren, 20 Neb. 399, 30 N. W. 413; Monday v. O'Neil, 44 Neb. 724, 63 N. W. 32, 48 Am. S. R. 760.

The plaintiffs' cause of action is based on their interpretation of section 72-240.06, R. R. S. 1943. Their substantial theory is that by virtue of this section when they obtained their lease they acquired title to wheat growing on the land and on this basis the action was instituted.

The defendant's cross-action is based on her interpretation of this same section. Her substantial theory is that when the plaintiffs acquired their lease they were entitled to the crops for which they were obligated to pay pursuant to appraisal made agreeable to the terms of section 72-240.06, R. R. S. 1943, and that in the interest of good husbandry she harvested the wheat and marketed it at the best price obtainable.

At this point it should be observed that neither party at any point in the proceedings, until the case came to this court on rehearing, raised the question of the constitutionality of section 72-240.06, R. R. S. 1943. It was presented on rehearing by the plaintiffs.

Section 72-240.06, R. R. S. 1943, by its terms, defines improvements on school lands, it provides for appraisement of improvements, it effectually obligates a new lessee to pay the amount of the appraisement, and also it effectually obligates the old lessee to surrender to the new lessee the improvements and to accept the appraisement as compensation therefor.

In Watkins v. Dodson, *supra,* this court declared this section unconstitutional on the ground that its effect was to permit the taking of private property without due process of law. That case, like this, was one where a new tenant on school lands was seeking to recover for crops which had been harvested by the old tenant.

A recovery was denied and the statutory provision was declared unconstitutional for the reason that in the provision for appraisement no opportunity was afforded

the old lessee to appear and be heard by testimony or otherwise with regard to the appraisement of the property to be taken from him.

The point here however is not the reason why the provision was declared unconstitutional but that it was declared unconstitutional. It having been declared unconstitutional it is nonexistent.

In Board of Educational Lands & Funds v. Gillett, 158 Neb. 558, 64 N. W. 2d 105, it was said: "An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; and it is, in legal contemplation, as inoperative as though it had never been passed."

In that case it was also said: "An interpretation given to a statutory or constitutional provision by the court of last resort becomes a standard to be applied in all cases, and is binding upon all departments of government, including the Legislature."

In Propst v. Board of Educational Lands & Funds, 156 Neb. 226, 55 N. W. 2d 653, certiorari denied 346 U. S. 823, 74 S. Ct. 39, 98 L. Ed. 348, it was said: "The law of this state has always been that an unconstitutional statute is a nullity, is void from its enactment, and is incapable of creating any rights or obligations." See, also, Finders v. Bodle, 58 Neb. 57, 78 N. W. 480; Whetstone v. Slonaker, 110 Neb. 343, 193 N. W. 749; Lennox v. Housing Authority of City of Omaha, 137 Neb. 582, 290 N. W. 451.

Under these authorities it is clear that the court has a duty of its own to perform. It may not properly grant relief based upon a statute which is nonexistent or one which has become nonexistent by reason of judicial declaration of unconstitutionality by this court whether the question has been raised by the parties or not. In the instance of previous declaration of unconstitutionality this court will take notice of its own judgment and opinion.

We hold that this principle is applicable to the case

at bar since it was not finally disposed of before the declaration of unconstitutionality of the statutory provision in question.

Effects of this are that there was no statutory definition of improvements on school lands; that there was no provision for appraisement of improvements on school lands; that there was no requirement that a new lessee on school lands should take or pay for improvements of a former lessee on school lands; and that there was no requirement that the old lessee of school lands should deliver to a new lessee his improvements on school lands.

Further effects are that the wheat and the other movable property in question on this land at the time she harvested the wheat was the property of the defendant and she was free to do with it as she chose. She chose to harvest and keep the wheat and on account thereof she has no claim against the plaintiffs. Apparently some other property was left which was kept by plaintiffs. She is entitled to the value of this other property from the plaintiffs. The plaintiffs obtained no rights to the wheat produced on the land by the defendant, hence their cause of action is not valid.

The judgment of the district court is reversed and the cause is remanded with directions to dismiss plaintiffs' petition, and with directions to dismiss defendant's cross-petition except as to that portion wherein she claims a right of recovery for the value of property other than wheat. If the tendered payment for improvements other than wheat has been accepted by the defendant then that portion of the cross-petition shall also be dismissed, but if it has not, then there shall be a new trial to determine whether or not there was such property taken and if so the value thereof.

REVERSED AND REMANDED WITH DIRECTIONS.

THOMAS RUSSO ET AL., APPELLANTS, V. FRED E. WILLIAMS AND CORA B. WORTH, EXECUTORS OF THE ESTATE OF GEORGE E. WILLIAMS, DECEASED, ET AL., APPELLEES.

71 N.W. 2d 131

Filed June 17, 1955. No. 33665.

1. **Fraud: Election of Remedies.** A party who has been induced to enter into a contract by fraud has, upon its discovery, an election of remedies. He may either affirm the contract and sue for damages or rescind it and be reinstated to the position he was in before it was consummated.
2. **Fraud: Rescission.** To maintain an action for rescission because of false representations the party seeking such relief must allege and prove what representations were made; that they were false and so known to be by the party charged with making them or else were made without knowledge as a positive statement of known fact; that the party seeking relief believed the representations to be true; and that he relied and acted upon them and was injured thereby.
3. **Fraud.** Fraud is never presumed, but must be established by the party alleging it by clear and satisfactory evidence.
4. ———. In an action in which relief is sought on account of fraud, the burden of alleging and proving the existence of all the elements thereof is upon the party seeking such relief.
5. ———. If a party, without knowing whether his statements are true or not, makes an assertion as to any material matter upon which the other party has relied, the party defrauded will, in a proper case, be entitled to relief.
6. **Vendor and Purchaser: Fraud.** A purchaser of real estate has a right to believe and rely upon representations made to him by his vendor as to the character, quality, and location of the property, when the facts concerning which the representations are made are unknown to the vendee.
7. **Fraud.** To maintain an action for fraudulent representations it is not only necessary to establish the telling of the untruth, knowing it to be such or that it was told without knowledge of the facts, but also to prove that the plaintiff had a right to rely upon it, did so rely, altered his condition because thereof, and suffered damages thereby.
8. ———. A person is justified in relying upon a representation made to him where the representation is a positive statement of fact and where an investigation would be required to discover the truth.
9. ———. The mere fact that one makes an independent investigation or examination, or consults with others, does not nec-

essarily show that he relies on his own judgment or on the information so gained, rather than on the representations of the other party, nor does it give rise to a presumption of law to that effect. If, under the circumstances, he is unable to learn the truth from such examination or investigation or, without fault on his part, does not learn it and in fact relies on the representations, he is entitled to relief, all other ingredients of liability being present.

10. **Fraud: Rescission.** Whether the right of one party to a contract to rescind the same arises on account of fraud inducing the contract or on account of a breach by the other party of a dependent covenant, such right is barred by failure of the one party, for an unreasonable time after knowledge of the facts giving rise to such right, to declare a rescission and disclaim the benefits of the contract.
11. **Equity.** The question whether laches exists in a particular case depends upon its own peculiar circumstances and is addressed to the sound discretion of the court, the question of the unreasonableness of the delay depending largely upon the nature of the property in the particular case.
12. **Fraud: Specific Performance.** As a general rule, if one party has been induced to make a contract by reason of any material misrepresentation on the part of the other party or his agent, specific performance will be denied, whether the misrepresentation was willful and intended, or made innocently, or with an honest belief in its truth.
13. ———: ———. The specific performance of a contract by a court of equity is not generally demandable or awarded as a matter of absolute legal right but is directed to and governed by the sound legal discretion of the court, dependent upon the facts and circumstances of each particular case. It will not be granted where enforcement would be unjust.
14. **Damages: Rescission.** The remedies of rescission and damages are inconsistent; the former proceeding upon disaffirmance and the latter upon affirmance of the contract.
15. **Rescission.** If the contract is actually rescinded it thereby becomes nonexistent.
16. **Election of Remedies.** However, an election of remedies is not made if, in fact, the remedy sought does not exist.

APPEAL from the district court for Buffalo County: ELDRIDGE G. REED, JUDGE. *Reversed and remanded with directions.*

Dryden & Jensen and *Paine & Paine*, for appellants.

Ward W. Minor, Fitzgerald, Hamer, Brown & Leahy, and *Blackledge & Sidner,* for appellees.

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

WENKE, J.

Thomas Russo and Elizabeth Russo, husband and wife, brought this action in the district court for Buffalo County against Fred E. Williams and Cora B. Worth, executors of the estate of George E. Williams, deceased. The purpose of the action is to rescind a contract entered into by the plaintiffs with these defendants for the purchase of a motel property located in Kearney, Nebraska. The basis for the action is the claim that Fred E. Williams, one of the executors, made false and fraudulent representations about the property in order to induce plaintiffs to buy it and that plaintiffs, relying thereon, were induced to do so. The trial court found against the plaintiffs and dismissed their action but granted defendants specific performance of the contract on the basis of the escrow agreement entered into pursuant thereto, as prayed for in their cross-petition. Plaintiffs filed a motion for new trial and have perfected this appeal from the overruling thereof.

The Fort Kearney National Bank of Kearney, Nebraska, was also made a defendant. It is the escrow agent of the parties for the purpose of carrying out the provisions of the agreement, which provisions are more specifically set out later in this opinion. The bank has no interest in the controversy except to carry out the orders of the court entered herein. This it has agreed to do as is evidenced by its answer.

In regard to the matter complained of appellants alleged: "* * * the executor of the estate of Geroge (George) E. Williams, Fred E. Williams, made certain false and fradulent (fraudulent) representations to these plaintiffs for the purpose of inducing them to purchase said real estate, as hereinafter described and amongst

other things, represented to these plaintiffs with reference to said premises, as follows: (1) That said premises were free of termites and were in good condition. (2) That the plumbing in said premises was in good serviceable and working conditon. (3) That the furnace in the main office building was in good serviceable and workable condition. (4) That the entire premises were in good serviceable and working condition, and that said property was a good income property. (5) That the sewer and septic tank on said premises were in good working and serviceable condition."

They then alleged further: "* * * that said premises were not in fact in good condition; that they were infested with termites; that the sewer was not in good condition nor the septic tank therein; that the plumbing was in bad condition and corroded; that the furnace and stoker in the main office building was not in workable condition whatsoever; that in fact, said buildings and all of said premises were in bad condition, and operation of said cabin camp would necessitate the expenditure of large sums of money to place it back into condition to operate again."

This action, being equitable in character, is triable here de novo in conformity with section 25-1925, R. R. S. 1943, which requires this court to: "* * * reach an independent conclusion as to what finding or findings are required under the pleadings and all the evidence, without reference to the conclusion reached in the district court or the fact that there may be some evidence in support thereof." See, also, O'Brien v. Fricke, 148 Neb. 369, 27 N. W. 2d 403; Rettinger v. Pierpont, 145 Neb. 161, 15 N. W. 2d 393; Krelle v. Bowen, 128 Neb. 418, 259 N. W. 48.

That rule is, however, subject: "* * * to the condition that when the evidence on material questions of fact is in irreconcilable conflict this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their

manner of testifying and must have accepted one version of the facts rather than the opposite." Rettinger v. Pierpont, *supra*. See, also, O'Brien v. Fricke, *supra;* Krelle v. Bowen, *supra;* Chitwood Packing Co. v. Warner, 138 Neb. 800, 295 N. W. 882.

This latter has particular significance here for a careful consideration of the testimony of the appellants leaves one in doubt as to just how much credence can be given to parts thereof.

George Edward Williams, also referred to as George E. Williams, died on November 13, 1951, the owner of the Midway Auto Court, the property herein involved. It consists of about 3 acres of land located in the eastern part of Kearney, Nebraska, on which are located the following buildings: One combination residence and office building which is two stories high and has a basement, 20 one-room units referred to as cabins, and a two-story building used for storage purposes. We shall hereinafter refer to the combination residence and office building as the residence-office building. In addition to the above improvements used for motel purposes it also has space available and rented for the use of trailers. The address of the motel is 1620 East Twenty-fifth Street, Kearney, Nebraska.

George Edward Williams, whom we shall herein refer to as the deceased, purchased this motel property in the early part of 1946. Since 1928 he had been a rancher, living on his ranch located some 40 miles northeast of Douglas, Wyoming. He sold this ranch when he bought the motel property. He moved into the residence-office building located thereon and continued to live therein and operate the motel business until his death.

The deceased was, at the time of his death, about 76 years old. He was not married. He left a brother, Fred E. Williams, and a sister, Cora B. Worth, surviving. He died testate and in his will, which was allowed by the county court of Buffalo County and admitted to probate, nominated his brother and sister as executors.

They qualified as such and are now, and have been since December 14, 1951, the duly appointed, qualified, and acting executors of his estate. We shall herein refer to them as the executors.

The deceased's will directed the executors to sell all real estate and personal property not specifically disposed of therein. The motel property was not specifically disposed of by the will. Accordingly, in January 1952, the executors started to advertise it for sale. They put an ad in a Grand Island paper. The appellants saw this ad and contacted the executors. This was about the middle of March 1952. As a result of negotiations that followed they entered into a contract for the purchase thereof on March 20, 1952. The consideration for the purchase of the motel property, together with all equipment and furnishings therein, with certain exceptions not here material, was $47,500 of which $5,000 was paid at the time the contract was signed. The balance was to be paid as follows: $20,000 at such time as the executors furnished an abstract showing merchantable title with all taxes paid, including those for 1951, same to be furnished on or before April 15, 1952, with the balance of $22,500 to be paid in the form of a first mortgage on the premises. This mortgage was to run for a period of 3 years and bear interest at 5 percent.

Abstracts to the property were furnished appellants but their counsel asked that certain requirements in regard thereto be met, particularly the payment of the federal estate tax. It was apparent these requirements could not be met by April 15, 1952. Possession was important to appellants as the tourist season was about to begin. In order to avoid any delay in this regard an escrow agreement was entered into. It is dated April 15, 1952. Therein the Fort Kearney National Bank of Kearney was named escrow agent. It agreed to act as such on April 17, 1952. Thereupon the parties delivered certain instruments to the bank and, in regard thereto, the escrow agreement provides: "* * * which

documents shall be held by said bank in escrow under the following instructions, to-wit: A. Abstract of title is now in the hands of abstractor for the purpose of making certain entries as requested by the purchasers in the opinion rendered by Paine & Paine, Attorneys of Grand Island, Nebraska. B. The Federal Estate Tax for the estate tax due from the estate of George E. Williams being probated in the County Court of Buffalo County, Nebraska, has not been determined, nor paid. C. When the above title is approved and Federal Estate tax determined and paid to the satisfaction of the purchasers, the Escrow Agent, upon being so instructed is to turn over to the purchasers the deed for the real estate and bill of sale for personal property and equipment, and to turn over to the sellors the sum of $20,000.00 and note & mortgage in amount of $22,500 as executors of the estate of George E. Williams."

The appellants went into possession on April 22, 1952, although, at their suggestion, Mr. and Mrs. Fred E. Williams had opened the motel during the week prior thereto. They have remained in possession and operated the motel property ever since. However, on September 8, 1952, appellants signed a notice of rescission which, immediately thereafter, they caused to be served on the appellees. Subsequent thereto, on September 29, 1952, they commenced this action.

Although appellants' counsel has never given his approval thereof we find the executors have furnished abstracts showing good merchantible title and have fully met the requirements of appellants' counsel in regard thereto, including the payment of federal estate tax. The federal estate tax was paid on July 2, 1952, and a certificate was obtained releasing the property from any estate tax lien on September 15, 1952. Thus the executors have fully performed the agreement and are entitled to the performance thereof unless good cause exists for denying it.

A party who has been induced to enter into a contract

by fraud has, upon its discovery, an election of remedies. He may either affirm the contract and sue for damages or disaffirm it and be reinstated to the position he was in before it was consummated. Rayburn v. Norton, 117 Or. 328, 243 P. 560.

As stated in 55 Am. Jur., Vendor and Purchaser, § 593, p. 986: "* * * equity may decree cancellation or rescission of a contract for fraud or misrepresentation constituting an inducement to its execution, especially when the legal remedy is inadequate, or the equitable relief by way of cancellation is more complete." See, also, State ex rel. Sorensen v. State Bank of Omaha, 128 Neb. 705, 260 N. W. 195; 66 C. J., Vendor and Purchaser, § 456, p. 813.

To maintain an action for rescission because of false representations the party seeking such relief must allege and prove what representations were made; that they were false and so known to be by the party charged with making them or else were made without knowledge as a positive statement of known fact; that the party seeking relief believed the representations to be true; and that he relied and acted upon them and was injured thereby.

" 'Fraud is never presumed, but must be established by the party alleging it by clear and satisfactory evidence.' Hampton v. Webster, 56 Neb. 628." Burnham v. Bennison, 126 Neb. 312, 253 N. W. 88. See, also, Krelle v. Bowen, *supra;* Davidson v. Crosby, 49 Neb. 60, 68 N. W. 338; Ish v. Finley, 34 Neb. 419, 51 N. W. 1031.

"In an action in which relief is sought on account of fraud, the burden of alleging and proving the existence of all the elements thereof is upon the party seeking such relief." Leichner v. First Trust Co., 133 Neb. 170, 274 N. W. 475.

However, in Rettinger v. Pierpont, *supra,* we said: " '* * * courts of equity do not restrict themselves by the same rigid rules as courts of law in the investigation of fraud and in the evidence and proofs required to

establish it. * * * the proof must be sufficient to satisfy the conscience of the chancellor or court that fraud is really existent, and to do this, it must be sufficient to overcome the natural presumption, which is always of considerable force, that men are honest and act from correct motives.' 19 Am. Jur., sec. 43, p. 66."

In this regard we said in Trebelhorn v. Bartlett, 154 Neb. 113, 47 N. W. 2d 374: "The general rule that fraud is not presumed but must be proved by the party alleging it does not mean that it cannot be otherwise proved than by direct and positive evidence. Fraud in a transaction may be proved by inferences which may reasonably be drawn from intrinsic evidence respecting the transaction itself, such as inadequacy of consideration, or extrinsic circumstances surrounding the transaction." See, also, Falkner v. Sack Bros., 149 Neb. 121, 30 N. W. 2d 572.

And in Herlan v. Bleck, 148 Neb. 816, 29 N. W. 2d 636, we said: "Direct evidence is not essential to establish fraud. It may be inferred from circumstances; but such inference must not be guesswork or conjecture, but the rational and logical deduction from the circumstances proved." See, also, Alter v. Bank of Stockham, 53 Neb. 223, 73 N. W. 667; Thurman v. City of Omaha, 64 Neb. 490, 90 N. W. 253; 24 Am. Jur., Fraud and Deceit, § 282, p. 128.

As stated in Glissman v. Orchard, 139 Neb. 344, 297 N. W. 612: "'* * * Evidence simply justifying a suspicion is not sufficient. * * *' Bank of Commerce of Grand Island v. Schlotfeldt, 40 Neb. 212, 58 N. W. 727."

Shortly after the deceased moved into and started operating the motel termites were discovered in some of the buildings. Sometime between when they were discovered and the spring of 1948 the deceased employed George H. Quackenbush, a local termite exterminator, to get rid of them. Quackenbush attempted to do so but it is apparent he was not completely successful in his efforts. After Quackenbush attempted to do so the

deceased became aware of the fact that there were termites still working in the buildings of the motel, as did others who worked for him.

On several occasions Fred E. Williams and his wife, as well as Cora B. Worth, visited the deceased at the motel and stayed with him in the residence-office building. We are satisfied none of them ever became aware of the fact that there were termites in the property nor do we think any of them became aware of that fact subsequent to his death and before the sale of the motel to appellants, although we are satisfied that termites did exist therein at the time of the sale.

Termites seem to work in places where they are not easily observed and apparently it takes somewhat of an expert to discover their presence unless they are discovered by chance or have advanced to the stage of destruction where the damage itself makes their presence known. We do not think such was the situation here at or before the time of the sale. It would appear that neither the appellants nor the executors had any knowledge of or ever had any experience with termites. They would apparently not have recognized them even if they had seen them. During the course of their negotiations, which led to the agreement, we find none of the parties thereto became aware of the presence of termites in the motel property.

During the course of the parties' dealings which, on four different days immediately preceding the contract, took place at the motel, Fred E. Williams, one of the executors, told appellants the place was in good or perfect condition and ready to be opened and operated. These statements were made in the presence of the other executor. We find appellants believed what Fred E. Williams said in this respect and were induced to enter into the agreement because thereof.

Thomas Russo, who was 49 years of age at the time of trial, is a native of New York City. There he worked in a watch factory as a material control clerk. In 1951

he came to Nebraska to marry Elizabeth Strasser. They were married on July 10, 1951. Subsequent to their marriage they lived in Grand Island, Nebraska, in her home located at 2007 West Louise Street. He lived there until they moved to the motel on April 22, 1952. While living in Grand Island he worked for 3 or 4 weeks in an ordnance plant doing the work of a laborer. He had never had any experience operating a motel.

Elizabeth Russo, the other appellant, has a high school education. She has worked as a theatre cashier, saleslady in a department store, operated a beauty parlor, and for 3 years took care of the desk in a hotel. The latter was in the Mayfair Hotel in Grand Island, which was then owned and being operated by her then husband, Harold G. Strasser. While taking care of the desk and office she hired the help and took care of the linens. She was not experienced in operating a motel.

The evidence shows both appellants were inexperienced in dealing with real estate; that they had never had any experience with termites; and that they had no knowledge of the damage termites can do.

Fred E. Williams, one of the executors, was 68 years of age at the time of the trial. He has been a rancher since 1908 and, at the time of the sale, was operating a cattle ranch near Medora, North Dakota, and a sheep ranch near Oakes, North Dakota. Formerly he owned and lived on a ranch joining that of the deceased some 40 miles northeast of Douglas, Wyoming. He sold this ranch in 1948 and moved to North Dakota where he is now living. During his visits with the deceased Fred never operated the motel nor did he do so after the death of his brother. He never made a careful check thereof and only observed it generally as he saw it while visiting or while showing it to some seven or eight prospective purchasers.

Cora B. Worth, the other executor, lives in Fairbury, Nebraska. She is 75 years of age and has been a widow for 40 years. She was present on some of the occasions

when the representations as to the condition of the motel were made by her brother Fred.

After the contract was entered into on March 20, 1952, and before appellees moved into the premises on April 22, 1952, Thomas Russo came to the motel on several occasions to do some work, principally painting the showers. He also had electric wall switches put in some of the cabins. However, it was not until the latter part of June 1952, about the 26th or 27th, that he first became aware of termites. At that time some stranger came to the place and showed him where they were in the basement of the residence-office building. Thereafter, on June 28, 1952, he found some himself while he was fixing a sill in the residence-office building. He showed them to his wife.

It is apparent, from what we have already said, that executor Fred E. Williams had no knowledge of the fact that termites existed in the motel property when he told appellants that the place was in good or perfect condition. However, knowledge in this respect is not essential if the statements made are such that they are material and relied on by the other party and induced him to act to his injury.

As early as Phillips v. Jones, 12 Neb. 213, 10 N. W. 708, this court held: "And if a party, without knowing whether his statements are true or not, makes an assertion as to any particular matter upon which the other party has relied, the party defrauded in a proper case will be entitled to relief."

And in Newberg v. Chicago, B. & Q. R. R. Co., 120 Neb. 171, 231 N. W. 766, we said: "This court was early committed to the doctrine: 'Whether in an action for damages for false representations it is necessary either to aver or prove the scienter, the authorities do not agree. The better rule, and the one adopted by this court, is that the intent or good faith of the person making false statements is not in issue in such a case.' Johnson v. Gulick, 46 Neb. 817. 'A purchaser of real

estate has a right to believe and rely upon representations made to him by his vendor as to the character, quality, and location of the property, when the facts concerning which the representations are made are unknown to the vendee.' Hoock v. Bowman, 42 Neb. 80. See Farley v. Weiss, 76 Neb. 402." See, also, Kuhlman v. Shaw, 91 Neb. 469, 136 N. W. 55; Gerner v. Mosher, 58 Neb. 135, 78 N. W. 384, 46 L. R. A. 244; Paul v. Cameron, 127 Neb. 510, 256 N. W. 11; Falkner v. Sacks Bros., *supra;* Linch v. Carlson, 156 Neb. 308, 56 N. W. 2d 101; Moore v. Scott, 47 Neb. 346, 66 N. W. 441.

As stated in Peterson v. Schaberg, 116 Neb. 346, 217 N. W. 586: "An instruction to a jury in an action for damages for false representation, which states in substance or in language naturally understood by a jury to mean that the defendant is not responsible for a misstatement of fact if he made it in good faith, is erroneous."

Were the statements made by the executor as to the condition of the motel property false statements of material facts upon which the buyers could rely or were they merely expressions of opinion?

It is stated in Beltner v. Carlson, 153 Neb. 797, 46 N. W. 2d 153: " 'To maintain an action for fraudulent representations, it is not only necessary to establish the telling of the untruth, knowing it to be such, or that it was told without knowledge of the facts, but also to prove that the plaintiff had a right to rely upon it, and did so rely, and altered his condition because thereof, and suffered damages thereby.' Dyck v. Snygg, 138 Neb. 121, 292 N. W. 119.' " See, also, Linch v. Carlson, *supra.*

As stated in 23 Am. Jur., Fraud and Deceit, § 28, p. 784: "It is sometimes difficult to determine whether a given statement is one of opinion or one of fact, inasmuch as the subject matter, the form of the statement, the surrounding circumstances, and the respective knowledge of the parties all have a bearing upon the question, and there may be a want of one or more of the con-

trolling circumstances. There is no certain rule by the application of which it can be determined when false representations constitute matters of opinion or matters of fact, but each case must in a large measure be adjudged upon its own facts, taking into consideration the nature of the representation and the meaning of the language used as applied to the subject matter and as interpreted by the surrounding circumstances."

In Musgrove v. Eskilsen, 127 Neb. 730, 256 N. W. 883, we used language which has particular application here. Therein we said: "Whether representations as to the condition of a water plant are actionable, if false, or amount merely to an expression of opinion depends upon the facts of each particular case. In the instant case the statements made were in the nature of positive representations of an existing fact, the truth of which defendants were unable to ascertain even by an examination of the plant, * * *."

That such is also true in regard to real estate is evidenced by the same opinion, although we held therein that under the circumstances disclosed the buyer had no right to rely upon a representation made that the place was in first-class condition. The opinion discloses we arrived at that result because the buyer was experienced and had full opportunity to inspect the property and determine whether or not such statement was true. See, also, McKibbin v. Day, 71 Neb. 280, 98 N. W. 845; Sipola v. Winship, 74 N. H. 240, 66 A. 962; Phillips v. Jones, *supra;* Daniels v. Oldenburg, 100 Cal. App. 2d 724, 224 P. 2d 472; Falkner v. Sacks Bros., *supra;* Peterson v. Schaberg, *supra;* State ex rel. Sorensen v. State Bank of Omaha, *supra.*

In Herzog v. Capital Co., 27 Cal. 2d 349, 164 P. 2d 8, it was held, under the circumstances there shown, that fraudulent representations of corporate vendor's local manager that a dwelling house was "in perfect condition in all respects" were actionable as against contention that such representations were mere "sales talk."

"One of the essential elements of fraud practiced by means of false representations is that the representation must be concerning a matter material to the contract." Linch v. Carlson, *supra.* See, also, Beltner v. Carlson, *supra.*

The fact that buildings have termites in them is a matter of serious concern and materially affects their value is beyond question. As already set out appellants were inexperienced as to real estate and knew nothing of termites and their propensities.

"A person is justified in relying upon a representation made to him where the representation is a positive statement of fact and where an investigation would be required to discover the truth." Trebelhorn v. Bartlett, *supra.* See, also, Falkner v. Sacks Bros., *supra;* Linch v. Carlson, *supra;* Garbark v. Newman, 155 Neb. 188, 51 N. W. 2d 315.

We think, under the circumstances here disclosed, appellants had a right to rely upon the statements made by the executor Fred E. Williams, and in fact, that they did rely thereon to their subsequent injury.

It should here be said that his expression of opinion as to value is not of that character. See, Musgrove v. Eskilsen, *supra;* McKibbin v. Day, *supra*; Realty Investment Co. v. Shafer, 91 Neb. 798, 137 N. W. 873; Cressler v. Rees, 27 Neb. 515, 43 N. W. 363, 20 Am. S. R. 691. As said in Cressler v. Rees, *supra*: " 'Where parties stand on an equal footing, expressions of opinion as to the value of certain property will not usually be considered so material that misstatements will constitute fraud. * * *' (Morgan v. Dinges, 23 Neb. 271, 36 N. W. 544, 8 Am. S. R. 121.)"

On the four trips appellants made to the motel immediately preceding the 20th of March, when the contract was entered into, we find they had the opportunity to and did fully examine and inspect the motel property. However, nothing was ever said about termites on these occasions. Does this fact prevent them

from now saying they relied on the representation made as to its condition?

"'A purchaser of real estate has a right to believe and rely upon representations made to him by his vendor as to the character, quality, and location of the property, when the facts concerning which the representations are made are unknown to the vendee.' (Hoock v. Bowman, 42 Neb. 80, 60 N. W. 389, 47 Am. S. R. 691.)" Realty Investment Co. v. Shafer, *supra.*

We think such would be true here as to all matters which could not normally be ascertained by an inexperienced person while examining and inspecting the property. As stated in Musgrove v. Eskilsen, *supra*: "Both defendants having inspected the property before the purchase was made and having then seen evidence of a leaky roof, we do not think they had a right to rely on these representations, even if false."

Also, as stated in Pasko v. Trela, 153 Neb. 759, 46 N. W. 2d 139, by quoting from 23 Am. Jur., Fraud and Deceit, § 144, p. 945: "'The mere fact that one makes an independent investigation or examination, or consults with others, does not necessarily show that he relies on his own judgment or on the information so gained, rather than on the representations of the other party, nor does it give rise to a presumption of law to that effect. If, under the circumstances, he is unable to learn the truth from such examination or investigation or, without fault on his part, does not learn it and in fact relies on the representations, he is entitled to relief, all other ingredients of liability being present.'"

If the defects are concealed, such as here, we have said: "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." Welch v. Reeves, 142 Neb. 171, 5 N. W. 2d 275.

In Falkner v. Sacks Bros., *supra,* where it was contended for the general rule that where ordinary prudence would have prevented the deception, an action for the fraud perpetrated by such deception will not lie, we said: "This rule has no application, for the defects were latent, * * *."

In Falkner v. Sacks Bros., *supra,* where the representation was that the tractor was in A-1 mechanical condition, we said: "The evidence shows that the tractor proved to be defective in a number of ways which has previously been outlined, and obviously there were latent defects which could not be discovered with ordinary prudence. The evidence fails to disclose that the plaintiff could have discovered that the transmission was defective, the clutch was worn out, or that the universal joints and drive shaft needed to be replaced, and that the air line was bad."

We do not think, because of the nature of termites, that the inspection and examination made by appellants before entering into the contract now prevents or estops them from saying they relied on the representation that the property was in good condition. It is apparent none of the parties observed anything that in any way made them suspicious.

We turn then to the other conditions of which appellants complain. Appellants say the furnace in the residence-office building was defective whereas it was represented to be in good condition. This building was being heated by a manually fed hot-air coal-stoker furnace which we find was in good serviceable condition at the time of the sale and thereafter, until it was taken out in the early part of June 1952. The fact is a natural gas line had been extended past this property in the early spring of 1952. Appellants desired to convert the coal burning furnace to gas and called the gas company

for that purpose. They tested the furnace to see if it was adaptable for conversion but found it was not. In this regard coal burning and gas burning furnaces are not necessarily built alike. When the gas company would not convert the coal furnace to gas the appellants had a new gas furnace put in. This was a matter of choice and not done because the furnace in the building was in bad condition.

Appellants say the plumbing was not in good condition. They complain of leaky faucets, stopped-up sinks, leaky pipes of which some were underground, one broken toilet, and cracks in the porcelain of several flush boxes. Some of this they should have observed when they examined and inspected the premises and of which they cannot now be heard to complain. The rest are such as are normal in an older property and of which they should have been aware. We find this complaint to be without merit.

Appellants complain of the fact that the sewer and septic tank were not in good working condition. The evidence shows that on occasions the sewer backed up into the washroom and into several of the cabins. Appellants had a plumber come out on several occasions in order to have this condition corrected. They also had to have the septic tank cleaned and the pump used in connection therewith fixed, as it did not work properly. We find nothing unusual in this. They are normal to older properties and such as a buyer should ordinarily expect might occur.

Appellants complain that the entire premises were not in good condition. There is evidence the linens were full of holes, that parts of the wood in some of the screens had to be replaced because they were rotten, and that some sills had to be replaced for the same reason. These are things appellants should have observed during their examination and about which they are now estopped to complain. There were also some replacements, improvements, and betterments made but

that was a matter entirely within the discretion of appellants. They knew, or should have known, they were not buying a new motel. If they wanted to replace some old equipment with new it was all right but they cannot properly complain of their decision in this respect.

Were the appellants guilty of such unreasonable delay, after gaining knowledge of the termites being in the property, that they are thereby prevented from rescinding the contract?

"It is a general and well-established rule that there can be no rescission of a contract unless the parties can be placed in statu quo or substantially so." Perry v. Meyer, 110 Neb. 347, 193 N. W. 717.

"Whether the right of one party to a contract to rescind the same arises on account of fraud inducing the contract or on account of a breach by the other party of a dependent covenant, such right is barred by failure of the one party, for an unreasonable time after knowledge of the facts giving rise to such right, to declare a rescission and disclaim the benefits of the contract." Platner v. Ellingwood, 123 Neb. 719, 243 N. W. 896. See, also, Sipola v. Winship, *supra;* Rayburn v. Norton, *supra;* Rasmussen v. Hungerford Potato Growers Assn., 111 Neb. 58, 195 N. W. 469.

"If the purchaser has knowledge of the grounds upon which he is entitled to rescind, an unreasonable delay upon his part, especially if accompanied by such change of circumstances as makes it impracticable for him to place the vendor in statu quo, or by such acts or conduct on the part of the purchaser as constitute waiver, prevents him from exercising his right to rescind. Even where time is not of the essence of the contract, a purchaser may still lose his right to rescind by delaying action to a time, which, under the circumstances, is unreasonable." 66 C. J., Vendor and Purchaser, § 476, p. 824.

"The question whether laches exists in a particular case depends upon its own peculiar circumstances and is

addressed to the sound discretion of the court, the question of the unreasonableness of the delay depending largely upon the nature of the property in the particular case." 66 C. J., Vendor and Purchaser, § 477, p. 825.

The evidence shows termites multiply rapidly and spread quickly through a building once they gain a foothold therein. After appellants discovered the termites in the residence-office building in the latter part of June 1952 they made no effort to eradicate or control them, although the evidence shows that can be done. They continued to operate the motel, having changed its name to Siesta Motel, and bought and put up signs to that effect. Naturally the longer the termites are left free to operate the more damage they will do. It was only after they discovered additional evidence of termites in several of the cabins in the early part of September 1952 that they took action. This was after the tourist season for 1952 was practically over. It is apparent the business had not been as profitable as appellants had anticipated and so, when they found this additional evidence of termites, they decided it was a good time to give the motel back to the executors. Mr. Russo testified that he and his wife were having domestic trouble about this time so he considered it would be a good idea to get rid of the motor court.

Under these circumstances we do not think appellants are entitled to rescind. They should have acted when they first discovered the place had termites and therefore not as represented. By waiting until September we find they affirmed the contract and that rescission should be denied.

That brings us to the question, are the executors entitled to specific performance of the contract and escrow agreement as decreed by the trial court?

Appellants contend the executors are limited to $1,000 damages for nonfulfillment of the contract. In this respect the contract provides: "IT IS MUTUALLY AGREED that time is an essential element in this con-

tract, and it is agreed in case either party shall fail to perform the stipulations of this contract, or any part thereof, the failing parties shall pay to the other parties of this contract, the sum of One Thousand Dollars, ($1000.00) as damages for non-fulfillment of the contract."

The foregoing provision was based on time being an essential element of the contract. The element of time was waived by the provisions of the escrow agreement hereinbefore set forth. The terms of the escrow agreement permitted appellants to go into immediate possession and with it was waived the provision for damages based thereon as possession thereunder was not contemplated until the provisions thereof had been fulfilled. The record clearly indicates a purpose to rely on the provisions of the escrow agreement to secure performance. See Perry v. Meyer, *supra*.

"The burden is primarily on the party seeking specific performance to show his right in equity and good conscience to the relief sought, * * *." 81 C. J. S., Specific Performance, § 140, p. 712.

"As a general rule, if defendant has been induced to make the contract by reason of any material misrepresentation on the part of plaintiff or his agent, specific performance will be denied, whether the misrepresentation was willful and intended, or made innocently or with an honest belief in its truth." 81 C. J. S., Specific Performance, § 43, p. 520.

"Under this theory, in the exercise of the discretion vested in the court in the granting of a decree of specific performance, a court of equity may, and in a proper case will, deny specific performance of a contract which is tainted with fraud, or was induced by misrepresentations of the complainant, although such fraud or misrepresentations were not such or were not made under such circumstances as to invalidate the contract, or were not such as would authorize the cancellation thereof. The representations need not be fraudulent." 49 Am.

Jur., Specific Performance, § 49, p. 64. See, also, 87 A. L. R. 1346.

"The specific performance of a contract by a court of equity is not generally demandable or awarded as a matter of absolute legal right but is directed to and governed by the sound legal discretion of the court, dependent upon the facts and circumstances of each particular case. It will not be granted where enforcement would be unjust, and may be denied where the party seeking it has failed to perform." O'Brien v. Fricke, *supra.*

The executors represented the motel property to be in good condition when, in fact, it was in a damaged condition because it contained termites. Under these circumstances specific performance of the contract would be unjust and the trial court was in error in granting it.

Appellants are entitled to some form of relief in this proceeding because of the damaged condition of the motel for, as we said in Herrin v. Johnson Cashway Lumber Co., 153 Neb. 693, 46 N. W. 2d 111: "It is the practice of courts of equity, when they once have obtained jurisdiction of a case, to administer all the relief which the nature of the case and the facts demand, and to bring such relief down to the close of the litigation between the parties." See, also, Best & Co., Inc. v. City of Omaha, 149 Neb. 868, 33 N. W. 2d 150; Lincoln Joint Stock Land Bank v. Barnes, 143 Neb. 58, 8 N. W. 2d 545.

It is true that the remedies of rescission and damages are inconsistent; the former proceeding upon disaffirmance and the latter upon affirmance of the contract. James v. Hogan, 154 Neb. 306, 47 N. W. 2d 847; Rasmussen v. Hungerford Potato Growers Assn., *supra.*

If the contract is actually rescinded it thereby becomes nonexistent. James v. Hogan, *supra.*

However, an election of remedies is not made if, in fact, the remedy sought does not exist. Bratt v. Wishart, 136 Neb. 899, 287 N. W. 769; Live Stock Nat. Bank v. Marshall, 131 Neb. 185, 267 N. W. 414; Henley v. Live

Stock Nat. Bank, 127 Neb. 857, 257 N. W. 244; Fuller v. Fried, on rehearing, 57 N. D. 824, 224 N. W. 668; Heibel v. United States Air Conditioning Corp., 206 Minn. 288, 288 N. W. 393.

We said in Henley v. Live Stock Nat. Bank, *supra:* "The doctrine of election of remedies has no application where the former action was a futile attempt to assert an alleged right which plaintiff never possessed, and in the assertion of which she was defeated."

And in Bratt v. Wishart, *supra,* we held: "It has been held by this court that 'A futile attempt to assert a non-existent remedy does not, under the doctrine of election of remedies, preclude a resort to a legal remedy or operate as an estoppel to assert it.' Live Stock Nat. Bank v. Marshall, 131 Neb. 185, 267 N. W. 414. See Henley v. Live Stock Nat. Bank, 127 Neb. 857, 257 N. W. 244; 18 Am. Jur. 146, sec. 24."

As was said by the Supreme Court of Minnesota in Heibel v. United States Air Conditioning Corp., *supra:* "This decision is the trail's end for plaintiff's attempt to rescind. But we cannot order judgment for defendant on its counterclaim for unpaid purchase price. That is because rescission is but one of the buyer's remedies for breach of warranty. See 2 Mason Minn. St. 1927, § 8443. His unsuccessful attempt to rescind is not such an election of remedies as to bar any other. Holcomb & Hoke Mfg. Co. v. Osterberg, 181 Minn. 547, 233 N. W. 302, 72 A. L. R. 722. Such a frustrated attempt to pursue a wrong remedy is not an election which will bar one otherwise right. In re Van Norman, 41 Minn. 494, 43 N. W. 334; Ross v. Amiret Farmers Elev. Co., 178 Minn. 93, 226 N. W. 417."

If the attempted rescission is not successful because the party seeking to rescind is found to have actually affirmed the contract then the contract exists and rights thereunder may be enforced. See, Herdan v. Hanson, 182 Cal. 538, 189 P. 440; Urdang v. Posner, 220 App. Div. 609, 222 N. Y. S. 396; Waters v. Woods, 5 Cal.

App. 2d 483, 42 P. 2d 1072; Reinertson v. Struthers, 201 Iowa 1186, 207 N. W. 247; Bischoff v Hustisford State Bank, 195 Wis. 312, 218 N. W. 353; Fuller v. Fried, *supra;* Heibel v. United States Air Conditioning Corp., *supra.*

As held in Reinertson v. Struthers, *supra*: "* * * the failure to secure relief based upon a rescission, unless for a failure to establish the fraud, simply leaves the party who sought it in the attitude of having conclusively affirmed the contract. But affirmance of the contract does not waive the fraud, nor bar the right to recover damages, but bars a subsequent rescission merely."

And as stated in Fuller v. Fried, *supra:* "The overwhelming weight of authority is to the effect that in these circumstances, that is, where the buyer seeks to avail himself of the remedy of rescission and such remedy no longer exists, the buyer is not precluded from invoking the only existing remedies, namely, some remedy based upon the theory of the continued existence of the contract."

The cause of action in either event is fraud and the allegations of fact would be precisely the same in substance, the only substantial difference between the two being the form of relief prayed for. See, Friederichsen v. Renard, 247 U. S. 207, 38 S. Ct. 450, 62 L. Ed. 1075; Waters v. Woods, *supra;* Reinertson v. Struthers, *supra;* Rasmussen v. Hungerford Potato Growers Assn., *supra.*

While evidence of the damage caused by the termites was introduced we do not think it sufficiently relevant to April 22, 1952, when the appellants actually went into possession of the property, that we can properly act in regard thereto. But we do not think this litigation should end because of that fact.

As stated in Fuller v. Fried, *supra:* "* * * we are of the opinion that the ends of justice require that the plaintiffs be permitted, if they so desire, upon such terms as may be just, to file an amended complaint asking relief by way of damages for breach of warranty." See,

also, Heibel v. United States Air Conditioning Corp., *supra.*

We therefore reverse the judgment of the district court and remand the cause thereto for further proceedings in accordance herewith subject, however, to the following directions: That appellants be given 60 days to amend their action for one in damages; that if they so elect, then that issue be tried and determined by the trial court; and that if the value of the motel property, as of April 22, 1952, be found to have actually been damaged because of termites being therein, the amount thereof.

If, within 60 days, the appellants do not elect to amend their cause to one for damages then the trial court is directed to order the provision of the escrow agreement to be carried out and to do the same, even though the appellants have elected to amend, if, after trial, no damages are found to have been established. If, however, it is found the property, as of April 22, 1952, was damaged by the fact that termites existed therein and the amount thereof determined, then the trial court is ordered to direct the escrow agent to pay the appellants the amount of such damages and to turn over to the executors the balance of the purchase price remaining in its possession, including the note and mortgage which is a part thereof, and to generally carry out the other provisons of the escrow agreement.

REVERSED AND REMANDED WITH DIRECTIONS.

LORAYNE R. KASAI, APPELLEE, V. STEVE KASAI, APPELLANT.
71 N. W. 2d 105

Filed June 17, 1955. No. 33729.

1. **Divorce.** The power to set aside or modify a decree of divorce under section 42-340, R. R. S. 1943, is not absolute but must be exercised within a sound legal discretion.
2. ———. Where a default has been regularly entered in an ac-

tion for divorce it is largely within the discretion of the trial court to say whether or not the defendant shall be permitted to come in afterwards and make his defense and, unless an abuse of discretion be made to appear, this court will not interfere.

3. **Judgments.** If the evidence given at the original trial is not contained in the record under review, the court cannot determine whether the judgment rendered on such trial was the result of false testimony.

APPEAL from the district court for Hall County: ERNEST G. KROGER, JUDGE. *Affirmed.*

Grenville P. North and *Lloyd W. Kelly,* for appellant.

Harold A. Prince, for appellee.

Heard before SIMMONS, C. J., CARTER, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ., and KOKJER, District Judge.

KOKJER, District Judge.

The plaintiff, LoRayne R. Kasai, obtained a divorce from defendant Steve Kasai by a decree entered on March 11, 1954. On September 10, 1954, defendant filed a motion and application praying that the decree be set aside on the grounds that it had been obtained by fraud and perjured testimony. After a hearing thereon the district court entered an order overruling the motion. We affirm that order.

The second amended petition upon which the case was tried, in addition to other necessary allegations, described in detail acts of cruelty on the part of the defendant toward the plaintiff as grounds for divorce. All of the property standing in the names of the parties was specifically described. Plaintiff's claim that substantially all of this property had been inherited from her deceased former husband and that nothing had been added through defendant's endeavors or from his resources was clearly set out. The prayer was for an absolute divorce, for the return of her former name, and for an order quieting the title of all of the property described in her.

The defendant, after interposing some preliminary pleadings, filed an answer which put in issue the material allegations of the petition and a cross-petition the allegations in which were extremely uncomplimentary to plaintiff.

March 11, 1954, was the date set for trial. Defendant caused subpoenas to be served on six witnesses requiring them to be present for the purpose of giving testimony in his behalf. He appeared in the courtroom at the appointed time with his attorney. Plaintiff and her attorney and witnesses were there ready to proceed. At this juncture defendant asked if he could talk to his wife. It was arranged, and the two went alone into the jury room. In about 10 minutes they returned into the courtroom. Defendant stated he did not want to go on with the case. He requested his lawyer to withdraw. The answer was withdrawn and the cross-petition was dismissed by defendant. Plaintiff's lawyer moved that the cross-petition be expunged from the record and the motion was sustained. Defendant was found and adjudged to be in default and the trial proceeded. The transcript discloses that plaintiff's testimony was corroborated by various witnesses. A decree was signed and entered on the day of the trial, finding that the allegations in plaintiff's second amended petition were true and awarding her the relief prayed for. This included specifically and in detail an award of the property to her in strict accordance with her claims as set out in her petition.

As to the alleged fraud, defendant claimed that plaintiff, during their talk in the jury room, promised to pay him $10,000 within 6 months after the entry of the divorce decree, to pay the costs of the action and his attorney's fee, and that there would be no determination of the title to the real estate in the decree if he would withdraw from the case, giving as her reason that she would like to save her face as far as scandal was concerned. According to his claim he was to give

her a quitclaim deed to the property after payment of the $10,000 to him.

Plaintiff testified that defendant, in the jury room, said he still loved her, to which she replied that he did not act like it when he filed his cross-petition for all people to read "and talk about me and drag me in the mud." Also, that he asked to meet and talk with her over a cup of coffee that afternoon and wanted a chance to win her back. She stated that she agreed to meet him for the cup of coffee if her brother-in-law and sister-in-law were present, and made no promise as to a reconciliation but told him if he felt he could "hurdle that barrier" that he had put up between them, she would not stop him. She said there was no mention of money during this conversation, and denied that she had ever promised to pay him anything.

There is no corroboration whatever for defendant's story. All later circumstances tend to support the one told by plaintiff. For example, the decree entered on the very day of the alleged promise quieted title to all the property in plaintiff. This was contrary to what plaintiff had promised if defendant's story is true, yet he made no complaint, filed no motion for new trial, and took no action at all until almost 6 months later. Defendant's statement that plaintiff's reason for promising to pay him $10,000 to withdraw was her desire to avoid a scandal questions itself when it is remembered that he had already filed in the clerk's office, open to public inspection, his cross-petition containing all of the scandalous material that he relied upon and there was no way she could have been relieved of scandal. On the afternoon of the trial the parties had coffee together in the presence of the plaintiff's brother-in-law and sister-in-law, which was in accord with plaintiff's story. At this meeting no mention was made of any money due from plaintiff to defendant. Defendant wrote to plaintiff later and called her over long distance telephone but never asserted any claim for money due

him. He did ask her to send him $200 or $300 at one time, and she agreed to buy some tools which were his for $200. This money was sent by plaintiff's brother-in-law. Defendant was in Grand Island some time after the divorce decree was entered but at no time until the filing of the motion to set aside the decree did defendant assert any claim that plaintiff owed him $10,000 or any other amount.

The power to set aside or modify a decree of divorce under section 42-340, R. R. S. 1943, is not absolute but must be exercised within a sound legal discretion. Arent v. Arent, 159 Neb. 347, 66 N. W. 2d 813; Pittman v. Pittman, 148 Neb. 864, 29 N. W. 2d 790.

Where a default has been regularly entered, as it was in this case, it is largely within the discretion of the trial court to say whether the defendant shall be permitted to come in afterwards and make his defense and, unless an abuse of discretion is made to appear, this court will not interfere. Roberts v. Roberts, 157 Neb. 163, 59 N. W. 2d 175.

The trial court held against the contentions of the defendant. Certainly it cannot be said under the record in this case that the trial judge abused his discretion. The record preponderates in favor of the contrary view.

With reference to defendant's claim that the decree was obtained by false testimony, it need only be pointed out that the evidence given at the original trial is not contained in the record upon which this cause is submitted. This being true, the court cannot determine whether or not the decree rendered at the trial was the result of false testimony. Glissmann v. Grabow, 155 Neb. 690, 53 N. W. 2d 94. The presumption is that it was not.

The order of the district court is affirmed.

AFFIRMED.

HOWARD V. KANOUFF ET AL., APPELLEES, V. SARAH G. NORTON, APPELLANT, IMPLEADED WITH THE HEIRS OF DELLA BIXLER, DECEASED, ET AL., APPELLEES.
71 N. W. 2d 89

Filed June 17, 1955. No. 33731.

1. **Judgments.** The district court is without power to set aside its decree after the term at which it was rendered in the absence of a showing of a statutory or equitable ground therefor.
2. ———. A consent decree is usually treated as an agreement between the parties. It is accorded greater force than ordinary judgments and ordinarily will not be modified over objection of one of the parties.

APPEAL from the district court for Holt County: DAYTON R. MOUNTS, JUDGE. *Affirmed.*

C. Russell Mattson and *Donald R. Kanzler,* for appellant.

Julius D. Cronin, George O. Kanouff, and *Howard V. Kanouff,* for appellees.

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

YEAGER, J.

This is an action by Howard V. Kanouff and Raymond W. Moody, plaintiffs, against Sarah G. Norton and unnamed heirs, devisees, legatees, personal representatives, and all others having or claiming an interest in the estate of Della Bixler, deceased, defendants, to quiet title to certain lands in Holt County, Nebraska. Sarah G. Norton was the only defendant who appeared at any stage of the proceedings. After issues were joined the case came on for trial and a trial was had as to all of the defendants and title was, by decree of court, generally quieted in favor of plaintiffs as to the unnamed defendants. As to the defendant Sarah G. Norton, who will be hereinafter referred to as the defendant, the decree quieted title in the plaintiffs against her

pursuant to her consent. She was at the time represented by counsel.

By the part of the decree quieting title against the defendant it was provided that if defendant should pay to plaintiffs $20,000 on or before April 1, 1954, plaintiffs would convey the real estate to her subject to existing liens and encumbrances of record. The decree further provided that for failure to pay the $20,000 by April 1, 1954, the defendant would have no further interest in the land. There are other provisions of the consent portion of the decree relating to both plaintiffs and the defendant but they have no significance here.

The defendant failed to comply with the obligation assumed by her and imposed by the decree.

On April 26, 1954, the defendant filed a petition in the original action to vacate the decree. Later, on July 28, 1954, an amended petition was filed. The amended petition is the basis of this proceeding.

To the amended petition an answer was filed and thereafter a trial was had, whereupon the petition was dismissed by decree of the district court.

This decree was undoubtedly a correct and proper disposition of the case. The petition fails to set forth any legally or equitably recognizable grounds for the vacation of the original decree.

Defendant's allegations as grounds for the vacation of the decree are that the plaintiffs promised to extend the time for the payment of the $20,000 beyond April 1, 1954, and that she was not fully aware of the nature and legal consequences of the decree. She does not contend that her counsel did not fully advise her, neither does she contend that any fraud or undue influence was practiced upon her by the plaintiffs, nor does she contend that mutual mistake was accountable for the decree.

It is assumed that the petition to vacate was filed at a term subsequent to the term at which the decree was entered since the decree was entered November 23, 1953, and the petition to vacate was filed April 26, 1954.

Under such circumstances the district court in equity had no power to set aside the decree in the absence of statutory grounds unless the circumstances disclosed showed some ground for equitable relief. Van Every v. Sanders, 69 Neb. 509, 95 N. W. 870; Howard Stove & Furnace Co. v. Rudolf, 128 Neb. 665, 260 N. W. 189; Watters v. Harris, 147 Neb. 1081, 26 N. W. 2d 182; Davies v. De Lair, 148 Neb. 395, 27 N. W. 2d 628. The facts here do not bring this case within the purview of these rules.

Also a consent judgment is ordinarily treated as an agreement between the parties. It is accorded greater force than ordinary judgments and will not be modified over objection by one of the parties. Clark v. Charles, 55 Neb. 202, 75 N. W. 563; McArthur v. Thompson, 140 Neb. 408, 299 N. W. 519, 139 A. L. R. 413.

For the reasons herein stated the decree of the district court is affirmed.

AFFIRMED.

GEORGE O. BARNES ET AL., APPELLEES, V. JOHN L. DAVITT, APPELLANT.
71 N. W. 2d 107

Filed June 17, 1955. No. 33745.

1. Trial. When the facts pertaining to the relationship of the persons involved are in dispute, or more than one inference can be drawn therefrom, the question is for the jury.
2. **Appeal and Error.** It is not the province of this court in reviewing the record in an action at law to resolve conflicts in or weigh the evidence.
3. **Trial: Appeal and Error.** Findings of a court in a law action in which a jury is waived have the effect of the verdict of a jury, and judgment thereon will not be disturbed unless clearly wrong.

APPEAL from the district court for Greeley County: WILLIAM F. SPIKES, JUDGE. *Affirmed.*

Thomas W. Lanigan, for appellant.

Lanigan & Ondracek and *Harold E. Connors,* for appellees.

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

CHAPPELL, J.

Plaintiffs, George O. Barnes and Louis V. Barnes, originally filed this forcible entry and detainer action in the county court of Greeley County on May 11, 1953, against defendant John L. Davitt, seeking restitution of described land owned by plaintiffs in said county. In that court, upon trial to a jury of issues made by plaintiffs' complaint and defendant's plea of not guilty and his special plea hereinafter set forth, the jury returned a verdict finding defendant guilty as charged and judgment was rendered thereon for plaintiffs, costs taxed to defendant. Therefrom defendant appealed to the district court, where the cause was tried to the court, jury waived, upon the issues as made by plaintiffs' complaint filed in the county court and defendant's pleas thereto. At conclusion of all the evidence, the trial court found and adjudged that defendant was guilty as charged, and taxed costs to defendant. Thereafter defendant's motions to vacate the judgment and render judgment for defendant and for a new trial were overruled. Therefrom defendant appealed to this court, assigning that the trial court erred in rendering such judgment and overruling his motions. We conclude that the assignments should not be sustained.

Plaintiffs' complaint alleged that they were the owners in fee simple of the described land involved, and that on or about May 3, 1953, defendant unlawfully, forcibly, and without their consent, entered the premises and unlawfully detained possession thereof; and that on May 5, 1953, they duly served upon defendant a written 3-day notice to vacate, which period had fully elapsed,

yet defendant continued to unlawfully and forcibly detain possession of the premises. They prayed for restitution and costs.

Thereto defendant filed a plea of not guilty and as a special plea alleged that the described land was enclosed by a fence and had been used by him for pasturage purposes for a number of years under oral lease from the former owner, one Harry J. Rooney; that in February 1951, a rental of $625 cash rent therefor was agreed upon and paid, and defendant held over for the year 1952 and paid the same rent under the February 1951 agreement; that defendant had possession of and used the premises up to the present time and claimed the right to possession for 1953 as a holdover tenant from year to year; that no 6-months' notice to vacate or terminate his tenancy was served upon him as required by law; and that on or about April 16, 1953, he tendered the 1953 rent to Rooney, but it was refused. Defendant further alleged that on or about May 1, 1953, pursuant to custom which he had followed for many years, he lawfully repaired the fences and wells, and on or about May 3, 1953, he peacefully and lawfully ran some of his livestock on the land and is now in lawful possession thereof, using the same for pasturage purposes. He prayed for dismissal of plaintiffs' complaint. We have summarized defendant's pleas at length because, as hereinafter observed, his own testimony as well as the evidence adduced by plaintiffs, is in conflict therewith in several material respects.

In Borcherding v. Eklund, 156 Neb. 196, 55 N. W. 2d 643, this court held: "In testing the sufficiency of evidence to support a verdict it must be considered in the light most favorable to the successful party, that is, every controverted fact must be resolved in his favor and he should have the benefit of every inference that can reasonably be deduced therefrom."

In Curry v. Bruns, 136 Neb. 74, 285 N. W. 88, we held: "When the facts pertaining to the relationship of the per-

sons involved are in dispute, or more than one inference can be drawn therefrom, the question is for the jury."

As held in Snyder v. Farmers Irr. Dist., 157 Neb. 771, 61 N. W. 2d 557: "It is not the province of this court in reviewing the record in an action at law to resolve conflicts in or weigh the evidence." Further, in Scottsbluff Nat. Bank v. Blue J Feeds, Inc., 156 Neb. 65, 54 N. W. 2d 392, we held: "Findings of a court in a law action in which a jury is waived have the effect of the verdict of a jury, and judgment thereon will not be disturbed unless clearly wrong."

Section 27-1401, R. R. S. 1943, provides a remedy "as well against those who make unlawful and forcible entry into lands and tenements, and detain the same, as against those who, having a lawful and peaceable entry into lands or tenements, unlawfully and by force hold the same; * * *."

In Critchfield v. Remaley, 21 Neb. 178, 31 N. W. 687, this court held: "Where lands are leased to a tenant for one year for a stipulated rent reserved, and after the expiration of the lease the tenant, without further contract, remains in possession, and is recognized as a tenant by the landlord, in the receipt of rent for another year, this will create a tenancy from year to year.

"In such case the tenancy can only be terminated by the agreement of the parties, express or implied, or by notice given, six calendar months ending with the period of the year at which the tenancy commenced." See, also, Farley v. McKeegan, 48 Neb. 237, 67 N. W. 161.

Also, in Pusey v. Presbyterian Hospital, 70 Neb. 353, 97 N. W. 475, 113 Am. S. R. 788, this court held: "A tenancy from year to year will not be created against the contrary intention of both parties, landlord as well as tenant, and the payment of rent is merely an evidential fact bearing upon the question of the intent of the parties. Johnson v. Foreman, 40 Ill. App. 456."

Further, in State v. Cooley, 156 Neb. 330, 56 N. W. 2d

129, we said: " 'It is generally held that if, after the expiration of a lease, the tenant pays rent and the landlord accepts the payment, the lease is extended. The extended term is usually said to be from year to year, although it is probable that in most cases it is meant that such a term results when the lease is for a year or for years. It has been generally ruled, however, that there is only a presumption of a tenancy from year to year arising from a holding over and that such presumption, or implication of the law as it is sometimes called, is rebuttable. It is rebuttable by showing that such a tenancy was not the intention of the parties or that they had entered into a contrary agreement.' 32 Am. Jur., Landlord and Tenant, § 940, p. 792.

"In West v. Lungren, 74 Neb. 105, 103 N. W. 1057, we quoted the following from Montgomery v. Willis, 45 Neb. 434, 63 N. W. 794: ' "Such a tenancy will be presumed where a tenant remains in possession after the expiration of his term, and his tenancy is recognized by the landlord, where no new contract was made. Critchfield v. Remaley, 21 Neb. 178. This rule is, however, only a rule of presumption, and the presumption is rebutted by proof of a different agreement, or of facts inconsistent with the presumption. Shipman v. Mitchell, 64 Tex. 174; Williamson v. Paxton, 18 Gratt. (Va.) 475; Grant v. White, 42 Mo. 285; Secor v. Pestana, 37 Ill. 525." ' " See, also, Corcoran v. Leon's, Inc., 126 Neb. 149, 252 N. W. 819.

In Miller v. Maust, 128 Neb. 453, 259 N. W. 181, citing numerous authorities, including Brown v. Feagins, 37 Neb. 256, 55 N. W. 1048, and Tarpenning v. King, 60 Neb. 213, 82 N. W. 621, this court held: "In an action of forcible entry and detainer, the ground of complaint is that the entry and detention were unlawful and forcible, absolute ownership or a possessory right not being a defense.

"In an action of forcible entry and detainer, the character of the entry and detention is the test of plain-

tiff's right to recover, where the complaint charges that defendant's possession was obtained and held forcibly.

"One purpose of the act empowering a justice of the peace to determine the issue in an action of forcible entry and detainer is to prevent even rightful owners of realty from taking the law into their own hands and recovering by violence what the remedial powers of a court would grant."

In the light of the foregoing rules we have examined the record. The material and relevant evidence adduced by plaintiffs may be summarized as follows: One Harry J. Rooney was the owner of 771 acres of sandhill pasture land about 3 miles west of Greeley. He had been the owner thereof since about 1943. From 1944 through 1952 he had orally leased the land to defendant for only the pasture season, May 1 to October 1 of each year. There is no evidence in this record of any agreement that defendant ever leased the land from March 1 to March 1 of any year. The rental therefor was for cash, and each year Rooney and defendant made a new agreement for such a lease. The rental contract price for this period was always by negotiation and differed for each year, except that it was the same for 1951 and 1952. In that respect, defendant's checks for payment of rent, offered by him and received in evidence marked "pasture rent," and oral evidence as well, corroborrates that fact.

The land was fenced and had two wells and two windmills upon it. Concededly, in accord with their agreements, Rooney was required to and did until 1953 repair the fences before May 1 each year and keep them in repair. Concededly also, Rooney was required to and did until 1953 at or about the same time each year hook up the windmills and keep them and the wells in repair. When that was done defendant would put his livestock in the pasture until about October 1, when he would remove them. Concededly Rooney, as required, did at that time each year until 1953 go on the

land, drain the water tanks, and unhook the windmills.

During the summer of 1952 Rooney decided to and did rent the land for the 1953 pasture season to one James Dugan for $1,000, with the privilege of purchasing the land at $30 an acre. At once, on September 8, 1952, Rooney so notified defendant in writing. In January 1953, Rooney decided to sell the land. He placed it in the hands of a broker, and leased other land to Dugan. However, before the land was sold, Rooney gave defendant, who owned adjacent land, an opportunity to buy it, which defendant refused to accept. When that was done, Rooney sold 209 acres of the land to Elmer L. Olson and Marjorie Davis Olson. Their agreement to do so, executed February 14, 1953, contained provision for possession by March 1, 1953. A warranty deed therefor was duly executed and delivered to the Olsons. Rooney also sold 320 acres of the land to plaintiffs. The agreement to do so, executed on February 12, 1953, contained a provision for possession on or before March 1, 1953. A warranty deed therefor was duly executed and delivered to plaintiffs. The rest of the 771 acres was then sold to one Mr. Dutcher, not involved in this action.

The three purchasers then not knowing that defendant claimed any right of possession, went into possession of the land, which was not then occupied by defendant. Thereon they built division fences between their lands, and plaintiffs staked out a well spot and repaired the fences between their land and defendant's adjoining land. Such fence was completed on or about Easter Sunday of 1953.

Thereafter, on April 16, 1953, defendant tendered $625 to Rooney as the pasture rent for 1953, which was refused. Then on April 20, 1953, defendant's counsel notified Rooney, Olson, Dutcher, and plaintiffs in writing that defendant claimed possession of described land under a lease with Rooney from year to year, and he intended to retain possession for 1953. The description

of the land involved was not complete, so on April 27, 1953, defendant's counsel completed the description and included therein another such notice to them in writing. Thereafter, on May 1, 1953, Rooney notified defendant's counsel in writing that if defendant trespassed upon or let his cattle run upon the land that summer, proper legal means would be taken to stop it. Nevertheless, on or about May 3, 1953, defendant took down the line fence between his land and plaintiffs, kicked down the fences between plaintiffs' land and Dutcher's land, and put about 100 head of his cattle on the land. Defendant then for the first time since 1944 hooked up the windmills, which were on Olsons' land. Concededly, if defendant had a lease from year to year, no proper 6-months' notice to vacate was given him. However, concededly, on May 5, 1953, a proper written 3-day notice to vacate was served upon defendant, who refused to vacate, and this action was commenced.

Defendant's evidence was directly conflicting with that adduced by plaintiffs in several material respects. He testified that he owned 880 acres of pasture land adjoining Rooney's, and dealt with Rooney beginning in 1944 when he rented the land for "additional pasture" and had a "continuous agreement for the pasture." He claimed that he had a gate in one corner and a let-down in the fence at a more accessible point, and that, having a year to year lease, and according to custom, he ran his cattle back and forth the year around. He admitted that Rooney was required to and did hook up the windmills and repair the wells and fences in April of each year, and did unhook the windmills about October 1 of each year. However, he claimed that after October 1 his cattle came from the land involved up to his own land for water. He claimed that when Rooney sold the land he had possession and continued to have possession of it. He admitted, however, that he took down Dutcher's fence, let down the fence between his land and plaintiffs, and put his cattle in there on May 3,

1953, as claimed by plaintiffs; and that his hired man then went down and turned on the windmills. Defendant denied that he had ever leased the land from May 1 to October 1 of each year, and denied that the terms of the lease were ever changed except for the amount of the rent. In that connection, however, he was asked: "Q. And was there any agreements about months on pasture, months or anything with Rooney made? A. Not that I know of."

Defendant's hired man, so employed during the last 3 years, was asked, referring to defendant: "Q. During those three years do you know whether he run his cattle the year around in this pasture, the land in controversy here? A. Nothing to stop him. They could go back down there. Q. Did they go back down there? A. Part of the time. * * * Q. And then the cattle would go up to Davitt's tank and drink and go back down anytime of the year? A. Yes, they could go to Davitt's well. Q. And that has been going on since you have been there? A. Yes, sir, nothing to stop them." Contrary to plaintiffs' evidence and defendant's own testimony as well, he testified that the fence was in bad repair and already down when defendant's cattle were put upon the land on May 3, 1953, but admitted that he then kicked the fence down between Dutcher's land and plaintiffs' land.

A witness for defendant who rented for cash rent by the year testified that he lived 12 miles north of Greeley, up near the river, and that in that country grama grass will not grow on sandhills, but grows in the valleys where there is clay bottom, and if not eaten down in summer it was all right and customary to pasture it in winter. Another witness for defendant, who lived 12 miles north of Greeley, testified that he did not know the land involved, but his lessee of sand pasture puts his cattle in about the middle of June and leaves them in until it freezes up and becomes inconvenient to take care of them for winter, at which time

the lessee takes them home until the next spring.

One of the plaintiffs, in rebuttal, testified that on Easter Sunday, 1953, when the fencing had been completed, all of the fence between plaintiffs and defendant was up, with horses on defendant's side thereof. Another witness, who lived at Greeley and owned pasture land 6 miles north of Greeley, testified for plaintiffs in rebuttal that he leased land for the pasture season, May 1 to October 1, and according to general practice his cattle were never put back in after October 1, although he had seen cattle in pastures the year around.

In the light of such evidence and the rules of law heretofore set forth, we conclude that the judgment of the trial court should be and hereby is affirmed.

AFFIRMED.

WAYNE C. OLSON, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.
71 N. W. 2d 124

Filed June 17, 1955. No. 33771.

1. **Automobiles.** The punishment for an offense under section 39-7,108 (3), R. R. S. 1943, is specifically defined in section 39-7,127, R. R. S. 1943, and that part of any penalty imposed in excess of the maximum therein provided and not permitted under any other applicable penalty section is void.
2. **Statutes.** Penal statutes are inelastic, must be strictly construed, and may not be extended by implication.
3. **Automobiles.** The discretionary power given to the court in section 60-427, R. R. S. 1943, to revoke a driver's license is limited to the charges of operating a motor vehicle in such a manner as to endanger life, limb, or property, or while under the influence of alcoholic liquor or any drug, brought under appropriate statutes, and does not apply to a simple charge of speeding brought under section 39-7,108 (3), R. R. S. 1943.
4. **Criminal Law: Appeal and Error.** When a part of a sentence is illegal an appellate court may, if the sentence is divisible, modify it by striking out the illegal part.

ERROR to the district court for Phelps County: EDMUND P. NUSS, JUDGE. *Affirmed as modified.*

Anderson, Storms & Anderson, for plaintiff in error.

Clarence S. Beck, Attorney General, and *Ralph D. Nelson,* for defendant in error.

Heard before SIMMONS, C. J., CARTER, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ., and KOKJER, District Judge.

KOKJER, District Judge.

By petition in error Wayne C. Olson, who entered a plea of guilty in the county court of Phelps County to a charge of second offense speeding, questions the legality of that part of the sentence imposed upon him which suspended his driver's license for 6 months. The district court sustained the action of the county court and dismissed the petition in error filed therein.

Wayne C. Olson is hereinafter referred to as the defendant. The caption of the complaint filed against him in the county court reads as follows: "COMPLAINT FOR SECOND OFFENSE, SPEEDING, Contrary to Sections 39-7108 and 39-7127, Revised Statutes of Nebraska, 1943." In the body of the complaint it is charged that he did "willfully and unlawfully operate a motor vehicle * * * upon a highway outside of a city or village at a rate of speed exceeding 60 miles per hour between the hours of sunrise and sunset, to-wit: at a rate of speed in excess of 75 miles per hour, and such being his second offense, * * * Contrary to Section 39-7108, Revised Statutes of Nebraska, 1943, * * *." Defendant entered a plea of guilty. The county court fined him $50, suspended his driver's license for 6 months, and taxed the costs to him. Without success, he presented his claim that the license suspension was not permitted under the law to the county court by motion to modify the sentence, and to the district court by petition in

error and a motion for new trial. He then raised the question here by proceedings in error.

The pertinent parts of section 39-7,108, R. R. S. 1943, provide: "No person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions then existing. * * * (3) The following speeds shall be prima facie lawful, but in any case when such speed would be unsafe, they shall not be lawful: * * * (c) sixty miles per hour between the hours of sunrise and sunset * * * (6) Except in metropolitan cities, in every charge of violation of this section, the complaint and also the summons or notice to appear, shall specify the speed at which the defendant is alleged to have driven, also the prima facie speed applicable within the district or at the location."

The complaint in this case was filed under subsection (3) of the above section. The charge made was solely that of driving in excess of the prima facie legal limit.

For the violation of section 39-7,108, R. R. S. 1943, the Legislature has provided a specific penalty. That penalty is set out in section 39-7,127, R. R. S. 1943, as follows: "Any person who shall violate any of the provisions of sections 39-726, 39-7,108 to 39-7,112 and 39-7,115 to 39-7,117, or of any other law of this state relating to the operation of motor vehicles, shall, except as otherwise specifically provided, upon conviction thereof be punished as follows: (1) For a first such offense, such person shall be fined not less than ten dollars nor more than fifty dollars, or imprisoned in the county jail for not more than thirty days, or both; (2) for each subsequent such offense, such person shall be fined not less than twenty-five dollars nor more than two hundred dollars, or shall be imprisoned in the county jail for not more than sixty days, or both."

No other penalty is specifically provided for violation of section 39-7,108, R. R. S. 1943, so section 39-7,127, R. R. S. 1943, applies. No mention is made in section

39-7,127, R. R. S. 1943, of the revocation of a driver's license.

The State asserts that section 60-427, R. R. S. 1943, justifies the license suspension. This section provides in part as follows: "Upon conviction in any court within this state of any violation of any law of this state pertaining to the operation of motor vehicles or of any city or village ordinance pertaining to the operation of a motor vehicle in such a manner as to endanger life, limb or property, or while under the influence of alcoholic liquor or any drug * * * the magistrate or judge of such court may, in his discretion, suspend the license of such convicted person to operate a motor vehicle for any purpose for a period of time not less than ten days nor more than one year, * * *."

It is true that where a person is charged and convicted under an applicable statute with the operation of a motor vehicle in such a manner as to endanger life, limb, or property, and no greater period of license suspension is provided in the statute under which the complaint or information is filed, his license may be suspended pursuant to the provisions of section 60-427, R. R. S. 1943. Kroger v. State, 158 Neb. 73, 62 N. W. 2d 312.

The charge set forth in the complaint against the defendant in the present case was speeding, and nothing more. There is no allegation that he operated his motor vehicle in such a manner as to endanger life, limb, or property, or while under the influence of alcoholic liquor or any drug. The statute, being criminal in nature, must be strictly construed and may not be extended by implication. Macomber v. State, 137 Neb. 882, 291 N. W. 674.

The State argues that section 60-427, R. R. S. 1943, should be construed so that the words "in such a manner as to endanger life, limb or property" be applied only to violations of city or village ordinances contain-

ing such provisions and not to violations of "any law of this state."

Under this construction, if one violated a law of this state by failing to stop at a stop sign, or driving with no taillight, or by using a muffler cut-out his driver's license could be suspended. Also, the suspension in the present case for speeding could be sustained. We do not approve this theory. There is nothing in the grammatical construction of the sentence nor in its punctuation to suggest such a meaning. It must be taken to mean exactly what it says.

The punishment for an offense under section 39-7,108 (3), R. R. S. 1943, is specifically defined in section 39-7,127, R. R. S. 1943, and that part of any penalty imposed in excess of the maximum therein provided and not permitted under any other applicable penalty section is void.

The discretionary power given to the court in section 60-427, R. R. S. 1943, to revoke a driver's license is limited to the charges of operating a motor vehicle in such a manner as to endanger life, limb, or property, or while under the influence of alcoholic liquor or any drug, brought under appropriate statutes, and does not apply to a simple charge of speeding under section 39-7,108 (3), R. R. S. 1943.

The rule is that when part of a sentence is illegal an appellate court may, if the sentence is divisible, modify it by striking out the illegal part. Kroger v. State, *supra*.

The order of the district court is modified and that part of the sentence suspending the defendant's license is stricken.

AFFIRMED AS MODIFIED.

LEO J. KOWALSKI, APPELLANT, V. NEBRASKA-IOWA PACKING CO., A CORPORATION, ET AL., APPELLEES, SYLVIA KARNISH, ADMINISTRATRIX OF THE ESTATE OF FRANK PODLAZEWSKI, DECEASED, INTERVENER-APPELLANT.

71 N. W. 2d 147

Filed June 24, 1955. No. 33682.

1. **Corporations.** A stockholder, before he can proceed in his own name but in behalf of the corporation for the redress of wrongs done to it, must establish that he has exhausted all available means to obtain relief through the corporation itself, unless the circumstances excuse him from so doing. That is a condition precedent.
2. ———. Facts showing that he has complied with this condition must be set forth in unmistakable terms in his bill.
3. ———. He must make an earnest and sincere and not a feigned or simulated effort to induce the managing officers of the corporation to take remedial action in its name.
4. ———. If he fails in this quarter, unless there is adequate reason to the contrary, he must resort to the stockholders and make an honest attempt to convince them that action ought to be instituted.
5. ———. It is only from actual necessity, in order to prevent a failure of justice, that a suit in equity for the benefit of the corporation can be maintained by a stockholder.

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

Theodore L. Kowalski, Norman Denenberg, and *Herbert Denenberg,* for appellants.

Kennedy, Holland, DeLacy & Svoboda, Thomas Freeman, William Ritchie, and *Bernard E. Vinardi,* for appellees.

Heard before SIMMONS, C. J., CARTER, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ., and KOKJER, District Judge.

SIMMONS, C. J.

Plaintiff is a stockholder in the Nebraska-Iowa Packing Company. He alleged that he brought this action for himself and all other stockholders similarly situated.

The Nebraska-Iowa Packing Company will hereinafter be called the Company. The action is against the Company, its officers and directors, and Wilson & Company, a corporation. Wilson & Company will hereinafter be called Wilson.

The Company for a number of years had been the owner of a packing plant which was leased to and operated by Wilson. As a result of an action approved by the stockholders, the Company sold the plant to Wilson and was proceeding to a dissolution of the Company. This action was brought to secure a decree holding for naught the action authorizing the sale and the sale to Wilson, and to restrain the sale and the dissolution of the Company.

After a series of amended pleadings and a petition in intervention, to which reference will later be made, issues were made and trial was had.

At the close of plaintiff's case-in-chief, the trial court sustained a motion to dismiss made by Wilson, the Company, and the directors then before the court.

The plaintiff and intervener appeal.

We affirm the judgment of the trial court.

The motions to dismiss were based on multiple reasons. Among them were the contentions that the plaintiff and intervener prior to the institution of this action had not taken the necessary steps to qualify them or either of them to bring a derivative action on behalf of the Company, and had not shown the necessary legal status to bring a stockholder's derivative action on behalf of the Company; and that neither the plaintiff nor intervener had made any attempt to exhaust their remedies within the corporation nor to persuade the stockholders or directors to act for the purpose of rescinding the transactions in controversy.

We determine that the action of the trial court was correct based on the above-recited elements of the motion to dismiss. We do not deem it necessary to examine or determine other questions presented.

In 1952, the officers of the Company negotiated a sale of the property involved to Wilson. Notice of a special meeting of the stockholders was sent to all stockholders June 24, 1952. The meeting was called for the purpose of approving or disapproving the contract of sale. This was accompanied by a letter to the stockholders. This was accompanied also by a card which authorized certain of the Company directors to be the proxies of the signatory stockholders at the meeting.

A second letter was sent July 12, 1952, to stockholders who had not responded to the first letter.

A third letter was sent July 26, 1952, to stockholders holding 20 or more shares who had not responded to either of the earlier letters.

The stockholders' meeting was held. Proxies representing 24,702 plus shares were received. The Company had outstanding 52,794 plus shares of stock.

The resolution approving the contract was unanimously adopted by the stockholders present in person and by proxies representing 30,471 plus shares of stock.

Plaintiff is the owner of 10 shares of stock in the Company.

December 4, 1952 (4 months after the stockholders' meeting of August 4, 1952), plaintiff filed his petition beginning this action. He alleged that he brought the action on behalf of the Company, and on behalf of himself and all others similarly situated. He alleged the corporate capacities of the Company and Wilson; the meeting of the stockholders; the favorable vote on the contract of sale and the sale; that the officers and directors had failed to exercise prudence and sound business judgment; that the sale price was not commensurate with actual market value; that it did not have the requisite approval of the stockholders; and the attempted dissolution of the Company.

On May 15, 1953, plaintiff filed an amended petition in which he amplified allegations of his original petition. He further alleged that the president and attorney

of the Company, being one and the same person, was guilty of a breach of fiduciary duties; that his letters to the stockholders contained false and misleading statements; and that the stockholders' meeting was held on the property of the Company rather than at its principal office. He alleged that it would be useless and unavailing to attempt to vindicate corporate rights of the Company through the corporation. By reference he based this upon allegations as to the property and the lease; the allegation that officers had secured proxies and voted them; the allegation that the president of the Company had received a fee of $25,000 from Wilson, and that it constituted a breach of duty; the allegation that the officers had failed to exercise any prudence or sound business judgment; and that the president had made false and misleading statements in the letters to stockholders prior to the stockholders' meetings. He alleged further that there was insufficient time to appeal to the stockholders.

There were subsequently filed amendments and supplemental amendments to the amended petition, not important here.

Although it is not important to our decision here, we think it right to point out that the $25,000 to be paid by Wilson to the Company for the account of its president "for services in working out and consumating this transaction" was specifically mentioned in the letter to the stockholders of June 24, 1952; it was also specifically recited in the proxy form sent out for the signature of the stockholders; and it was discussed in the letter of July 12, 1952, to the stockholders wherein it was recited that it was to the advantage of the Company to have Wilson pay that fee.

The petition in intervention was filed June 19, 1953, by the administratrix of a deceased stockholder's estate, joining in the prayer of the plaintiff. It was alleged that the estate was owner of 40 shares of the Company stock. It appears that in December 1953, this stock was as-

signed to Sylvia Karnish. She is thereafter treated as the intervener.

Neither the plaintiff nor intervener testified at the trial. There was evidence that plaintiff was seriously ill from May 22, 1952, and got back to his desk about October 1, 1952. He was unable to attend the stockholders' meeting.

There is affirmative evidence that neither the plaintiff, the intervening administratrix, nor any other stockholder ever complained of this transaction to the president or board of directors of the Company between the date of the stockholders' meeting of August 4, 1952, and the date this litigation was started, nor did they ask that the sale be set aside or that the matter be reconsidered.

The Company had outstanding 52,794 plus shares of common stock; 30,471 plus shares of stock were voted in favor of approving the transaction here involved; and the owners of 22,323 plus shares did not vote.

The plaintiff and intervener represent an ownership of 50 shares.

Under the circumstances shown here, can they maintain a derivative action, purporting to represent the stockholders to redress an alleged wrong done to the Company?

Section 21-1,113, R. R. S. 1943, provides: "Every corporation operating or organized under this act, may at any meeting of its board of directors, mortgage, sell, lease or exchange all or substantially all of its property and assets, including its good will and its corporate franchises, and such sale, lease or exchange may be made upon such terms and conditions and for such consideration, which may be in whole or in part shares of stock in, or other securities of, any other corporation or corporations, as its board of directors shall deem expedient and for the best interests of the corporation; provided, that such mortgage, sale, lease or exchange must first be authorized or later be approved by the affirmative vote of the holders of a majority of the stock issued

and outstanding given at a stockholders' meeting duly called for that purpose, or when authorized by the written consent of the holders of a majority of the stock issued and outstanding; and provided further, that the articles of incorporation may require the vote or written consent of the holders of a larger proportion of the stock issued and outstanding."

The charge here goes basically to the decision taken at the stockholders' meeting.

The Legislature evidently intended that the questions presented originally by plaintiff should be advanced in the stockholders' meeting. That would be the obvious forum in the absence of the statute. Plaintiff did not avail himself of that forum and makes no showing of an effort to cause such a forum to be set up for 4 months thereafter before beginning this litigation. Assuming that he personally was disabled for the first 2 months of that period, it does not follow that the owners of the remaining shares of stock were unable to act. His plea of no sufficient time is obviously without merit.

In Fisher v. National Mtg. Loan Co., 132 Neb. 185, 271 N. W. 433, we held: "The cases seem to hold that there must be a demand that the stockholders as a body sue the directors before an individual stockholder may sue for himself or others so situated for the benefit of the corporation. There is one exception to this general rule, i.e., unless such request, for any reason, would be useless or unavailing. This exception seems to be recognized in most every case cited. The theory of the rule, and the exception, seems to be that the individual stockholder must exhaust all means of redress within the corporation itself before bringing such an action."

Our rule is in accord with the rule generally adhered to and followed by the courts. The rule is stated in 72 A. L. R. 628 as follows: "The cases are uniform in holding that there must be a request that the stockholders as a body sue the directors; or that an action be brought for their benefit, before an individual stock-

holder may bring an action in the interest of the corporation,—unless such a request would be useless and unavailing. In other words, an individual stockholder must exhaust all means of redress within the corporation before bringing an action in the interest of the corporation." See, also, 18 C. J. S., Corporations, § 525, p. 1210, § 564, p. 1280; 13 Am. Jur., Corporations, § 459, p. 502.

In Bartlett v. New York, New Haven & Hartford R. R. Co., 221 Mass. 530, 109 N. E. 452, the court held: "A stockholder of a corporation has no personal right of action against directors who have defrauded it and thus affected the value of his stock. Such wrongs are against the corporation itself and, except through that, have no relation to the stockholder. It is the corporation alone whose interests are directly concerned, whose rights are to be asserted, and to whose exclusive use the judgment, if recovered, must be paid. * * * A stockholder, before he can proceed in his own name but in behalf of the corporation for the redress of wrongs done to it, must establish that he has exhausted all available means to obtain relief through the corporation itself, unless the circumstances excuse him from so doing. That is a condition precedent. Facts showing that he has complied with this condition must be set forth in unmistakable terms in his bill. He must make an earnest and sincere and not a feigned or simulated effort to induce the managing officers of the corporation to take remedial action in its name. If he fails in this quarter, unless there is adequate reason to the contrary, he must resort to the stockholders and make an honest attempt to convince them that action ought to be instituted. Directors and the majority of stockholders are presumed to be acting, not fraudulently, but with fair discretion in obedience to law, and in good faith toward all concerned, and with a consciousness of duty toward the corporation and all its stockholders. It is an implied condition of becoming a stockholder in a corporation that its general policy shall be determined by the holders of a majority of the

stock and that disagreements as to its dominating policy and as to the details of its management shall be settled by the stockholders, and that recourse cannot be had to the courts to adjust difficulties of this sort. It is only from actual necessity, in order to prevent a failure of justice, that a suit in equity for the benefit of the corporation can be maintained by a stockholder."

Plaintiff pleads here that there were seven directors of the Company. Neither by pleading nor proof is there any suggestion that more than one might possibly have been moved by motive other than a good faith performance of duty toward the corporation and its stockholders. Plaintiff neither pleads nor proves an effort to persuade the officers and directors to act as he now contends they should have acted. There is no basis here for a finding that a demand upon them would have met with refusal. Plaintiff did not explore, in any wise, the attitude of the directors. He made no showing to them of the alleged basis of his suit. He ignored them. It is true that the directors who were served and answered resisted plaintiff's litigation, but that came after the transaction had been substantially completed with Wilson and after the charges set out in the pleadings had been made. The rule contemplates this action be taken before, and not after, litigation is initiated. The Supreme Court of the United States has held: "It is not a trifling thing for a stockholder to attempt to coerce the directors of a corporation to an act which their judgment does not approve, or to substitute his judgment for theirs." Corbus v. Alaska Treadwell Gold Mining Co., 187 U. S. 455, 23 S. Ct. 157, 47 L. Ed. 256.

Neither is there any basis here for a finding that an appeal to the stockholders would have been useless or unavailing. It was not tried. There is evidence that one stockholder, owner of 1,327 plus shares of stock, who was present at the stockholders' meeting and who was one of the two stockholders seconding the motion to approve the sale, received $1,000 of the $25,000 fee

paid the president, and that he worked for the sale. This evidence of payment was volunteered by the president of the Company. If that motive prompted the one stockholder, it does not follow that the owners of the remaining shares of stock aggregating more than 51,000 shares were so motivated.

On this record, the allegation that this is a derivative action, within the conditions as to pleading and proof required by the rule, is a patent fiction.

The trial court properly dismissed the cause. Its judgment is affirmed.

AFFIRMED.

MARYELLEN RICE, APPELLANT, V. RODERICK J. NEISIUS, APPELLEE.
71 N. W. 2d 116

Filed June 24, 1955. No. 33698.

1. **Negligence.** Gross negligence within the meaning of the motor vehicle guest statute means great and excessive negligence or negligence in a very high degree. It indicates the absence of slight care in the performance of a duty.
2. ———. When the evidence is resolved most favorably towards the existence of gross negligence, the question of whether or not it supports a finding of gross negligence is one of law.
3. **Automobiles.** A verdict in a guest case should not be directed, or a cause of action dismissed, or a judgment entered notwithstanding the verdict, unless the court can definitely determine that the evidence of defendant's negligence, when taken as a whole, fails to reach such degree of negligence that is considered gross.
4. ———. In order to recover damages for injuries sustained while riding in the host's automobile, a guest must establish by a preponderance of the evidence the gross negligence of the host relied upon, and that such gross negligence so established was the proximate cause of the accident resulting in the damages sought.
5. ———. What amounts to gross negligence in any given case must depend upon the facts and circumstances. The fact that the operator of the automobile may have been guilty of ordinary

negligence is insufficient to warrant a recovery in favor of a guest.

APPEAL from the district court for Douglas County: CARROLL O. STAUFFER, JUDGE. *Affirmed.*

Lyle Q. Hills and *Edward J. Baburek*, for appellant.

Gross, Welch, Vinardi & Kauffman and *Clancy L. Hollister*, for appellee.

Heard before SIMMONS, C. J., CARTER, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ., and FLORY, District Judge.

CARTER, J.

This is an action to recover damages for personal injuries by a guest against the owner of an automobile who was riding in the rear seat at the time an accident occurred. The trial court directed a verdict for the defendant and the plaintiff appeals.

On December 29, 1952, the defendant, a resident of Pierz, Minnesota, was visiting in Omaha, Nebraska. He was the owner of a Plymouth automobile which was involved in an accident on that day. The circumstances were substantially as follows: Defendant was visiting the plaintiff while in Omaha. Plaintiff lived with Mr. and Mrs. Roy Canterbury. On the evening of December 28, 1952, plaintiff, defendant, and Mr. and Mrs. Roy Canterbury went from Omaha to Council Bluffs, Iowa, for dinner at the Riviera Club. On the trip to Council Bluffs, Roy Canterbury drove defendant's automobile, the latter riding in the back seat with the plaintiff. They remained at the Riviera Club until about 3 a. m., on the morning of December 29, 1952, when they left for home. The evidence shows that Ralph Kerr drove his car onto the highway just ahead of defendant's car which was being driven by Roy Canterbury. Mrs. Canterbury rode in the front seat with her husband and the plaintiff and defendant occupied the back seat. It was about 3 miles from the Riviera Club to the east end of the South

Omaha bridge over the Missouri River. While traveling these 3 miles the evidence shows that Canterbury drove defendant's car at a speed of 80 miles an hour. The evidence indicates that Canterbury was racing with Kerr as the car driven by Canterbury came along side the Kerr car but did not pass it. The roads on the Iowa side of the river were dry. There was ice and packed snow on the west 200 feet of the bridge.

Somewhere near the center of the bridge Canterbury passed the Kerr automobile. Kerr says he was traveling 45 miles an hour when defendant's car passed him at a rate of speed he estimated at 55 miles an hour. Kerr says that he saw the brake lights come on as the Neisius car driven by Canterbury came to the icy part of the bridge about 200 feet east of the west end. The car skidded to the right, struck an abutment where a toll house formerly set, spun around, hit the curb on the north side of the bridge, and upset. Mr. and Mrs. Canterbury were killed in the accident and plaintiff and defendant suffered injuries.

There is evidence in the record that plaintiff complained to Roy Canterbury two or three times about the speed at which he was driving. Defendant also asked Canterbury to take it easy and not drive so fast. The bridge was posted and showed a speed limit of 25 miles an hour.

It is contended by the plaintiff that Canterbury was guilty of gross negligence and that such gross negligence was imputed to the defendant, the owner of the car.

The plaintiff was a guest being transported in defendant's automobile at the time of the accident. It was being driven by Roy Canterbury with the consent of the defendant who was riding in the back seat. In order to recover damages for injuries sustained while riding in the host's automobile, a guest must establish by a preponderance of the evidence the gross negligence of the host which is relied upon, and that such gross negligence so established was the proximate cause of the acci-

dent resulting in the damages sought. Ottersberg v. Holz, 159 Neb. 239, 66 N. W. 2d 571; Born v. Estate of Matzner, 159 Neb. 169, 65 N. W. 2d 593. We will first determine if the trial court correctly sustained the motion of the defendant for a directed verdict in his favor on the ground that the evidence was insufficient to sustain a finding of gross negligence on the part of Roy Canterbury, the driver of the automobile. The plaintiff is entitled to have the evidence and all reasonable inferences deducible therefrom considered most favorably to her. Paxton v. Nichols, 157 Neb. 152, 59 N. W. 2d 184.

There is little conflict in the evidence. The automobile was driven from Omaha to Council Bluffs by Roy Canterbury. They returned to Omaha by the same route traveled when they went from Omaha to Council Bluffs. Roy Canterbury continued to drive the car with the consent of the defendant. The evidence shows that Canterbury drove the car at a speed of 80 miles per hour between the Riviera Club and the east end of the bridge. He passed the Kerr car on the bridge at a speed of approximately 55 miles per hour. When he came to the icy portion of the highway he applied his brakes, as evidenced by his brake lights going on. The car skidded and struck the abutment formerly occupied by a toll house and went out of control. It was evidence of negligence to drive at a speed of 55 miles an hour across the bridge, but it was not of itself gross negligence. It is clear that the automobile went out of control when it entered upon the icy portion of the bridge. There was a loss of control of the car and a failure to observe the icy condition of the west end of the bridge, and if there had been no failure in these respects, there would not have been an accident. But such failures under the circumstances shown are not sufficient upon which to base a conclusion that the evidence was sufficient to submit the issue of gross negligence to the jury. There is evidence that both plaintiff and defendant com-

plained to Canterbury about the speed he was driving before he came to the bridge. But Canterbury evidently reduced his speed when he came onto the bridge, from 80 to 55 miles an hour. The speed of 80 miles an hour before entering upon the bridge was not a contributing factor to the accident. Plaintiff did say that she complained once and possibly twice about the speed of the car on the bridge. There is no evidence of any negligent conduct on the part of Canterbury other than the excessive speed. The accident was clearly caused by the icy condition of the highway where it occurred. The road was dry and free from ice on the Iowa side of the bridge. Canterbury either failed to remember about the ice or misjudged its distance from the end of the bridge. The defendant was riding in the back seat and the evidence does not disclose that he failed to perform any duty required of him under the facts of the case.

Gross negligence is defined as great or excessive negligence; that is, negligence of a very high degree. It indicates the absence of slight care in the performance of a duty. Proof of negligence is insufficient to hold an owner or operator of an automobile liable for injuries sustained by a guest unless it is of that nature which is called gross negligence. There is no evidence in the present case that Canterbury was heedless of the safety of those riding with him or that he was guilty of negligence of a very high degree, or that his conduct indicated the absence of slight care.

In determining if gross negligence has been sufficiently established, each case must be determined upon its own facts and circumstances. No two cases are exactly alike. We find none so similiar on its facts within our guest statute as to control the result in the present case. We think a consideration of the following cases sustains our conclusion that the evidence was insufficient to warrant the trial court in submitting the issue of gross negligence to the jury: Born v. Estate of Matzner, *supra;* Lusk v. County of York, 158 Neb. 662, 64 N. W. 2d 338;

Cronin v. Swett, 157 Neb. 662, 61 N. W. 2d 219; Cunning v. Knott, 157 Neb. 170, 59 N. W. 2d 180; Paxton v. Nichols, *supra*.

The question is raised as to whether or not the negligence of Roy Canterbury is imputable to the defendant. In view of our holding that the evidence is insufficient to submit to a jury the question of gross negligence it is unnecessary to decide this question.

The judgment of the trial court is in all respects correct and it is affirmed.

AFFIRMED.

THOMAS J. CLARE, SR., AND TRUMAN CLARE, JOINT EXECUTORS OF THE ESTATE OF ALICE K. CLARE, DECEASED, APPELLANTS, V. COUNTY OF LANCASTER, NEBRASKA, ET AL., APPELLEES.

71 N. W. 2d 190

Filed June 24, 1955. No. 33739.

1. **Counties: Waters.** Counties have the right to reconstruct highways and in so doing to provide for the flow of water as it was wont to flow in the course of nature theretofore.
2. ———: ———. In the absence of negligence there is no liability on the part of a county in providing for the flow across a reconstructed highway of water naturally falling upon upper land which in the course of nature would have flowed across the highway onto lower land.

APPEAL from the district court for Lancaster County: HARRY R. ANKENY, JUDGE. *Affirmed.*

Lloyd E. Chapman, for appellants.

Elmer M. Scheele, Frederick H. Wagener, Dale E. Fahrnbruch, Richard S. Harnsberger, Edward F. Carter, Jr., Fred Vette, and *Jack M. Pace,* for appellees.

Heard before SIMMONS, C. J., YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ., and KOKJER, District Judge.

YEAGER, J.

This action as originally instituted was by Alice K. Clare, plaintiff, against the County of Lancaster, Nebraska, and Louis W. Weaver, defendants. After the action was instituted, on motion of the defendant County of Lancaster, the County of Gage, Nebraska, Carl G. Hartwig, Martha Hartwig, Edgar C. Hartwig, and S. Ileene Hartwig, were made additional parties defendant.

At the time the action was instituted, which was May 25, 1950, the plaintiff was the owner of the west half of the southwest quarter of Section 31, Township 7 North, Range 7, Lancaster County, Nebraska. At that time Carl G. Hartwig and Martha Hartwig, husband and wife, were the fee simple owners of the north half of the northwest quarter and the northwest quarter of the northeast quarter of Section 6, Township 6 North, Range 7 East of the 6th P. M., in Gage County, Nebraska. Edgar C. Hartwig and S. Ileene Hartwig were at the time tenants on the land. On January 16, 1951, Carl G. Hartwig and Martha Hartwig conveyed the land by deed to Edgar C. Hartwig and S. Ileene Hartwig. The land of the Hartwigs is immediately to the south of the land of the then plaintiff and is separated by a section-line road. This section line is also the dividing line between the Counties of Lancaster and Gage. To the south of the section line the road is in the County of Gage and to the north it is in Lancaster County. By agreement between the counties the road was maintained separately for alternate distances of 1½ miles each, except in the case of bridges which were constructed and maintained by dividing the cost equally between the counties. That portion which separated the two described bodies of land was maintained by the County of Lancaster.

By the petition on which the case was tried the plaintiff alleged in substance that the Counties of Lancaster and Gage were political subdivisions of the State of Nebraska and that it was the duty of the two

counties to maintain the highway; that the defendant Weaver was the duly elected county surveyor of the County of Lancaster and had general supervision of the highways of the County of Lancaster; that prior to and in the summer of 1949 the section-line road and the south line of plaintiff's land descended from the southeast corner to the southwest corner of plaintiff's land and into a draw or creek on to the west thereof and that the road was graded in such manner that the water coming from the east and south came down a road ditch in such manner that it was carried west beyond plaintiff's land; that in the summer of 1949 the highway was regraded and greatly elevated; that a culvert was placed under the grade of the highway from south to north to carry the water across onto the land of plaintiff which had been carried previously to the west; that a ditch was constructed on the south side of the highway which was diked or dammed so as to prevent the flow of the water to the west and to cause it to flow across onto the land of plaintiff; that the defendants Hartwig terraced their land so that water which previously flowed to the west past plaintiff's land was caused to be diverted and to flow across the highway to the north onto it; and that in May 1950 there was a heavy rainfall which washed out the culvert and the dike in the ditch along the highway, all to the injury and damage to the land of the plaintiff. The plaintiff further substantially alleged that after the culvert and dike were washed out the defendant counties threatened and planned to restore the culvert and dike.

In consequence of all of this the plaintiff prayed for restraining injunctive relief against the defendant counties from the restoration and reconstruction of the culvert and drainage across the road, against the defendants Hartwig from the diversion alleged, and for mandatory injunctive relief requiring the defendant counties to restore the drainage along the highway from east to west as it existed prior to the time it was changed in

1949. She also prayed for a judgment for the alleged damage to her land.

In a separate answer the defendant County of Lancaster substantially, to the extent necessary to set it forth here, said that the highway was reconstructed in 1949 to a height of 1 foot to 18 inches above the adjoining land; that at about the place where the culvert was placed the natural drainage was from the south to the north across the road and onto plaintiff's land; that the construction and placement of the culvert was to cause the water to flow across the road onto plaintiff's land in the natural course of drainage and to prevent the washout of the roadbed in the road; and that a dike was constructed to the west of the culvert but that the dike did not check the flow of any water which would have flowed to the west thereof in the course of nature.

The defendant County of Gage and the defendants Hartwig denied that anything done by them diverted the flow of water contrary to the flow in the course of nature onto plaintiff's land.

During the progress of this litigation the plaintiff died and the action was revived in the name of Thomas J. Clare, Sr., and Truman Clare, joint executors of the estate of Alice K. Clare. They became substitute plaintiffs and they are the appellants herein. They will be referred to as plaintiffs.

The case was tried to the court, at the conclusion of which a decree was rendered denying any relief to the plaintiffs. Motion for new trial was duly filed and overruled. The appeal is from the decree and the order overruling the motion for new trial. There are four assignments of error but none of them will be specifically referred to since they deal collectively with the one question of whether or not under the facts in the light of recognized legal and equitable principles the plaintiffs are entitled to relief.

Basically, as already indicated by the outline of

the pleadings, the action is to prevent the reconstruction of the culvert and to require the defendants to make provision for the passage of the water from the south and east in such manner that it will not flow across the highway onto the lands of plaintiffs.

To sustain their contention the plaintiffs adduced evidence in substance that their land lies immediately to the north of the highway in question which is a section-line road and is on the dividing line between the defendant counties and that it extends from east to west for a distance of about 1,070 feet; that there was a drop in the elevation from the east to west of about 20 feet; that for a distance at least to a point about 200 feet west of the point where the culvert was located the slope of the land was from the south and southeast to north and northwest from the land to the south of the highway onto the lands of the plaintiffs; that prior to the summer and fall of 1949 the road was a graded dirt road with grader ditches along both sides; that in this condition no water flowed across the road onto plaintiffs' lands; that in the summer and fall of 1949 the County of Lancaster on behalf of the two counties regraded this road and in so doing elevated and widened the roadbed the entire distance along this land; that it was elevated about 18 inches to 2 feet; that in so doing they graded out road ditches on both sides; that about 150 feet west of the location of the culvert and in the south road ditch a dam or dike was placed to prevent water from flowing on westward along the south side of that road; and that a cut was made across the road and the culvert in question, which was 36 feet long and 18 inches in diameter, was placed in this cut the fall of which from south to north was 3 feet.

The witnesses for plaintiffs say that this caused the water from the south and east to flow across the road onto plaintiffs' lands to their damage whereas prior thereto no water had flowed across but that it had

previously flowed down the road ditches and on past these lands.

It should be said here that there is no evidence that the culvert as such ever caused any damage or had anything to do with any damaging flow of water. The culvert was plugged before any damage of which complaint is made occurred.

The plaintiffs' evidence further indicates that in May 1950, after the culvert had been plugged and the dike cut, there was a heavy rain which washed out the culvert and cut a channel across the road through which water ran onto plaintiffs' land. This caused a channel to be cut thereon and the channel has continued to be enlarged by water which has flowed in that direction since that time.

In addition to this witnesses for plaintiffs say that the defendants Hartwig have terraced their land as a result of which water has been diverted causing it to flow onto plaintiffs' land at the point in question here contrary to its natural course.

Certain of the contentions made through the evidence of plaintiffs are definitely fallacious. The evidence as to the topography in this area discloses without question that the location of the culvert was the approximate low point of a path over which, in the course of nature, flowed the surface water from a drainage area extending east and south and about 200 feet west of the culvert. The over-all drop from east to west was about 20 feet but it was not uniform. There was a drop to the area where the culvert was placed and then a gradual rise to the west of about 2 feet and then a decline on westward. There was no evidence that there ever had been a design to construct a drainage way to the west but only to grade sufficiently to condition and repair the old dirt road. Thus naturally and of necessity the water coming down, if it flowed away at all, flowed across the road unless and until it got high enough to flow over the westward elevation in the road ditch.

In addition to this there was evidence of witnesses on behalf of the defendants running back as far as 60 years that this location had at all times been the regular passage for water coming from the south and east. This evidence came from a witness who had lived in the immediate vicinity for 69 years, neighbors, and men who had over a long period of time been engaged in the care and maintenance of this road.

From the greater weight of evidence the conclusion is inescapable that at all times prior to the summer and fall of 1949 the course of the flow of water from the southeast, the south, and from a small area southwest was across this road onto plaintiffs' land.

It follows then that by the action of the defendant counties there was no diversion, except the possibility of diversion by the dike or dam which was placed in the south road ditch about 150 feet west of the culvert, but only attempted confinement of passage of water in a culvert, whereas theretofore the passage was spread over a wider area, the width of which at any particular time has not been accurately described.

The counties had the right to reconstruct this highway in 1949. No one questions this right. This they did. In this it was their right and duty to provide for the flow of the water as it was wont to flow in the course of nature theretofore. Crummel v. Nemaha County, 118 Neb. 355, 224 N. W. 864; Clark v. Cedar County, 118 Neb. 465, 225 N. W. 235; Leaders v. Sarpy County, 134 Neb. 817, 279 N. W. 809; Webb v. Platte Valley Public Power & Irr. Dist., 146 Neb. 61, 18 N. W. 2d 563; McGill v. Card-Adams Co., 154 Neb. 332, 47 N. W. 2d 912.

The plaintiffs as owners of the lower land were, under the facts of this case, required to bear the burden of receiving the water collected upon the upper land and naturally flowing therefrom. Leaders v. Sarpy County, *supra;* McGill v. Card-Adams Co., *supra.* This is not a departure from the rule announced in Snyder v. Platte Valley Public Power & Irr. Dist., 144 Neb. 308, 13 N. W.

2d 160, 160 A. L. R. 1154, that a proprietor of land may defend against the encroachment of surface water. This case does not present any question of the right of an owner to defend against surface water. It presents only the question of the rights and liabilities of counties in providing for the passage of water over highways.

A restriction upon the right of the counties in the reconstruction of the road and in providing for the passage of water was that they should not be guilty of negligence. Fairbury Brick Co. v. Chicago, R. I. & P. Ry. Co., 79 Neb. 854, 113 N. W. 535, 13 L. R. A. N. S. 542; Webb v. Platte Valley Public Power & Irr. Dist., *supra*.

As pointed out the counties, in the exercise of their rights, placed the culvert across the highway. In this there was no diversion. Whether or not this would have reasonably and properly provided for the flow of water is not known and cannot be ascertained from the record since it was plugged and washed out before it ever had an opportunity to function. As pointed out, in May 1950 there was a rain of unusual proportions as a result of which the culvert and its plug were washed out. The passage since then is the channel across the road which was made when the culvert was washed out.

As to the dam or dike in the south road ditch it cannot well be said that this caused any diversion. By the greater weight of evidence it reasonably appears that its elevation was not above the highest natural elevation of the land to the west of the natural passage of water from the south to the north. Its only effect was to prevent the flow of water from this watershed over into the watershed to the west.

As a matter of information this dike or dam was cut from its top to the bottom of the road ditch before the incident of May 1950 to a width estimated by plaintiffs' witnesses at from 6 to 10 inches and by defendants' witnesses from 18 to 30 inches and that since it has been for the most part, if not altogether, washed away. It has never been replaced.

It appears by the greater weight of the evidence that there has been no diversion of water by the defendant counties. It further appears by the same weight of evidence that the counties have not up to this time been guilty of negligence in the efforts made to carry the water across this road.

As to the defendants Hartwig, they being the owners of land to the south of the road, it is claimed that they diverted water into this drainage way by artificial structures on their land. There is some evidence to this effect, and we think that in this respect the evidence preponderates in favor of the plaintiffs. Witnesses for plaintiffs testified that in this manner water from several acres was diverted. A witness for the defendants gave it as his opinion that water from only .34 of an acre was diverted.

It is clear that water from some area and in some amount was diverted. It does not follow however from this that the plaintiffs are entitled to relief. The true rule in this connection is that if surface water flows in a well-defined course in its primitive condition it cannot be arrested or diverted in a different direction or otherwise interfered with to the injury of another landowner. Todd v. York County, 72 Neb. 207, 100 N. W. 299, 66 L. R. A. 561; Bussell v. McClellan, 155 Neb. 875, 54 N. W. 2d 81, on rehearing, 156 Neb. 189, 55 N. W. 2d 606; Keim v. Downing, 157 Neb. 481, 59 N. W. 2d 602.

In other cases the element of injury has not been specifically contained in the statement of the rule. See, Hengelfelt v. Ehrmann, 141 Neb. 322, 3 N. W. 2d 576; Schomberg v. Kuther, 153 Neb. 413, 45 N. W. 2d 129; Ricenbaw v. Kraus, 157 Neb. 723, 61 N. W. 2d 350. It is however an element of the rule and implicit in the language employed in the statement in these cases.

While there is evidence of diversion there is none of injury or damage flowing therefrom. In the absence of such evidence the plaintiffs are entitled to no relief against the defendants Hartwig.

The decree of the district court is affirmed.

AFFIRMED.

THE BOARD OF TRUSTEES OF YORK COLLEGE, YORK, NEBRASKA, ET AL., APPELLEES, V. E. M. CHENEY, TRUSTEE, ET AL., APPELLEES, IMPLEADED WITH YORK COLLEGE, A CORPORATION, APPELLANT.
71 N. W. 2d 195

Filed June 24, 1955. No. 33744.

1. **Judgments.** A judgment is void unless a reasonable method of notification is employed and a reasonable opportunity to be heard is afforded to persons affected.
2. ———. Where a proper method of notification is not employed, the judgment is void and not merely subject to reversal. The rendition of such a judgment is a denial of due process of law.
3. ———. Even though the court has jurisdiction over a defendant and even though he is given notice of the action, a judgment against him is void if he was denied all opportunity to be heard.
4. **Appearances.** The filing of a motion for new trial and to vacate a void judgment to which a party is entitled as a matter of right is ordinarily a general appearance, but such general appearance does not relate back so as to validate the void proceedings. Its only effect is to confer jurisdiction over the person of defendant from its date.
5. **Pleading: Trial.** A motion for judgment on the pleadings, like a demurrer, admits the truth of all well-pleaded facts in the pleadings of the opposing party, together with all reasonable inferences to be drawn therefrom. The party moving for judgment on the pleadings necessarily admits, for the purpose of the motion, the untruth of his own allegations insofar as they have been controverted.
6. ———: ———. A judgment on the pleadings is allowable not for lack of proof but for lack of an issue; hence, it is proper where the pleadings entitle the party to recover without proof, as where they disclose all the facts, or where the pleadings present no issue of fact but only a question of law.

APPEAL from the district court for York County: HARRY D. LANDIS, JUDGE. *Reversed and remanded.*

Emory P. Burnett, Chauncey C. Sheldon, Warren K. Dalton, and *Van Pelt, Marti & O'Gara,* for appellant.

Clarence S. Beck, Attorney General, and *Homer L. Kyle,* for appellees.

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

CHAPPELL, J.

York College, an eleemosynary corporation, appealed to this court from certain orders and judgments of the trial court hereinafter set forth and discussed, assigning that the trial court erred: (1) In rendering its judgment of July 16, 1954, without notice and opportunity to be heard; (2) in subsequently rendering and entering a judgment on the pleadings; and (3) in applying its orders and judgments to all property, both real and personal, held in trust for York College. We sustain the assignments.

York College was organized as a corporation on August 26, 1890. Its purpose was the promotion of education by the establishment and maintenance of a college at York, Nebraska. Its charter was amended August 17, 1920, in particulars unimportant here. Its business affairs were controlled and conducted by a board of trustees who had authority to own property.

On February 29, 1892, E. M. Cheney, trustee, and his wife, conveyed *specifically described real estate* in York to the board of trustees of York College in trust for the Church of the United Brethren in Christ for school purposes. The deed read in part: "All the *above described property is the York College Campus. No Mortgage shall ever be put upon the Campus or the Buildings thereon, nor shall the same ever be alienated or encumbred (sic), and in case this restriction is violated, the property shall revert to the County of York, and the Court of said County shall appoint five trustees to receive and hold said property for school purposes* * * *." (Italics

supplied.) The deed was delivered to and accepted by the trustees. Thereafter the college took and since has had possession and occupancy of the real estate. It allegedly also owns assets and personal property used to operate the college.

This court on March 5, 1954, in Board of Trustees of York College v. Cheney, 158 Neb. 292, 63 N. W. 2d 177, affirmed the trial court's judgment refusing to eliminate from the aforesaid deed the condition therein prohibiting the encumbrance or alienation of the real estate constituting the real property described in the deed; refusing to quiet the title thereto in fee simple in the board of trustees of York College so that they could mortgage, encumber, and convey it for operation and support of the college; and dismissing their application for such relief. On March 26, 1954, the mandate therein was issued by this court, and such case was entirely closed and terminated. Further, neither the trial court nor this court determined in such action that York College had theretofore violated the conditions of its deed aforesaid. No such issue was ever presented therein to either court for decision.

Nevertheless, purportedly in such original action, the county attorney of York County filed an application in the district court for York County on July 16, 1954, suggesting that "the Evangelical United Brethren Church, as successor to the church of the United Brethren in Christ, has withdrawn support from York College and their trustees decided to give up sponsorship of the same.

"Wherefore, in accordance with the restricted deed to the Trustees of York College, the Court should appoint five trustees, and they and their successors in office to receive and hold said property of York College for school purposes." The application then prayed for that relief and for such other relief as equity requires.

Thereafter on the same day, without any notice to York College or any of its officers or trustees, and without any opportunity given for them to be heard upon

the application, the trial court, in accord with the prayer thereof, rendered a judgment appointing five named trustees to "hold said property of York College for school purposes" and directed them to "function as provided by law."

In that connection, Article I, section 3, Constitution of Nebraska, provides: "No person shall be deprived of life, liberty, or property, without due process of law." That language is controlling here.

In Restatement, Judgments, § 6, p. 36, it is said: "A judgment is void unless a reasonable method of notification is employed and a reasonable opportunity to be heard afforded to persons affected." As stated in Comment a, p. 36: "Where a proper method of notification is not employed, the judgment is void, and not merely subject to reversal. * * * The rendition of such a judgment is a denial of due process of law, * * *." Also, as said in Comment f, p. 39: "Even though the court has jurisdiction over the defendant, and even though he is given notice of the action, a judgment against him is void if he was denied all opportunity to be heard." See, also, 42 Am. Jur., Process, § 4, p. 7; 12 Am. Jur., Constitutional Law, § 573, p. 267; Herman v. Barth, 85 Neb. 722, 124 N. W. 135; Albin v. Consolidated School District, 106 Neb. 719, 184 N. W. 141; Sheridan County v. Hand, 114 Neb. 813, 210 N. W. 273; Shambaugh v. Buffalo County, 133 Neb. 46, 274 N. W. 207; Morehouse v. Morehouse, 159 Neb. 255, 66 N. W. 2d 579. It is therefore elementary that the judgment rendered July 16, 1954, was void and of no force and effect whatever.

On July 22, 1954, York College and its president filed a motion for new trial and to vacate the judgment of July 16, 1954, for reasons, among others, that it was rendered without notice to or opportunity to be heard and without any hearing of any kind whereat any evidence was adduced; that the restrictive clause in the deed aforesaid to the trustees of York College provides for the appointment of trustees only upon the alienation

or encumbrance of the real property described in said deed, no violation of which had been proposed or attempted, nor had the real estate been abandoned but was still held by the trustees of York College for the use and benefit of the college; and that the judgment was not restricted to such real property, but also erroneously included all other property and assets owned by York College. It admitted that on June 30, 1954, the board of trustees of York College had adopted a resolution to appoint a committee to investigate the possibility of securing a purchaser for its other college property and assets to pay its debts and liabilities, to consider its right to pledge and its legal obligation, if any, arising by reason of the pledging of endowment fund assets of the college, and report back to the board. It also resolved that the 4-year liberal arts program should be discontinued for the ensuing school year and that a committee should be appointed to deal with assets of the college, including disposition of any personnel, faculty, or administrative staff, and the student body. However, their motion filed July 22, 1954, affirmatively alleged that no action to alienate, encumber, or abandon any property used in the conduct of York College had been taken by the board of trustees of the college.

It is argued by the Attorney General that by filing its motion July 22, 1954, and having a hearing thereon November 22, 1954, the college entered a general appearance and the judgments herein discussed were without prejudice to it. However, as held in Ivaldy v. Ivaldy, 157 Neb. 204, 59 N. W. 2d 373, after citing and quoting from numerous applicable and controlling authorities: "Such general appearance does not relate back so as to validate the void proceedings. Its only effect is to confer jurisdiction over the person of defendant from its date." In such opinion, quoting from Godfrey v. Valentine, 39 Minn. 336, 40 N. W. 163, 12 Am. S. R. 657, this court said: " 'The course of the moving party in thus seeking to have a void judgment set aside,

—to which relief he is entitled as a matter of right,— but at the same time consenting and asking that the court shall now hear and adjudicate upon the cause, may justify the court in entertaining the cause and proceeding as in an action pending in which the defendant has voluntarily appeared. But in thus urging his legal right, and thus invoking and consenting to the future action of the court, the moving party should not be deemed to have conferred jurisdiction retrospectively, so as to render valid the previous judgment, which, being unsupported by any authorized judicial proceedings, was not merely voidable, but void, and in legal effect a nullity.' "

Be that as it may, on August 7, 1954, while the motion of the college for new trial and to vacate the judgment was still pending, the Attorney General filed a motion for judgment on the pleadings for the alleged reason that the motion for new trial and to vacate the judgment rendered July 16, 1954, admitted that the college cannot or will not continue to use its real and personal property for school purposes as required by Board of Trustees of York College v. Cheney, *supra*. It will be here noted that no personal property or other assets and money belonging to York College was ever involved in that case, and the restriction in the deed to the trustees of York College referred only to specifically described real property.

Thereafter, on November 13, 1954, the trial court rendered a judgment sustaining the motion for judgment on the pleadings and impliedly, although not expressly, overruled the motion of York College for new trial and to vacate the judgment of July 16, 1954. In that connection, the only reference in this record to the fact that such motion was ever overruled appears in the notice of appeal filed by York College and the order of the trial court fixing supersedeas bond, which both recited that it was overruled November 13, 1954.

Nevertheless, on November 22, 1954, after all the aforesaid judgments and orders had been rendered, a hear-

ing was held by the trial court purportedly upon the motion of York College for new trial and to vacate the judgment of July 16, 1954, whereat evidence was adduced. There the county attorney under oath admitted that no notice was ever given to York College of his application aforesaid, that it was never given any opportunity to be heard, and that no evidence whatever was offered by anyone before the judgment of July 16, 1954, was rendered.

The president of York College, under oath, verified those facts. He further testified as follows: That no executive committee or board of trustees of York College had ever authorized the sale, conveyance, or transfer of any of the property of York Collage except some food and perishable supplies belonging to it. However, they had loaned their band instruments to a college at Le Mars, Iowa. The college still had $9,000 of its own money in a bank at York and actual possession of the college property, although temporarily it was not then conducting an academic school program because Evangelical United Brethren Church was no longer financially supporting or sponsoring the college. However, the trustees of York College were endeavoring to find another church or organization which would do so. The board of trustees had no intention of removing or disposing of any of the college property until they obtained proper instructions from a court in a proper action brought for that purpose. We conclude that the college was entitled to such relief as a matter of right.

Thereafter, the motion of the college for new trial and to vacate the judgment of July 16, 1954, was never formally disposed of. However, on December 3, 1954, the trial court entered the judgment theretofore rendered on November 13, 1954. Therein it found that the motion of the Attorney General for judgment on the pleadings should be sustained; that the board of trustees of York College had ceased to use its property held in trust for school purposes; and that said board of trustees

should be and were relieved and discharged by the court as trustees of said property. It then adjudged that the trustees appointed by the court on July 16, 1954, and their duly appointed successors should take possession of *"all property, both real and personal,* belonging to, and which is or may hereafter become a part of, the trust res of said trust, and shall hold and administer the same for school purposes in accordance with the terms and conditions of said trust." (Italics supplied.)

This court has held that: "A motion for judgment on the pleadings, like a demurrer, admits the truth of all well-pleaded facts in the pleadings of the opposing party, together with all reasonable inferences to be drawn therefrom. The party moving for judgment on the pleadings necessarily admits, for the purpose of the motion, the untruth of his own allegations insofar as they have been controverted." International Harvester Co. v. County of Douglas, 146 Neb. 555, 20 N. W. 2d 620.

Such rule was reaffirmed in Anderson v. Anderson, 155 Neb. 1, 50 N. W. 2d 224, which also held that: "The general rule is that, while the court will take judicial notice of its records, it will not in one case take such notice of the record in another case.

"The doctrine that the court will take judicial notice of a final order made by it in another case which is so interwoven and interdependent with the pending case as to justify the application of it is an exception to the general rule, recognized by the necessity of giving effect to a former holding which finally decided questions of fact and law."

In State ex rel. Nebraska State Bar Association v. Wiebusch, 153 Neb. 583, 45 N. W. 2d 583, we held: "Where, upon statements in the pleadings, one party is entitled by law to judgment in his favor, judgment should be so rendered by the court."

As stated in 71 C. J. S., Pleading, § 427, p. 870: "A motion for judgment on the pleadings searches the

record and permits an examination of the prior pleadings of the party making the motion; the court may consider the whole record and give judgment for the party who appears entitled to it." As stated in § 429, p. 871: "A judgment on the pleadings may be granted when it appears from the pleadings that only a question of law is presented." As stated on page 872: "A judgment on the pleadings is allowable not for lack of proof, but for lack of an issue; hence, it is proper where the pleadings entitle the party to recover without proof, as where they disclose all the facts, or where the pleadings present no issue of fact * * *."

In Boldt v. First Nat. Bank of West Point, 59 Neb. 283, 80 N. W. 905, it is held: "To warrant affirmative relief to a party in a cause submitted upon the pleadings he must be entitled thereto upon the facts therein stated. The question is not upon whom is the burden of proof, but who is to be accorded judgment upon the facts pleaded. See State v. Lincoln Gas Co., 38 Neb. 33."

Also, as held in McMillan v. Chadron State Bank, 115 Neb. 767, 214 N. W. 931: "A motion for judgment on the pleadings requires a consideration of what may be found in all the pleadings as the ultimate facts."

In the light of such rules we may assume for the purpose of argument only that the motion of York College for new trial and to vacate the judgment of July 16, 1954, was a pleading which could be considered by the trial court together with all other pleadings in the case, including the ultimate decision in Board of Trustees of York College v. Cheney, *supra,* in disposing of the Attorney General's motion for judgment on the pleadings. Yet, we conclude that they presented, with regard to the real property, personal property, and other assets of York College, issues of fact determinable only by a trial on the merits in a proper action which required the trial court to overrule the Attorney General's motion for judgment on the pleadings.

For reasons heretofore stated we decide that the

judgment of the trial court rendered July 16, 1954, was void and of no force and effect; that the motion of York College for new trial and to vacate such judgment should have been sustained; and that the motion of the Attorney General for judgment on the pleadings should have been overruled, and that the sustaining thereof and rendition of the judgment in response thereto were both erroneous and should be vacated. We therefore conclude that the judgment rendered July 16, 1954, and the judgment and order rendered November 13, 1954, and entered December 3, 1954, should be and hereby are reversed and vacated, and the cause is remanded for further proceedings in conformity with this opinion.

REVERSED AND REMANDED.

PHIL D. HERTZ, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.
71 N. W. 2d 113

Filed June 24, 1955. No. 33759.

1. **Criminal Law: Trial.** The district court may not properly direct a verdict of not guilty unless the evidence is so lacking in probative force that the court may say as a matter of law that it is insufficient to support a finding of guilt.
2. ———: ———. It is not the province of the district court to resolve conflicts in evidence in a criminal action or to pass upon the credibility of witnesses.
3. **Criminal Law: Evidence.** In a criminal action evidence of other similar acts to be admissible must amount to proof of other similar criminal offenses.
4. ———: ———. Evidence of other similar acts are admissible in a criminal prosecution for the purpose only of showing motive, criminal intent, or guilty knowledge.

ERROR to the district court for Hall County: WILLIAM F. SPIKES, JUDGE. *Reversed and remanded.*

Flansburg & Flansburg and *E. Merle McDermott*, for plaintiff in error.

Clarence S. Beck, Attorney General, and *Homer L. Kyle,* for defendant in error.

Heard before SIMMONS, C. J., CARTER, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ., and KOKJER, District Judge.

YEAGER, J.

Phil D. Hertz was prosecuted in the district court for Hall County, Nebraska, by information in the name of the State of Nebraska charging that, having in his possession a false, forged, and counterfeited conditional sale contract for the payment of money, he knowingly, falsely, and feloniously published the same as true with the intent to prejudice, damage, and defraud. He was tried to a jury, found guilty, and sentenced to serve a term of from 3 to 5 years in the State Penitentiary.

He duly filed a motion for new trial which was overruled. He seeks a reversal of the order overruling the motion for new trial and the judgment and sentence by petition in error to this court. For convenience he will be hereinafter referred to as defendant and the State of Nebraska will be referred to as the State.

As grounds for reversal the defendant sets forth six separate assignments of error. The first four will be considered as one since basically the four are predicated upon the single proposition that the evidence was insufficient to sustain a verdict of guilt of the charge contained in the information.

In support of the charge against the defendant the State adduced evidence that he was engaged in Grand Island, Nebraska, in the sale and distribution of sewing machines. Sales were made by salesmen in Nebraska and adjoining states. Sales were usually made on conditional sales contracts. Two salesmen were Orville H. Hobson and Edward H. Dishman.

Hobson was called as a witness by the State. He testified that prior to the incident which is the basis of the prosecution he had a conversation or conversa-

tions with the defendant in which the defendant stated in substance that he was having certain temporary financial difficulties and talked over with him a plan to meet these difficulties. The details of the plan have not been testified to, but generally it appears that it involved the obtaining by the witness and another salesman of forged conditional sales contracts for the sale of machines which defendant could use for the purpose of obtaining money or credit.

The witness testified that pursuant to this plan he caused to be prepared a contract and caused to be signed thereto the name of a fictitious person and that he delivered the contract to the defendant. He testified further substantially that the defendant knew that the contract was not genuine.

Other testimony is that after the defendant received the contract he sold it to Jamson, Peterson, Mehring Company and received in payment for it $108. It is upon this contract that the prosecution herein is based.

This is a substantial résumé of all of the evidence in direct proof of the elements of the charge against the defendant except that by the testimony of Edward H. Dishman the testimony of Hobson was corroborated as to the plan devised for raising money or obtaining credit.

At the close of the State's case the defendant moved for a directed verdict which motion was overruled.

The question presented by the motion was that of whether the evidence had sufficient probative value to justify the submission of the defendant's guilt to a jury.

The rule is that the court will not direct a verdict of not guilty unless the evidence is so lacking in probative force that the court may say as a matter of law that it is insufficient to support a finding of guilt. Kitts v. State, 153 Neb. 784, 46 N. W. 2d 158; Phillips v. State, 154 Neb. 790, 49 N. W. 2d 698; Spreitzer v. State, 155 Neb. 70, 50 N. W. 2d 516; Vanderheiden v. State, 156 Neb. 735, 57 N. W. 2d 761.

The evidence was positive and unequivocal that the defendant was the promoter of the scheme hereinbefore described. The evidence was further positive that he knowingly received the fictitious instrument described. And the evidence was also positive that he knowingly used the instrument to obtain money. There was nothing which could justify the court in saying as a matter of law that the evidence was insufficient to sustain a finding of guilty. The motion for a directed verdict at the close of the State's evidence was properly overruled.

After this motion was ruled upon, the defendant adduced his evidence, after which his motion for directed verdict was renewed. In his evidence he denied generally and specifically the charges made against him. There was nothing however in that evidence to do anything more than present a case of conflicting evidence.

It is not the province of the district court to resolve conflicts in evidence in a criminal action or to pass upon the credibility of witnesses. These are matters for a jury. Spreitzer v. State, *supra;* Vanderheiden v. State, *supra.* This motion was properly overruled. This effectually disposes of the first four assignments of error.

Accordingly it must be said that the verdict of the jury should be sustained unless, as the defendant contends, there were other errors prejudicial to the defendant requiring a reversal.

By the fifth assignment of error the defendant charges that the court erred in admitting evidence of other alleged separate and distinct similar offenses of the defendant.

In determining whether or not evidence of other similar acts is admissible, one rule is that it must amount to proof of other similar criminal offenses. Davis v. State, 58 Neb. 465, 78 N. W. 930; Swogger v. State, 116 Neb. 563, 218 N. W. 416; Foreman v. State, 127 Neb. 824, 257 N. W. 237; Doerffler v. State, 129 Neb. 720, 262 N. W. 678; Henry v. State, 136 Neb. 454, 286 N. W. 338.

Another rule is that such evidence is admissible only

for the purpose of showing motive, criminal intent, or guilty knowledge. Davis v. State, *supra;* Becker v. State, 91 Neb. 352, 136 N. W. 17; St. Clair v. State, 103 Neb. 125, 169 N. W. 554; Taylor v. State, 114 Neb. 257, 207 N. W. 207; Rice v. State, 120 Neb. 641, 234 N. W. 566; Jurgensen v. State, 135 Neb. 537, 283 N. W. 228.

The evidence admitted in this case of which complaint is made related to 10 conditional sales contracts other than the one on which the prosecution is based.

All that can be said of them is that they were marked for identification and a representative of the firm of Jamson, Peterson, Mehring Company testified that he received them in the ordinary course of business. He did not testify that he received them from the defendant. In truth he gave no information at all as to the source from which they came.

This was followed by testimony of Hobson the effect of which was to say that he delivered five of them to the defendant and that they were fictitious, and testimony of Dishman the effect of which was that he delivered five and that likewise they were fictitious.

There is no evidence whatever that the defendant uttered them.

In this light and under the rules cited it cannot well be said that this evidence amounted to proof of other similar offenses. This evidence, introduced as it was, was clearly without foundation and inadmissible. It cannot be doubted that this evidence was prejudicial.

The sixth assignment of error is an attack upon the substance of instruction No. 10. For the purpose of this review, determination upon this assignment is of no significance. However in order to avoid repetition of possible error on a new trial, in view of the indication that a new trial will be necessary, it appears that it should be considered.

By this instruction the jury was told that evidence tending to show the commission of other similar offenses is proper to be considered for the purpose of throwing

light upon the question of the guilt or innocence of the defendant of the charge contained in the information. The limitations upon the admissibility of evidence of other similar offenses in a criminal prosecution were not set out in this or any other instruction.

Thus, as has been indicated, the instructions contained no proper statement as to the admissibility of evidence of other similar offenses. The instruction was therefore prejudicially defective.

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

REVERSED AND REMANDED.

HAYES ALLEN, APPELLEE, V. ARTHUR KAVANAUGH, APPELLANT.
71 N. W. 2d 119

Filed June 24, 1955. No. 33760.

1. **Automobiles: 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 headlights.
2. ———: ———. The basis of this rule is that a driver of an automobile is legally obligated to keep such a lookout that he can see what is plainly visible before him and that he cannot relieve himself of that duty. And, in conjunction therewith, he must so drive his automobile that when he sees the object he can stop his automobile in time to avoid it.
3. ———: ———. As a general rule a motorist who drives his 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 headlights is negligent as a matter of law.
4. **Negligence: Trial.** Where the evidence shows beyond reasonable dispute that a plaintiff's negligence was more than slight as compared with a defendant's negligence it is the duty of the court to determine the question as a matter of law and direct a verdict in favor of the defendant.
5. **Trial.** In a case where a motion has been made at the close of all of the evidence for a directed verdict, which motion

should have been sustained but was overruled and the case was submitted to a jury which returned a verdict contrary to the motion, and a motion for judgment notwithstanding the verdict is duly filed, it is the duty of the court to sustain the motion and render judgment in accordance with the motion for a directed verdict.

APPEAL from the district court for Johnson County: VIRGIL FALLOON, JUDGE. *Reversed and remanded with directions.*

Hubka & Hubka, for appellant.

Robert S. Finn, for appellee.

Heard before SIMMONS, C. J., CARTER, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ., and FLORY, District Judge.

SIMMONS, C. J.

This is an action for property damage resulting from the collision of two automobiles. Plaintiff pleaded that the sole and proximate cause of the collision was the negligence of the defendant. Defendant pleaded that the negligence of plaintiff caused the accident.

Trial was had. At the close of plaintiff's case-in-chief, and at the close of all evidence, defendant moved for a directed verdict. The motions were overruled.

The trial court submitted the cause to the jury upon issues of negligence of the defendant and proximate cause, and upon the issue of contributory negligence. The jury returned a verdict for the plaintiff upon which judgment was rendered. The defendant filed a motion for judgment notwithstanding the verdict, or, if the motion was not sustained, for a new trial. The motion was overruled. Defendant appeals.

We reverse the judgment of the trial court, and remand the cause with directions to sustain the motion for a judgment notwithstanding the verdict.

We state the evidence in the light of the rule that in determining such a motion the plaintiff is entitled to

have every controverted fact resolved in his favor and to have the benefit of every inference that can be reasonably deduced from the evidence. Plumb v. Burnham, 151 Neb. 129, 36 N. W. 2d 612.

The accident happened on a north and south graveled state highway at a point where the traveled surface was 24 feet in width and level so far as the area involved here is concerned. There were distinct north and southbound lanes of travel. It happened about 9 p. m. on August 9, 1953. The weather was clear, the road was dry, there was dust in the air, and there was no wind.

Defendant was the owner of a 1934 Ford Tudor automobile. About 6 p. m. on the day of the accident he stopped the car, with the motor running, in about the middle of the highway, according to his testimony. He went for his mail, returned to the car, found that the engine had stopped running, and he could not get it started. He testified that he left the car with taillight burning and went to his farm home. He did not return to his car until the next morning.

Plaintiff's evidence is that about 9 p. m. that evening he was driving north on the right-hand side of the road at a speed of 25 miles per hour. He observed an "object" of dull color that he thought was a car ahead of him in the road. There were no lights on the object. He did not then determine its position on the highway or whether it was moving. The object was then 100 yards or more ahead. He was at that time on the east half of the road, going north.

Plaintiff started to slow down and pull over to the left and into the southbound lane of travel. He was completely over on the west half of the road at about a distance of 100 feet from defendant's car. He was then traveling at 15 miles per hour. He had seen the object ahead of him during all of this time. He knew the object was on the west side of the road when he was 100 feet away from it. Prior to that time he thought the defendant's car was "a'going" down the road. At 50 to 60 feet

away from it he determined that the object was not moving. On cross-examination, he testified that he thought defendant's car was standing still when he was 100 feet away from it. He testified on direct examination that he applied his brakes when he was probably 30 feet from defendant's car, and "slid into him."

Plaintiff testified that he intended to go around defendant's car to the left.

On cross-examination, he testified that when he was about 15 feet from defendant's car he saw he could not go around it without upsetting. He was then going 10 miles per hour. He was going about 3 or 4 miles per hour at the time of the impact.

Defendant's car was knocked forward and to the right a distance of about 12 feet and was seriously damaged. Plaintiff's car stopped at the point of impact and was seriously damaged on the right front bumper and fender.

There is no contention made here that defendant was not negligent. The defendant's contention is that plaintiff was negligent so as to bar his recovery as a matter of law.

Beginning with Roth v. Blomquist, 117 Neb. 444, 220 N. W. 572, 58 A. L. R. 1473, we have consistently held: "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."

In Buresh v. George, 149 Neb. 340, 31 N. W. 2d 106, we held: "The basis of this rule is that a driver of an automobile is legally obligated to keep such a lookout that he can see what is plainly visible before him and that he cannot relieve himself of that duty. And, in conjunction therewith, he must so drive his automobile that when he sees the object he can stop his automobile in time to avoid it."

We have also held: "The existence or presence of smoke, snow, fog, mist, blinding headlights, or other similar elements which materially impair or wholly de-

stroy visibility are not to be deemed intervening causes but rather as conditions which impose upon the drivers of automobiles the duty to assure the safety of the public by the exercise of a degree of care commensurate with such surrounding circumstances." Haight v. Nelson, 157 Neb. 341, 59 N. W. 2d 576.

Here, of course, plaintiff's negligence is not that he did not see what he should have seen, but that he saw defendant's car when he was over 300 feet from it, when he was 100 feet from it, and when he was 50 to 60 feet from it. High speed is not involved here. There is not and obviously could not be any contention that plaintiff could not have stopped his car in time to avoid a collision, until the last moment before the impact. He was not then trying to stop, but to go around the defendant's car on the left, and then found that he could not do so because of the condition of the shoulder of the road. Then, and then only, did he try to stop. He at all times had a clear passage in his own lane of travel to the right of the defendant's car. He did not use or attempt to use it, but instead he pulled his car into the direct lane of travel leading to defendant's car, and maintained that course with full knowledge of the obstruction ahead of him and ran into it. Even at the time he elected to try to go around defendant's car to the left, the way was open for him to have gone around defendant's car to the right in full safety. He did not use it. We have held: "A motorist who drives his 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 headlights is negligent as a matter of law." Fischer v. Megan, 138 Neb. 420, 293 N. W. 287.

In Stocker v. Roach, 140 Neb. 561, 300 N. W. 627, we held a defendant, as to his cross-petition, barred from recovery by contributory negligence as a matter of law. There the defendant while moving at a speed of 35 miles an hour saw an object in the road when 100 to 200

feet away from it. A collision followed. We there held: "If this court should decline to hold the defendant's conduct to be negligent, the court would be in the anomalous position of holding that failuure to see an object within range of a driver's lights, or failure to so drive or control a car that the driver can avoid collision with obstacles appearing within range of his lights, constitutes negligence, but that failure to exercise any care after being aware of an obstacle, if not a warning, is not negligence."

In the Stocker case, the speed was 35 miles per hour, and there was no slowing down or applying of brakes after the object was seen. Here the speed was less and there was slowing down, both of which would have made easier a stopping or turning aside to avoid the collision.

The language of the Supreme Court of Louisiana in Arbo v. Schulze (La. App.), 173 So. 560, is pertinent here: "The truck is alleged to have been seventy feet from the corner of Holly Grove street, and plaintiff alleges he saw it when fifty feet away when his speed was not more than twelve miles per hour. No matter how it was parked or of what material constructed, the truck was far enough away when he saw it to enable plaintiff to avoid striking it. If the truck was only partially revealed or but dimly perceived, there was the more reason for caution on plaintiff's part. He saw an object directly in his path, and if its outline or dimensions appeared uncertain he should have slowed down, or, if necessary, stopped, in order to ascertain its extent and location, before attempting to pass. If the roadway was narrow, as alleged, there was an additional reason for caution." See, also, Albrecht v. Waterloo Construction Co., 218 Iowa 1205, 257 N. W. 183; Geisen v. Luce, 185 Minn. 479, 242 N. W. 8; Perkins v. Great Central Transport Corp., 262 Mich. 616, 247 N. W. 759; Waterstradt v. Lanyon Dock Co., 304 Mich. 437, 8 N. W. 2d 128; Fortune v. McGinn, 23 Tenn. App. 504, 134 S. W. 2d 898.

It is patent from plaintiff's own testimony that he was guilty of contributory negligence as a matter of law.

In Andelt v. County of Seward, 157 Neb. 527, 60 N. W. 2d 604, we held: "Section 25-1151, R. R. S. 1943, by the use of the words 'when the contributory negligence of the plaintiff was slight and the negligence of the defendant was gross in comparison' clearly intended the words 'in comparison' as qualifying both of the clauses immediately preceding. The words 'slight' and 'gross' as used in the statute are comparative terms and the intent of the statute is that the negligence of the parties shall be compared with the other in determining questions of slight and gross negligence."

The negligence of the plaintiff is obviously more than slight when compared with that of the defendant in accord with the above rule. It bars his recovery as a matter of law.

In Krepcik v. Interstate Transit Lines, 152 Neb. 39, 40 N. W. 2d 252, we held: "Where the evidence shows beyond reasonable dispute that a plaintiff's negligence was more than slight as compared with a defendant's negligence it is the duty of the court to determine the question as a matter of law and direct a verdict in favor of the defendant."

The trial court should have sustained defendant's motion for a directed verdict made at the close of all the evidence.

We also held in Krepcik v. Interstate Transit Lines, *supra:* "In a case where a motion has been made at the close of all of the evidence for a directed verdict, which motion should have been sustained but was overruled and the case was submitted to a jury which returned a verdict contrary to the motion, and a motion for judgment notwithstanding the verdict is duly filed, it is the duty of the court to sustain the motion and render judgment in accordance with the motion for a directed verdict."

The judgment of the trial court is reversed and the

cause remanded with directions to sustain defendant's motion for judgment notwithstanding the verdict.

REVERSED AND REMANDED WITH DIRECTIONS.

BEN HEINIS, AS ADMINISTRATOR OF THE ESTATE OF BEN ALLEN HEINIS, JR., DECEASED, APPELLEE, V. H. S. LAWRENCE, FIRST AND REAL NAME HAROLD S. LAWRENCE, APPELLANT.

71 N. W. 2d 127

Filed June 24, 1955. No. 33763.

Automobiles: Negligence. When one, being in a place of safety, sees, or in the exercise of reasonable care for his own safety should see, the approach of a moving vehicle in close proximity, suddenly moves from the place of safety into the path of such vehicle and is struck, his own conduct constitutes contributory negligence more than slight in degree, as a matter of law, and precludes recovery.

APPEAL from the district court for Chase County: VICTOR WESTERMARK, JUDGE. *Reversed and remanded with directions.*

Edward E. Carr and *Hollman & McCarthy,* for appellant.

Maupin & Dent, for appellee.

Heard before SIMMONS, C. J., CARTER, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ., and FLORY, District Judge.

FLORY, District Judge.

This is an action for damages brought by Ben Heinis as administrator of the estate of Ben Allen Heinis, Jr., deceased, plaintiff and appellee herein, against H. S. Lawrence, defendant and appellant. The action is for damages for the death of the deceased alleged to have been caused on or about the 2nd day of July 1953, by the negligence of the defendant in the operation of his

automobile. At the close of the plaintiff's testimony defendant moved for a directed verdict and renewed the motion at the close of all of the testimony. Ruling on these motions was reserved by the trial court. The case was submitted to the jury and a verdict rendered for the plaintiff. Thereafter the trial court overruled the motions for directed verdict and motion for judgment for the defendant notwithstanding the verdict, and judgment was rendered on the verdict. Motion for new trial was filed and overruled and appeal taken therefrom by the defendant.

The appellant assigns as error that the trial court erred in not finding, as a matter of law, that decedent was guilty of contributory negligence which was the proximate cause of the accident and sufficient to bar recovery by the plaintiff; and that the court erred in overruling the defendant's motion for directed verdict at the close of the plaintiff's case and again at the conclusion of all of the evidence.

We have concluded that as a matter of law plaintiff's evidence conclusively shows that the deceased was guilty of negligence more than slight as compared with the negligence of the defendant, barring recovery herein.

The accident occurred on U. S. Highway No. 6 at a point about 10½ miles east of Imperial in Chase County, Nebraska, at about 10:55 a. m., or shortly before, and there is no evidence of bad weather or that any other vehicles or obstructions were involved in the accident. Deceased, at the time of his death, was 17 years of age and residing with his parents. At the time of the accident he was riding on top of a load of wheat on a grain truck which was proceeding in an easterly direction. The defendant was driving his automobile in the same direction approaching the truck from the rear. Deceased, who is referred to frequently in the evidence as Bennie, and another boy, Kent Searl, were riding on the left side of the truck with their legs hanging over the side. Two other boys were riding on top of

the wheat, and three men were in the cab of the truck. The truck was going east slowly, at a speed of 7 or 8 miles an hour, down a hill preparing to stop at the foot of the hill to let the deceased off.

The county surveyor testified that the highway was an oil mat 23 to 24 feet wide; that he prepared a plat, exhibit No. 1; that the west end of this plat does not extend clear back to the top of the hill to the west; and that it is approximately 1,000 feet from where he started measuring to the low point between the hill to the west and the hill gradually rising from there to the east. The record is not clear as to how far it was beyond the 1,000 feet to the crest of the hill to the west.

The testimony of the plaintiff's witnesses placed the point of the accident at approximately the low spot shown on plaintiff's exhibit No. 1, or more than 1,000 feet east of the crest of the hill over which defendant's car was approaching from the west.

As the wheat truck was slowing down at this point the deceased jumped from the side of the truck into the north lane of the highway and was almost immediately struck by the car of the defendant who had turned into the north lane to pass the slowly moving truck.

Plaintiff's witness Charles Richard Heinis, 12-year-old brother of the deceased who was sitting on top of the wheat, testified that he first saw the car when Bennie jumped off the truck, and that the car was right behind the truck. He yelled "Bennie," and the car hit Bennie right after he yelled. He further testified that the car was starting to go around the truck when he first saw it, and that Bennie ran a step and then the car hit him.

Kent Searl, a 13-year-old boy, was riding beside Bennie to Bennie's right. He first saw the car about 2 feet behind the truck on the left side getting ready to pass. Bennie was jumping, and took a step.

Arthur Searl, the driver of the wheat truck, testified that he was going 7 or 8 miles an hour, slowing

down to let the boy off at the foot of the hill to get another truck; that he could not see to the west in the rear-view mirror on account of the legs of the boys sitting on the side of the truck; and that he asked twice if there was any car coming and got a reply of "no" once. The first thing he saw was when the boy flew past in the air after he had been hit. The truck was still rolling very slowly at the time, near the point where they had decided to stop. He did not know the boy was going to jump or was off the truck until he saw him in the air.

There is no evidence of the speed of the defendant's car other than the physical facts and the testimony of the defendant that he was traveling between 55 and 60 miles an hour.

The testimony of the plaintiff's witnesses as reflected on exhibit No. 1 is that deceased was thrown 101 feet and then rolled to a total distance of 173 feet from the point of impact. The defendant's car went off the pavement on the north side at about the point of impact and went 216 feet where it upset in the borrow pit. The testimony of plaintiff's witnesses and the photograph, exhibit No. 12, show that the right front fender near the headlight on defendant's car was what struck the deceased.

The oil mat pavement at the scene of the accident was marked with a white, broken center line. Going up the hill both to the east and to the west were the customary yellow warning or no-passing lines approaching the crests of the hills. Also at the top of the hill to the west of the point of the accident, as shown on exhibit No. 2, was a highway sign "Do Not Pass on Hills or Curves." The two yellow lines overlapped slightly at the bottom of the hill, and the accident occurred a short distance to the east of the beginning of the yellow line in the south lane of traffic ascending the hill to the east.

Appellee contends that the defendant was negligent

in crossing this yellow line into the north lane of traffic to pass the truck. Whether the defendant had pulled into the north half of the highway to pass the slowly-moving truck before he came to the yellow line in the south lane of traffic, or crossed the line near its beginning we do not believe is material in this case. The photograph, exhibit No. 2, shows that both the hill to the west and the one to the east of the point of the accident were gradually sloping hills, and the plat, exhibit No. 1, shows that the hill to the east has much less elevation and a more gradual slope than the hill to the west. There is no evidence of any vehicle approaching from the east.

The yellow line is a warning that the vision ahead is obstructed as to approaching vehicles, but we do not hold that it is an absolute prohibition against turning into the left-hand lane of traffic to pass a very slowly moving vehicle when there is sufficient vision ahead to permit such passing in safety.

The evidence shows no warning to defendant that the deceased was about to jump from the truck into the path of his car. We can only reach the conclusion that the deceased jumped without looking or, if he looked, failed to see the approaching car of the defendant which was within his line of vision before he jumped.

In the case of Troup v. Porter, 126 Neb. 93, 252 N. W. 611, this court said that the evidence of defendant's speed was sufficient to require submission to the jury on the question of defendant's negligence unless the negligence of decedent was more than slight in comparison thereto. In that case decedent ran between parked cars into the path of defendant's car. It was held that "decedent herein in stepping from between two parked automobiles directly in front of the defendant's car without looking is more than slight negligence in comparison with the negligence of the defendant * * *."

In Cuevas v. Yellow Cab & Baggage Co., 141 Neb. 662, 4 N. W. 2d 790, the rule was stated that: "'"Contributory negligence is conduct for which plaintiff is responsible, amounting to a breach of the duty which the law imposes upon persons to protect themselves from injury, and which, concurring and cooperating with actionable negligence for which defendant is responsible, contributes to the injury complained of as a proximate cause." * * * See Eaton v. Merritt, 135 Neb. 363, 281 N. W. 620. Want of ordinary care, and not knowledge of the danger, is the test of contributory negligence. * * *'"

In Travinsky v. Omaha & C. B. St. Ry. Co., 137 Neb. 168, 288 N. W. 512, this court said: "We think that, as a matter of law, the last movement of the deceased constituted more than slight negligence contributing to cause the accident, * * *," and further held that: "The negligence does not arise from the single circumstance of whether the pedestrian looks or does not look. The determining element in this type of case is the sudden movement into the path of the vehicle followed by almost instantaneous collision."

We have considered all of the cases cited by the appellee, but in each of these cases there is some dispute in the testimony as to the actual facts, leaving a question for determination by the jury. In this case there were only two witnesses who actually saw the car strike the deceased. His brother, Charles Heinis, testified as follows: "Q- How quick did the car hit him after you had hollered at him? Do you have any idea about that? A- Just about right after. * * * Q- How far was the car from the truck when you saw it? A- Just behind it. * * * Q- And it was starting to go around when you saw it? A- Yes. Q- That was when you yelled, Bennie? A- Yes, and he jumped off the truck."

The other eyewitness, Kent Searl, testified: "Q- And then you say you saw the car right at the back of the

truck? A- Yes. Q- And then you looked at Bennie? A- Yes. Q- And he was jumping? A- Yes. Q- Just then the car hit him? A- Well, he probably took a step, because his legs were spread like he was ready to."

This undisputed testimony of the plaintiff's witnesses brings this case squarely within the rule laid down in the Troup case, *supra,* and subsequent cases above cited, that, regardless of whether the defendant may have been negligent, the negligence of the deceased was more than slight in comparison therewith and that the verdict should have been directed for the defendant.

The judgment of the trial court is reversed and the cause remanded with directions to sustain defendant's motion for judgment notwithstanding the verdict.

REVERSED AND REMANDED WITH DIRECTIONS.

IRA O. PEEK, APPELLANT, V. AYERS AUTO SUPPLY, A COPARTNERSHIP, ET AL., APPELLEES.
71 N. W. 2d 204

Filed June 24, 1955. No. 33782.

1. **Workmen's Compensation.** Where the amount of an award in a workmen's compensation case is payable periodically for 6 months or more, a party may make application for increase on account of decrease in capacity since the award was rendered, due to the injury.
2. **Workmen's Compensation: Appeal and Error.** It is the function of this court in a workmen's compensation case to consider it de novo on the record.

APPEAL from the district court for Richardson County: VIRGIL FALLOON, JUDGE. *Affirmed.*

Tesar & Tesar, for appellant.

Fraser, Connolly, Crofoot & Wenstrand, for appellees.

Heard before SIMMONS, C. J., CARTER, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ., and KOKJER, District Judge.

YEAGER, J.

This is an action by Ira O. Peek, plaintiff and appellant, against Ayers Auto Supply, a copartnership, Noble I. Ayers, Noble I. Ayers, Jr., John C. Ayers, and Consolidated Underwriters, defendants and appellees, originally instituted to recover compensation under the workmen's compensation law on account of injuries sustained by plaintiff while he was employed by the Ayers Auto Supply, a copartnership composed of the defendants Ayers. The Consolidated Underwriters is the workmen's compensation insurance carrier for the other defendants. Hereinafter the Ayers Auto Supply and the defendants Ayers will for convenience be referred to as the defendants.

On three previous occasions, under the present title, this case has been before this court. This appeal however does not require a detailed review of the matters previously presented. Pertinent matters previously presented however were that on May 1, 1946, plaintiff was injured in consequence of which he instituted action in the workmen's compensation court in which he was awarded compensation. An appeal was taken to the district court and in a petition filed therein plaintiff enumerated his injuries. The injuries enumerated were lacerated and severed ears, lacerated forehead and right leg, shock hemorrhage from wounds, concussion, facial disfigurement, loss of memory, inability to concentrate, closure of ear canals with resultant impairment of hearing, severe headaches, injuries to teeth, numbness of legs and arms and right side of head, dizziness, and nervousness, which he said totally and permanently disabled him from the performance of work in employment.

The issue raised by that petition was finally tried in the district court and by decree rendered on June 27, 1951, that court rejected plaintiff's claim that he was totally and permanently disabled but did find that he was temporarily totally disabled for 105 weeks and

temporarily partially disabled for an additional 175 weeks and awarded compensation accordingly.

From that decree an appeal was taken to this court where the evidence was reviewed and this court specifically rejected the contention that plaintiff had been totally and permanently disabled. In the opinion rendered this court found that he had sustained temporary partial disability of 75 percent for 175 weeks in addition to 105 weeks temporary total disability, the same as was done by the district court. The only change made was that the weekly rate of pay for temporary partial disability was increased from $13.50 to $17.90. Peek v. Ayres Auto Supply, 155 Neb. 233, 51 N. W. 2d 387. While it is perhaps of no real significance, when the adjudication was made by this court the period or periods for which plaintiff was entitled to receive compensation had expired.

This conclusion was arrived at on evidence wherein the condition of plaintiff, his symptoms, and his activities were fully described. This evidence included the testimony of numerous physicians and a report from the Mayo Clinic. It is clear that the decision was based upon a full exposition of the known facts.

The award made by this court at that time was fully paid and satisfied.

Thereafter on January 13, 1953, the petition which is the basis of the present appeal was filed. By it the plaintiff claimed additional compensation, again on the ground that by reason of the progress of his condition since the previous award he is totally and permanently disabled and is entitled to additional compensation. The right of plaintiff to maintain this action was sustained by this court in Peek v. Ayers Auto Supply, 157 Neb. 363, 59 N. W. 2d 564.

The issue as to additional compensation was tried in the district court and the petition dismissed on the ground that there had been shown no material change for the worse in the condition of plaintiff since the pre-

vious trial. A motion for new trial was filed and overruled. This appeal is from that determination and the ruling on the motion for new trial.

It is the rule that where the amount of an award in a workmen's compensation case is payable periodically for 6 months or more, a party may make application for increase on account of decrease in capacity since the award was rendered, due to the injury. § 48-141, R. R. S. 1943; Micek v. Omaha Steel Works, 136 Neb. 843, 287 N. W. 645; Huff v. Omaha Cold Storage Co., 136 Neb. 907, 287 N. W. 764; Riedel v. Smith Baking Co., 150 Neb. 28, 33 N. W. 2d 287; Peek v. Ayers Auto Supply, 157 Neb. 363, 59 N. W. 2d 564.

The subject of inquiry therefore is that of whether or not the evidence discloses that since the previous hearing the plaintiff has shown a decrease in capacity to engage in gainful employment.

Basically the description of plaintiff's condition, as drawn from the evidence adduced, is not different from what it was when previously considered by this court. It is not contended that it is different. Two doctors have furnished evidence to the effect that the results of the basic condition have become aggravated and that in their opinion the plaintiff is totally and permanently disabled from engaging in employment.

This evidence is clearly inconsistent with facts unquestionably and unequivocally appearing in the record. These facts in probability were not disclosed to these doctors. The plaintiff, according to his own testimony, was employed for 4 weeks as an oiler on a dragline and he worked around 8 hours a day. In the 4 weeks he got in about 2 weeks of time because the dragline did not work when it rained. For this work he was paid $1 an hour. Thereafter, starting in the spring of 1953, he worked 2 days a week at Kyle's Service Station in Auburn, Nebraska, where he was still working at the time of trial. At first he was paid 80 cents an hour and later $1.15 an hour. It appears that in this employment

he earns around $100 a month. He testified that he did not do the heavy work but the work he was doing was of a character which fitted into his previous occupational training and experience. His employer testified that over the period of his employment there was apparent improvement in his capacity to work.

These doctors did not appear and give testimony in court. Their evidence was in the form of written statements prepared away from court which statements, under stipulation of the parties, were read into the record in the case. These statements on their face appear to have been based upon examinations made of plaintiff by them and history furnished to them by the plaintiff.

It is inconceivable that they would have rendered opinions that plaintiff was totally and permanently disabled if they had been supplied with the history of the employment to which plaintiff and his employer testified on the trial. Accordingly these opinions must be rejected as representing the true condition of the plaintiff.

With the rejection of these opinions there is nothing to justify a departure from the conclusion arrived at by this court when the case was previously considered.

There was medical evidence on behalf of the defendants which was contrary to that adduced by plaintiff. This was contained in a prepared written statement made by a doctor who purportedly made an examination on behalf of the defendants. This statement was admitted in evidence pursuant to stipulation.

From the statement it was made to appear that the doctor had shortly before the trial made an examination of the plaintiff and that the statement was in part based on that examination. The plaintiff and his wife testified on the trial that no such examination was made. In this respect this was the status of the record with reference to the evidence at the close of the trial. Neither party asked for leave at the time of trial to call the doctor

as a witness or obtain his testimony by deposition in further exploration of the question of whether or not the doctor had in fact made an examination.

After the motion for new trial was filed the plaintiff took steps to take the deposition of the doctor to be used in support of his motion for new trial. Leave to take the deposition was denied.

Assuming, but not deciding, that depositions containing evidence of value in the determination to be made upon a motion for a new trial may in instances be proper, this is not such a case.

The purported reason for taking the deposition, as it appears from an affidavit which appears in the record, was that the doctor's evidence was false, and that in the manner of its introduction a fraud had been practiced upon the court.

The parties agreed upon the manner of introduction of the evidence of this doctor. It was introduced in the same manner as the evidence of the doctors for plaintiff. It is not pointed out how or in what manner this became a fraud upon the court. There of course was none.

As to the question of falsity in the evidence of the doctor, he stated in substance that preliminary to the making of the statement introduced in evidence he examined the plaintiff. The plaintiff insists that this was not true, and the bill of exceptions discloses that he and his wife so testified at the trial of the case in the district court. Thus the doctor's evidence was fully controverted on the trial.

The only apparent purpose of the taking of the deposition was to permit the exertion of an effort by examination to cause the doctor to retract that portion of his evidence wherein he stated that he had, as a preliminary to making his statement, examined the plaintiff. There is nothing to indicate a probability that this could have been accomplished. Therefore it may not be said

that prejudicial error was involved in the refusal to allow the taking of the deposition.

It is the function of this court in a workmen's compensation case to consider it de novo on the record. Schneider v. Village of Shickley, 156 Neb. 683, 57 N. W. 2d 527; Miller v. Livestock Buying Co., 157 Neb. 51, 58 N. W. 2d 596.

This record has been so examined and on that basis the conclusion has been reached that the plaintiff has failed to sustain the burden of showing a decrease in his capacity to work since the previous award was rendered, in consequence of which he is not entitled to recover further compensation.

The judgment of the district court is affirmed.

AFFIRMED.

LE ROY CHAPMAN, APPELLANT, V. NORMAN HAYWARD ET AL., APPELLEES.
71 N. W. 2d 201

Filed June 24, 1955. No. 33801.

1. **Criminal Law: Escape.** Where a prisoner is released on an illegal or void order of the court he may be retaken and compelled to serve out the sentence, even though the time in which the original sentence should have been served has expired.
2. ———: ———. Where one sets in motion the proceedings by which he secures an illegal or void release from custody, he becomes an escapee in contemplation of the law as of the date he secures such order, when such order is finally determined to be illegal or void.
3. **Extradition.** To be a fugitive from justice under the Uniform Criminal Extradition Act, it is necessary that the person charged as such must have been actually present in the demanding state at the time of the commission of the crime, or, having been there, has committed some overt act in furtherance of the crime subsequently consummated, and has departed to another jurisdiction.

APPEAL from the district court for Lincoln County: ISAAC J. NISLEY, JUDGE. *Affirmed.*

Maupin & Dent and *Richard W. Satterfield,* for appellant.

Frank E. Moss and *James G. McIntosh,* for appellees.

Heard before SIMMONS, C. J., CARTER, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ., and FLORY, District Judge.

CARTER, J.

This is a habeas corpus action commenced in the district court for Lincoln County by Le Roy Chapman, petitioner, against the sheriff of Lincoln County, Nebraska, and others, respondents. The action is in resistance of a proceeding to remove petitioner from the State of Nebraska to the State of Utah by extradition to answer the charge of being an escapee from the Utah State Prison as a fugitive from justice from the State of Utah. The trial court found that petitioner was properly in the custody of the respondents and denied the writ. The petitioner appeals.

The record discloses that on or prior to January 4, 1954, petitioner was imprisoned in the Utah State Prison for the crime of burglary under an indeterminate sentence of 1 to 20 years. On that day a hearing was had in the district court for Salt Lake County, Utah, on the merits of a habeas corpus proceeding instituted by Le Roy Chapman. The trial court indicated that the allegations of the habeas corpus petition would be sustained and ordered the immediate release of the petitioner. A final order releasing the petitioner was filed on January 29, 1954. On May 18, 1954, the Supreme Court of the State of Utah reversed the judgment of the district court for Salt Lake County and directed the entry of an order remanding Le Roy Chapman to the custody of the warden of the Utah State Prison.

On September 24, 1954, a complaint was filed in the city court of Salt Lake City charging petitioner with escape from the Utah State Prison, in violation of Title

76, chapter 50, section 2, Utah Code Annotated, 1953. On December 8, 1954, the Governor of Utah made an executive requisition upon the Governor of Nebraska for the extradition of the petitioner from the State of Nebraska to the State of Utah to answer such charge and that the requisition was honored and an extradition warrant issued by the Governor of Nebraska. The petitioner was at the time serving a sentence of 90 days in the county jail of Lincoln County, Nebraska, for carrying a concealed weapon.

The petition for habeas corpus is grounded on the fact that Chapman was not in the State of Utah on January 29, 1954. Petitioner was released on habeas corpus by the district court for Salt Lake County on January 4, 1954. He left the State of Utah on January 6, 1954, and did not again return to that state. The final order of the district court for Salt Lake County was entered on January 29, 1954, after petitioner had left the state. He was officially released, therefore, on January 29, 1954, on an order which was subsequently reversed and held for naught by the Supreme Court of the State of Utah. It is the contention of the respondents that he became an escapee on January 29, 1954. In Hopkins v. North, 151 Md. 553, 135 A. 367, 49 A. L. R. 1303, the court states the general rule to be: "The decided weight of authority and, in our opinion, the better reasoned cases, hold that, where a prisoner secures his liberty through some illegal or void order, it is to be treated as an escape, and he can be retaken and compelled to serve out his sentence, even though the time in which the original sentence should have been served has expired." Cases on this subject are collected in the annotation to Hopkins v. North, *supra*, found in 49 A. L. R. 1306. See, also, Tines v. Hudspeth, 164 Kan. 471, 190 P. 2d 867.

The petitioner relies upon the fact that he was not in the State of Utah on the day the crime was alleged to have been committed. He relies upon Hyatt v. Corkran,

188 U. S. 691, 23 S. Ct. 456, 47 L. Ed. 657; In re Application of Shoemaker, 25 Cal. App. 551, 144 P. 985; Dennison v. Christian, 72 Neb. 703, 101 N. W. 1045, 117 Am. S. R. 817; and Finch v. West, 106 Neb. 45, 182 N. W. 565. We hold these cases inapplicable since the adoption of the Uniform Criminal Extradition Act in 1935.

Sections 5 and 6 of the Uniform Criminal Extradition Act, which appear as sections 29-705 and 29-706, R. R. S. 1943, provide as follows: "A warrant of extradition must not be issued unless the documents presented by the executive authority making the demand show that the accused was present in the demanding state at the time of the commission of the alleged crime, that he thereafter fled from that state and is now in this state, and that he is lawfully charged by indictment found, or by an information filed by a prosecuting officer and supported by affidavits to the facts, or by affidavit made before a magistrate in that state, with having committed a crime under the laws of that state, or that he has been convicted of crime in that state and has escaped from confinement or broken his parole." § 29-705, R. R. S. 1943.

"The Governor of this state may also surrender, on demand of the executive authority of any other state, any person in this state charged on indictment found in such other state with committing an act in this state intentionally resulting in a crime in such other state; and the provisions of sections 29-701 to 29-728 not otherwise inconsistent shall apply to such case, notwithstanding that the accused was not in that state at the time of the commission of the crime and has not fled therefrom." § 29-706, R. R. S. 1943.

These sections have been construed to provide for the extradition of a criminal from the state in which he acted to the state in which his acts had criminal effect. The language of these sections was designed to cover cases not clearly reached by prior extradition laws. Prior to 1935 it was possible to extradite only those criminals

who were held to be fugitives, that is, who had been physically present in the state in which the crime was committed and had fled therefrom. It had been held that one who commits a crime against the laws of a state by acts done outside of that state was not a fugitive within the meaning of the extradition act. The uniform act was drafted to meet the need for authority to extradite in such cases. It clearly provides for the extradition of a criminal from the state in which he acted to the state in which his acts had criminal effect. See 9 Uniform Laws Annotated, Miscellaneous Acts, pp. 169 to 172. The rule under the Uniform Criminal Extradition Act is: To be a fugitive from justice it is necessary that the person charged as such must have been actually present in the demanding state at the time of the commission of the crime, or, having been there, has then committed some overt act in furtherance of the crime subsequently consummated, and has departed to another jurisdiction. See, also, Getzendanner v. Hiltner, 117 W. Va. 418, 185 S. E. 694; In re Application of Campbell, 147 Neb. 820, 25 N. W. 2d 419; Strassheim v. Daily, 221 U. S. 280, 31 S. Ct. 558, 55 L. Ed. 735.

The record shows that Chapman sought and obtained an order releasing him from the Utah State Prison, to which he was not entitled. He therefore set in motion the proceedings by which he secured his illegal release. He left the state before the litigation was completed. When it was finally determined that the order granting his release was illegal, he became an escapee from the Utah State Prison. He put in force the agency to secure an illegal release and thereby committed an overt act, in contemplation of law, in furtherance of the offense which was subsequently consummated in Utah, and departed the jurisdiction. His offense was one for which he could be extradited under sections 29-705 and 29-706, R. R. S. 1943.

The trial court was correct in denying the writ of

habeas corpus. The judgment of the district court is affirmed.

AFFIRMED.

ROBERT L. HANSON ET AL., APPELLEES, V. UNION PACIFIC RAILROAD COMPANY, A CORPORATION, APPELLEE, RAILWAY EMPLOYES' DEPARTMENT, AMERICAN FEDERATION OF LABOR, ET AL., APPELLANTS.

71 N. W. 2d 526

Filed July 1, 1955. No. 33561.

1. **Labor Relations.** The objective of the Railway Labor Act is the amicable adjustment of disputes and in that way to avoid strikes with their harmful effect upon public interests.
2. ———. The purpose of the Eleventh subsection of section 152 of 45 U. S. C. A., the Railway Labor Act, is to permit a railway and a union to agree to a union shop notwithstanding any statute or law, state or federal, that forbids such agreements.
3. **Constitutional Law: Commerce.** Congress, in the choice of means to effect a permissible regulation of commerce, must conform to due process.
4. **Constitutional Law.** When the question is whether legislative action transcends the limits of due process guaranteed by the Fifth Amendment, decision is guided by the principle that the law shall not be unreasonable, arbitrary, or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained.
5. **Constitutional Law: Commerce.** The Fifth Amendment is not a guarantee of untrammeled freedom of action and of contract. In the exercise of its power to regulate commerce, Congress can subject both to restraints not shown to be unreasonable.
6. **Constitutional Law.** Class legislation discriminating against some and favoring others is prohibitive. But the rule does not prohibit or prevent classification which is reasonable, for, while the law must affect alike all persons in the same class and under similar conditions, classification based upon substantial distinction, with a proper relation to the objects classified and the purposes sought to be achieved, if it does operate alike on all members of the class, is not special, discriminatory, or class legislation.
7. ———. The freedom of association, the freedom to join or not to join in association with others for whatever purposes

such association is lawfully organized, is a freedom guaranteed by the First Amendment.

APPEAL from the district court for Douglas County: JACKSON B. CHASE, JUDGE. *Affirmed.*

Schoene & Kramer, Gross, Welch, Vinardi & Kauffman, Mulholland, Robie & Hickey, Richard R. Lyman, and *Donald W. Fisher,* for appellants.

Swarr, May, Royce, Smith & Story, for appellees Hanson et al.

W. R. Rouse, F. J. Melia, J. H. Anderson, and *James A. Wilcox,* for appellee Union Pacific R. R. Co.

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

WENKE, J.

Robert L. Hanson, Horace A Cameron, Harold J. Grau, Leonard W. Koch, and William A. Cornell brought this action in the district court for Douglas County. The defendants are the Union Pacific Railroad Company, a corporation, and the following labor organizations: Railway Employes' Department, American Federation of Labor; International Association of Machinists; International Brotherhood of Boilermakers, Iron Ship Builders & Helpers of America; International Brotherhood of Blacksmiths, Drop Forgers & Helpers; Sheet Metal Workers' International Association; International Brotherhood of Electrical Workers; Brotherhood of Railway Carmen of America; International Brotherhood of Firemen, Oilers, Helpers, Roundhouse and Railway Shop Laborers; Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express and Station Employes; Brotherhood of Maintenance of Way Employes; The Order of Railroad Telegraphers; Brotherhood of Railroad Signalmen of America; Railroad Yardmasters of America; Hotel and Restaurant Employes International Alliance and Bartenders International League of America; Brotherhood of Sleeping Car Porters; and The American Railway

Supervisors Association, Incorporated. The basis for the action is the contention that the union shop agreements entered into by the Union Pacific Railroad Company and the foregoing labor organizations are in violation of Article XV, section 13, of the Constitution of Nebraska, and section 48-217, R. R. S. 1943. The purpose of this action is to enjoin these defendants, particularly the Union Pacific Railroad Company, from putting into effect the provisions of these union shop agreements. The trial court found the union shop agreements to be in conflict with Nebraska's Constitution and statutes and therefore enjoined the Union Pacific Railroad Company from giving effect to its union shop agreements with the defendant labor organizations insofar as employment in Nebraska is concerned. The labor organizations filed a motion for new trial and have appealed from the overruling thereof.

Article XV, section 13, of the Constitution of Nebraska, provides: "No person shall be denied employment because of membership in or affiliation with, or resignation or expulsion from a labor organization or because of refusal to join or affiliate with a labor organization; nor shall any individual or corporation or association of any kind enter into any contract, written or oral, to exclude persons from employment because of membership in or nonmembership in a labor organization."

Section 48-217, R. R. S. 1943, provides: "To make operative the provisions of Sections 13, 14 and 15 of Article 15 of the Constitution of Nebraska, no person shall be denied employment because of membership in or affiliation with, or resignation or expulsion from a labor organization or because of refusal to join or affiliate with a labor organization; nor shall any individual or corporation or association of any kind enter into any contract, written or oral, to exclude persons from employment because of membership in or nonmembership in a labor organization."

The appellee Union Pacific Railroad Company is a corporation organized under and existing by virtue of the laws of the State of Utah with its principal place of business located in Omaha, Nebraska. It is a common carrier by rail subject to Part I of the Interstate Commerce Act and a "carrier" within the meaning of and subject to the Railway Labor Act. We will herein refer to it as the Union Pacific.

The appellant labor organizations, at all times herein material, have been and now are the duly designated and authorized collective bargaining representatives of the different crafts or classes of nonoperating employees employed by the Union Pacific. We shall herein refer to them as the labor organizations.

The individually named appellees are residents of the State of Nebraska and employed by the Union Pacific therein. They belong to the craft or class of employees known as clerical, office, station, and storehouse employees who are represented, for the purposes of collective bargaining, by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes. They are not members of that or any other labor organization which has entered into a union shop agreement with the Union Pacific. They bring this action for themselves and for all other employees of the Union Pacific who are similarly situated. They will herein be referred to as appellees.

Prior to January 10, 1951, the Railway Labor Act prohibited union shops. See 45 U. S. C. A., § 152, Fourth and Fifth, p. 478. However, effective as of that date, Congress amended the Act as follows:

"Eleventh. Notwithstanding any other provisions of this chapter, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted—

"(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: Provided, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

"(b) to make agreements providing for the deduction by such carrier or carriers from the wages of its or their employees in a craft or class and payment to the labor organization representing the craft or class of such employees, of any periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership: Provided, That no such agreement shall be effective with respect to any individual employee until he shall have furnished the employer with a written assignment to the labor organization of such membership dues, initiation fees, and assessments, which shall be revocable in writing after the expiration of one year or upon the termination date of the applicable collective agreement, whichever occurs sooner.

"(c) The requirement of membership in a labor organization in an agreement made pursuant to subparagraph (a) of this paragraph shall be satisfied, as to both a present or future employee in engine, train, yard, or hostling service, that is, an employee engaged in any of the services or capacities covered in the First Division of paragraph (h) of section 153 of this title, defining the

jurisdictional scope of the First Division of the National Railroad Adjustment Board, if said employee shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services; and no agreement made pursuant to subparagraph (b) of this paragraph shall provide for deductions from his wages for periodic dues, initiation fees, or assessments payable to any labor organization other than that in which he holds membership: Provided, however, That as to an employee in any of said services on a particular carrier at the effective date of any such agreement on a carrier, who is not a member of any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services, such employee, as a condition of continuing his employment, may be required to become a member of the organization representing the craft in which he is employed on the effective date of the first agreement applicable to him: Provided, further, That nothing herein or in any such agreement or agreements shall prevent an employee from changing membership from one organization to another organization admitting to membership employees of a craft or class in any of said services.

"(d) Any provisions in paragraphs Fourth and Fifth of this section in conflict herewith are to the extent of such conflict amended." 45 U. S. C. A., § 152, p. 481.

The purpose of this amendment, as stated in Otten v. Baltimore & O. R. Co., 205 F. 2d 58, is to permit: "* * * a railway and a union to agree to a 'union shop' notwithstanding any 'statute or law', state or federal, that forbids such agreements."

Subsequent thereto, and in accordance with and pursuant to the procedures provided by the Railway Labor Act, the Union Pacific and the labor organizations negotiated and entered into agreements in accordance with

the authority granted by the foregoing amendment. The agreements became effective as of March 31, 1953. These agreements required, subject to certain conditions and limitations not material here, that all employees covered by the basic collective bargaining agreements between the Union Pacific and these labor organizations, who were not already members thereof, must, as a condition of their continued employment, file their application with, pay their initiation fee to, and become members of the labor organization representing their respective class or craft within 60 days after the beginning of such employment or the effective date of such agreement, whichever is later, and thereafter maintain such membership.

Appellees were notified by the Union Pacific that they were required, as a condition of their continued employment, to join the labor organization, party to the union shop agreement, which represented the respective class or craft in which they were employed. The appellees did not comply with this notice but brought this action.

The Tenth Amendment to the Constitution of the United States provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

As stated in House v. Mayes, 219 U. S. 270, 31 S. Ct. 234, 55 L. Ed. 213: "* * * the Government created by the Federal Constitution is one of enumerated powers, and cannot, by any of its agencies, exercise an authority not granted by that instrument, either in express words or by necessary implication; that a power may be implied when necessary to give effect to a power expressly granted; that while the Constitution of the United States and the laws enacted in pursuance thereof, together with any treaties made under the authority of the United States, constitute the Supreme Law of the Land, a State of the Union may exercise all such governmental

authority as is consistent with its own constitution, and not in conflict with the Federal Constitution; that such a power in the State, generally referred to as its police power, is not granted by or derived from the Federal Constitution but exists independently of it, by reason of its never having been surrendered by the State to the General Government; * * *."

As to a power expressly granted it was held in United States v. Darby, 312 U. S. 100, 61 S. Ct. 451, 85 L. Ed. 609, 132 A. L. R. 1430: "From the beginning and for many years the amendment has been construed as not depriving the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end."

When Congress acts in regard to a matter over which it has authority it was held in Mondou v. New York, N. H. & H. R. R. Co., 223 U. S. 1, 32 S. Ct. 169, 56 L. Ed. 327, 38 L. R. A. N. S. 44: "'* * * The government of the United States, then, though limited in its powers, is supreme; and its laws, when made in pursuance of the constitution, form the supreme law of the land, "anything in the constitution or laws of any State, to the contrary notwithstanding."' (McCulloch v. Maryland, 4 Wheat. 316, 17 U. S. 316, 4 L. Ed. 579.) * * * And now that Congress has acted, the laws of the States, in so far as they cover the same field, are superseded, for necessarily that which is not supreme must yield to that which is." See, also, Oregon-Washington R. R. & Navigation Co. v. State of Washington, 270 U. S. 87, 46 S. Ct. 279, 70 L. Ed. 482; Amalgamated Assn. Employees v. Wisconsin Employment Relations Board, 340 U. S. 383, 71 S. Ct. 359, 95 L. Ed. 364, 22 A. L. R. 2d 874; International Union of United Automobile Workers v. O'Brien, 339 U. S. 454, 70 S. Ct. 781, 94 L. Ed. 978; Garner v. Teamsters, Chauffeurs & Helpers Union, 346 U. S. 485, 74 S. Ct. 161, 98 L. Ed. 228. Thus, if two acts cannot be reconciled or consistently stand together the

law of the state must yield. International Union of United Automobile Workers v. O'Brien, *supra.*

However, in the absence of Congress acting in regard thereto, it was held in Cooley v. Board of Wardens of Port of Philadalphia, 12 How. 299, 13 L. Ed. 996: "* * * the mere grant of such a power to Congress, did not imply a prohibition on the states to exercise the same power; that it is not the mere existence of such a power, but its exercise by Congress, which may be incompatible with the exercise of the same power by the states, and that the states may legislate in the absence of congressional regulations." See, also, Oregon-Washington R. R. & Navigation Co. v. State of Washington, *supra.* As stated in Lincoln Federal Labor Union v. Northwestern Iron & Metal Co., 335 U. S. 525, 69 S. Ct. 251, 93 L. Ed. 212, 6 A. L. R. 2d 473: "* * * states have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law."

In regard to interstate commerce the foregoing rule has been stated in Oregon-Washington R. R. & Navigation Co. v. State of Washington, *supra,* as follows: "In the relation of the States to the regulation of interstate commerce by Congress there are two fields. There is one in which the State can not interfere at all, even in the silence of Congress. In the other, (and this is the one in which the legitimate exercise of the State's police power brings it into contact with interstate commerce so as to affect that commerce,) the State may exercise its police power until Congress has by affirmative legislation occupied the field by regulating interstate commerce and so necessarily has excluded state action." And, as stated in United States v. Darby, *supra:* "In the absence of Congressional legislation on the subject state laws which are not regulations of the commerce itself

or its instrumentalities are not forbidden even though they affect interstate commerce."

However, even though it enters the field Congress may not necessarily pre-empt it for, as stated in Garner v. Teamsters, Chauffeurs & Helpers Union, *supra:* "Of course, Congress, in enacting such legislation as we have here, can save alternative or supplemental state remedies by express terms, or by some clear implication, if it sees fit." See, also, Amalgamated Assn. Employees v. Wisconsin Employment Relations Board, *supra;* Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Board, 336 U. S. 301, 69 S. Ct. 584, 93 L. Ed 691; Hill v. Florida ex rel. Watson, 325 U. S. 538, 65 S. Ct. 1373, 89 L. Ed. 1782; United States v. Darby, *supra.*

"A state law is superseded by a Federal regulation only to the extent that the two may be inconsistent. An act of Congress may occupy only a limited portion of the field of regulation of a particular subject matter, leaving unimpaired the right of the several states to enact regulations covering other aspects of the subject or merely to supplement the Federal legislation in respect to local conditions." 11 Am. Jur., Constitutional Law, § 175, p. 872.

All this is fully supported by the second paragraph of Article VI, of the Constitution of the United States, which provides: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." See, also, Mondou v. New York, N. H. & H. R. R. Co., *supra.*

"The principle is therefore fundamental that state laws must yield to acts of Congress within the sphere of its delegated power. It is very obvious that where Congress has under the Federal Constitution the right of exercising exclusive jurisdiction and puts forth its

power to cover the field, state legislation ceases to have efficacy; for when Congress passes a law in that field of legislation common to both Federal and state governments, the act of Congress supersedes all inconsistent state legislation. Congress in regulating a matter within the concurrent field of legislation speaks for all of the people and all of the states, and it is immaterial that the public policy embodied in the congressional legislation overrules the policies theretofore adopted by any of the states with respect to the subject matter of such legislation." 11 Am. Jur., Constitutional Law, § 175, p. 872.

The extent to which Congress has entered the field on any subject depends upon its intent. As was said in Truax v. Raich, 239 U. S. 33, 36 S. Ct. 7, 60 L. Ed. 131, L. R. A. 1916D 545, Ann. Cas. 1917B 283: "The purpose of an act must be found in its natural operation and effect * * *." See, also, Napier v. Atlantic Coast Line R. R. Co., 272 U. S. 605, 47 S. Ct. 207, 71 L. Ed. 432.

That Congress intended to pre-empt the field is fully evidenced by the following language of the amendment: "Notwithstanding * * * any * * * statute or law * * * of any State, any carrier or carriers as defined in this chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted * * * to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class * * *."

If additional proof of such intent is needed it can be found in the report submitted by the House of Representatives' Committee on Interstate and Foreign Commerce in connection with H. R. 7789, the bill which submitted the amendment to the House, and the debates in the Senate on S. 3295, a companion bill, particularly in connection with Senator Holland's proposed amend-

ment thereto. A study of the history of the amendment leaves no doubt of the fact that Congress intended to strike down all state constitutional and statutory restrictions relating to union shop agreements insofar as they applied to carriers in interstate commerce and the labor organizations representing their employees. Did Congress have the power to do so?

Article I, section 8, of the Constitution of the United States, insofar as here material, provides: "The Congress shall have Power * * * To regulate Commerce * * * among the several States, * * *."

It was said in Gibbons v. Ogden, 9 Wheaton 1, 6 L. Ed. 23, in regard to the foregoing, that: "It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution." And that: "* * * Congress may control the State laws, so far as it may be necessary to control them, for the regulation of commerce." See, also, United States v. Darby, *supra;* Mondou v. New York, N. H. & H. R. R. Co., *supra.*

As stated in Mondou v. New York, N. H. & H. R. R. Co., *supra:* "This power over commerce among the States, so conferred upon Congress, is complete in itself, extends incidentally to every instrument and agent by which such commerce is carried on, may be exerted to its utmost extent over every part of such commerce, and is subject to no limitations save such as are prescribed in the Constitution. But, of course, it does not extend to any matter or thing which does not have a real or substantial relation to some part of such commerce."

"The fundamental principle is that the power to regulate commerce is the power to enact 'all appropriate legislation' for 'its protection and advancement' (The Daniel Ball, 10 Wall. 557, 564); to adopt measures 'to promote its growth and insure its safety' (Mobile Coun-

ty v. Kimball, 102 U. S. 691, 696, 697); 'to foster, protect, control and restrain.' Second Employers' Liability Cases, supra, p. 47. See Texas & N. O. R. Co. v. Railway Clerks, supra. That power is plenary and may be exerted to protect interstate commerce 'no matter what the source of the dangers which threaten it.' Second Employers' Liability Cases, p. 51; Schechter Corp. v. United States, supra." National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1, 57 S. Ct. 615, 81 L. Ed. 893, 108 A. L. R. 1352. See, also, Texas & New Orleans R. R. Co. v. Brotherhood of Railway & Steamship Clerks, 281 U. S. 548, 50 S. Ct. 427, 74 L. Ed. 1034.

"It should be emphasized that Congress, not the courts, is primarily charged with determination of the need for regulation of activities affecting interstate commerce." American Communications Assn. v. Douds, 339 U. S. 382, 70 S. Ct. 674, 94 L. Ed. 925.

Under this power Congress has dealt with labor relations in fields other than the railroads. See the National Labor Relations Act and the Labor Management Relations Act. The latter is often referred to as the Taft-Hartley Act.

"'* * * The act of interstate commerce is done by the labor of men and with the help of things; and these men and things are the agents and instruments of the commerce.'" Mondou v. New York, N. H. & H. R. R. Co., *supra.*

"It is a familiar principle that acts which directly burden or obstruct interstate or foreign commerce, or its free flow, are within the reach of the congressional power. Acts having that effect are not rendered immune because they grow out of labor disputes. See Texas & N. O. R. Co. v. Railway Clerks, 281 U. S. 548, 570; Schechter Corp. v. United States, supra, pp. 544, 545; Virginian Railway v. System Federation, No. 40, 300 U. S. 515. It is the effect upon commerce, not the source of the injury, which is the criterion. Second Em-

ployers' Liability Cases, 223 U. S. 1, 51." National Labor Relations Board v. Jones & Laughlin Steel Corp., *supra.*

"The constitutional justification for the National Labor Relations Act was the power of Congress to protect interstate commerce by removing obstructions to the free flow of commerce. National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1 (1937). That Act was designed to remove obstructions caused by strikes and other forms of industrial unrest, which Congress found were attributable to the inequality of bargaining power between unorganized employees and their employers. It did so by strengthening employee groups, by restraining certain employer practices, and by encouraging the processes of collective bargaining." American Communications Assn. v. Douds, *supra.* See, also, Wallace Corp. v. National Labor Relations Board, 323 U. S. 248, 65 S. Ct. 238, 89 L. Ed. 216.

As stated in Amalgamated Assn. Employees v. Wisconsin Employment Relations Board, *supra*: "The National Labor Relations Act of 1935 and the Labor Management Relations Act of 1947, passed by Congress pursuant to its powers under the Commerce Clause, are the supreme law of the land under Art. VI of the Constitution."

Under this power Congress has dealt with the railroads in regard to many subjects, most of which have been upheld as coming within its authority. They include the Safety Appliance Acts, the Employers Liability Acts, hours-of-service laws, and others of analogous character. See, Mondou v. New York, N. H. & H. R. R. Co., *supra;* Napier v. Atlantic Coast Line R. R. Co., *supra;* Alabama & Vicksburg Ry. Co. v. Jackson & Eastern Ry. Co., 271 U. S. 244, 46 S. Ct. 535, 70 L. Ed. 928; Missouri Pacific R. R. Co. v. Porter, 273 U. S. 341, 47 S. Ct. 383, 71 L. Ed. 672; Northern Pac. Ry. Co. v. State of Washington, 222 U. S. 370, 32 S. Ct. 160, 56 L. Ed. 237; Chicago, R. I. & Pac. Ry. Co. v. Hardwick Farmers Elevator Co., 226 U. S. 426, 33 S. Ct. 174, 57

L. Ed. 284, 46 L. R. A. N. S. 203; Missouri Pac. R. R. Co. v. Stroud, 267 U. S. 404, 45 S. Ct. 243, 69 L. Ed. 683; New York Central R. R. Co. v. Winfield, 244 U. S. 147, 37 S. Ct. 546, 61 L. Ed. 1045, Ann. Cas. 1917D 1139; Wilson v. New, 243 U. S. 332, 37 S. Ct. 298, 61 L. Ed. 755, L. R. A. 1917E 938, Ann. Cas. 1918A 1024.

As stated in Mondou v. New York, N. H. & H. R. R. Co., *supra:* "Among the instruments and agents to which the power extends are the railroads over which transportation from one State to another is conducted, the engines and cars by which such transportation is effected, and all who are in any wise engaged in such transportation, whether as common carriers or as their employés."

Congress enacted the Railway Labor Act to regulate the common carriers of the country and their employees.

"* * * Congress, in the exertion of its power over interstate commerce, may regulate the relations of common carriers by railroad and their employes, while both are engaged in such commerce, subject always to the limitations prescribed in the Constitution, and to the qualification that the particulars in which those relations are regulated must have a real or substantial connection with the interstate commerce in which the carriers and their employes are engaged." Mondou v. New York, N. H. & H. R. R. Co., *supra.* See, also, Wilson v. New, *supra.*

The primary purpose of the Railway Labor Act is set forth therein as follows: "First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof." 45 U. S. C. A., § 152, p. 478.

"The plain objective of the Railway Labor Act is the amicable adjustment of disputes and in that way to avoid strikes with their harmful effect upon public interests." Brotherhood of Railroad Shop Crafts v. Lowden, 86 F. 2d 458. See, also, Texas & New Orleans R. R. Co. v. Brotherhood of Railway & Steamship Clerks, *supra;* Railroad Retirement Board v. Alton R. R. Co., 295 U. S. 330, 55 S. Ct. 758, 79 L. Ed. 1468; Steele v. Louisville & N. R. R. Co., 323 U. S. 192, 65 S. Ct. 226, 89 L. Ed. 173.

"The peaceable settlement of labor controversies, especially where they may seriously impair the ability of an interstate rail carrier to perform its service to the public, is a matter of public concern." Virginian Ry. Co. v. System Federation No. 40, 300 U. S. 515, 57 S. Ct. 592, 81 L. Ed. 789. See, also, Texas & New Orleans R. R. Co. v. Brotherhood of Railway & Steamship Clerks, *supra.*

"The power of Congress over interstate commerce extends to such regulations of the relations of rail carriers to their employees as are reasonably calculated to prevent the interruption of interstate commerce by strikes and their attendant disorders." Virginian Ry. Co. v. System Federation No. 40, *supra.*

It is to this purpose that the amendment authorizing agreements to be entered into between a carrier or carriers and a labor organization or labor organizations providing for a union shop and agreements authorizing deductions to be made by carriers from the wages of its employees for certain purposes and under certain conditions must reasonably relate itself.

Appellees contend that the sole purpose for enacting the amendment was to get rid of free-riders in the railroad industry and that trying to do so in this manner is not reasonably calculated to prevent the interruption of interstate commerce by strikes and their attendant disorders but rather to create them. They state that the subject of union shops has always been a prolific

source of labor disputes and, in support thereof, point to the record of what took place here and what has taken place on other railroads in that regard. They also point to the fact that union representatives, at the hearings before the committees of Congress, conceded that a union shop would not affect their bargaining power one way or the other and to other factors, such as the financial and numerical strength of the unions, to show they do not need additional governmental help in order for them to properly carry on their function of collective bargaining and deal with the carriers on an equal level. While we think there is much merit in the logic of appellees' contentions we cannot adopt it as here controlling for reasons hereinafter set forth.

The Supreme Court of the United States, in National Labor Relations Board v. Jones & Laughlin Steel Corp., *supra*, said: "Long ago we stated the reason for labor organizations. We said that they were organized out of the necessities of the situation; that a single employee was helpless in dealing with an employer; that he was dependent ordinarily on his daily wage for the maintenance of himself and family; that if the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and resist arbitrary and unfair treatment; that union was essential to give laborers opportunity to deal on an equality with their employer. American Steel Foundries v. Tri-City Central Trades Council, 257 U. S. 184, 209. We reiterated these views when we had under consideration the Railway Labor Act of 1926. Fully recognizing the legality of collective action on the part of employees in order to safeguard their proper interests, we said that Congress was not required to ignore this right but could safeguard it. Congress could seek to make appropriate collective action of employees an instrument of peace rather than of strife."

Within its power, policy making in this regard, is still for Congress. Colgate-Palmolive-Peet Co. v. Na-

tional Labor Relations Board, 338 U. S. 355, 70 S. Ct. 166, 94 L. Ed. 161.

In that regard it has been said: "Even should we consider the Act unwise and prejudicial to both public and private interest, if it be fairly within delegated power our obligation is to sustain it." Railroad Retirement Board v. Alton R. R. Co., *supra.*

There is no question but what Congress had the right to repeal the restrictive provisions against union shops which it placed in the Railway Labor Act in 1934. This it did by the amendment of January 10, 1951. If that had been the only thing done then, without federal legislation on the subject, the laws of the several states would be controlling. See, Otten v. Baltimore & O. R. Co., *supra;* Wicks v. Southern Pac. Co., 121 F. Supp. 454, and authorities hereinbefore cited. There are 17 states that have some form of restriction against union shops and 31 that do not. Since union shop agreements are legal and enforceable, unless restricted by either the state or federal government, this left an anomalous situation. That Congress was fully aware of this situation is evidenced by the following quote from the report of the Committee on Interstate and Foreign Commerce of the House of Representatives in submitting the amendment to the House: "It will be noted that the proposed paragraph eleventh would authorize agreements notwithstanding the laws of any State. For the following reasons, among others, it is the view of the committee that if, as a matter of national policy, such agreements are to be permitted in the railroad and airline industries it would be wholly impracticable and unworkable for the various States to regulate such agreements. Railroads and airlines are direct instrumentalities of interstate commerce; the Railway Labor Act requires collective bargaining on a system-wide basis; agreements are uniformly negotiated for an entire railroad system and regulate the rates of pay, rules of working conditions of employees in many States;

the duties of many employees require the constant crossing of State lines; many seniority districts under labor agreements, extend across State Lines, and in the exercise of their seniority rights employees are frequently required to move from one State to another."

In this situation we think Congress had before it a situation of which it could properly take notice and upon which it could reasonably act. However, in regard to such action, it was limited by the following principles:

"* * * the powers conferred upon the Federal Government are to be reasonably and fairly construed, with a view to effectuating their purposes. But recognition of this principle can not justify attempted exercise of a power clearly beyond the true purpose of the grant." Railroad Retirement Board v. Alton R. R. Co., *supra.*

"* * * Congress, in the choice of means to effect a permissible regulation of commerce, must conform to due process, * * *." Virginian Railway Co. v. System Federation No. 40, *supra.*

"* * * if the provisions go beyond the boundaries of constitutional power we must so declare." Railroad Retirement Board v. Alton R. R. Co., *supra.*

Courts have enforced union and closed shop agreements. They are ordinarily considered private contracts in which governmental action is not involved. See, Colgate-Palmolive-Peet Co. v. National Labor Relations Board, *supra;* National Licorice Co. v. National Labor Relations Board, 309 U. S. 350, 60 S. Ct. 569, 84 L. Ed. 799; Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Board, *supra.*

Apparently the federal government has never affirmatively authorized closed shops and, prior to this amendment to the Railway Labor Act, has never taken affirmative action to authorize union shops. Since the due process clause protects against governmental action, either state or federal, union shop contracts have been enforced and, of course, have not been held illegal on

constitutional grounds as that question was not involved.

As stated in Teague v. Brotherhood of Locomotive Firemen, 127 F. 2d 53: "Private parties acting upon their own initiative and expressing their own will, however else they may offend and their acts give rise to justiciable controversies, do not thereby offend the guarantees of the Constitution. Grovey v. Townsend, 295 U. S. 45, 55 S. Ct. 622, 78 L. Ed. 1292, 97 A. L. R. 680." See, also, Corrigan v. Buckley, 271 U. S. 323, 46 S. Ct. 521, 70 L. Ed. 969; Courant v. International Photographers, 176 F. 2d 1000.

The Fifth Amendment to the Constitution of the United States provides, insofar as here material, that: "No person shall * * * be deprived of life, liberty, or property, without due process of law; * * *."

It was held in Railroad Retirement Board v. Alton R. R. Co., *supra*, the power of Congress to regulate interstate commerce is subject thereto. And it was held in Secretary of Agriculture v. Central Roig Refining Co., 338 U. S. 604, 70 S. Ct. 403, 94 L. Ed. 381, not even resort to the commerce clause can defy the standard of due process.

"The Fifth Amendment relates but to governmental action, federal in character, not to action by private persons. Corrigan v. Buckley, 271 U. S. 323, 46 S. Ct. 521, 70 L. Ed. 969; National Federation of Ry. Workers v. National Mediation Board, 71 App. D. C. 266, 110 F. 2d 529, 537." Teague v. Brotherhood of Locomotive Firemen, *supra*.

"When the question is whether legislative action transcends the limits of due process guaranteed by the Fifth Amendment, decision is guided by the principle that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained. Nebbia v. New York, 291 U. S. 502, 525." Footnote from Railroad Retirement Board v. Alton R. R. Co., *supra*. See, also, Virginian Ry. Co. v. System Federation No.

40, *supra*; Lincoln Federal Labor Union v. Northwestern Iron & Metal Co., 149 Neb. 507, 31 N. W. 2d 477.

But, as stated in Currin v. Wallace, 306 U. S. 1, 59 S. Ct. 379, 83 L. Ed. 441: "There is no requirement of uniformity in connection with the commerce power (Art. I, § 8, par. 3) * * *. Undoubtedly, the exercise of the commerce power is subject to the Fifth Amendment (Monongahela Navigation Co. v. United States, 148 U. S. 312, 336; United States v. Cress, 243 U. S. 316, 326; Louisville Bank v. Radford, 295 U. S. 555, 589); but that Amendment, unlike the Fourteenth, has no equal protection clause. LaBelle Iron Works v. United States, 256 U. S. 377, 392; Steward Machine Co. v. Davis, 301 U. S. 548, 584."

Appellees contend they are deprived of certain contractual and property rights by this amendment. Among these they specifically list their seniority, vacation, free transportation, and rights under the Railway Labor Act, particularly paragraphs Third, Fourth, and Fifth, 45 U. S. C. A., § 152, p. 478. Among the latter they refer to the right to be free from being influenced or coerced by their employers to induce them to join or remain members of any labor organization.

It is true, as stated in Primakow v. Railway Express Agency, 56 F. Supp. 413, that seniority rights are property and the exclusive property of the individual employee.

However, as stated in J. I. Case Co. v. National Labor Relations Board, 321 U. S. 332, 64 S. Ct. 576, 88 L. Ed. 762:

"Collective bargaining between employer and the representatives of a unit, usually a union, results in an accord as to terms which will govern hiring and work and pay in that unit. The result is not, however, a contract of employment except in rare cases; no one has a job by reason of it and no obligation to any individual ordinarily comes into existence from it alone. The negotiations between union and management result in

what often has been called a trade agreement, rather than in a contract of employment. * * *

"After the collective trade agreement is made, the individuals who shall benefit by it are identified by individual hirings. The employer, except as restricted by the collective agreement itself and except that he must engage in no unfair labor practice or discrimination, is free to select those he will employ or discharge. But the terms of the employment already have been traded out. There is little left to individual agreement except the act of hiring. This hiring may be by writing or by word of mouth or may be implied from conduct. In the sense of contracts of hiring, individual contracts between the employer and employee are not forbidden, but indeed are necessitated by the collective bargaining procedure.

"But, however engaged, an employee becomes entitled by virtue of the Labor Relations Act (here Railway Labor Act) somewhat as a third party beneficiary to all benefits of the collective trade agreement, even if on his own he would yield to less favorable terms. The individual hiring contract is subsidiary to the terms of the trade agreement and may not waive any of its benefits * * *."

As stated in West Coast Hotel Co. v. Parrish, 300 U. S. 379, 57 S. Ct. 578, 81 L. Ed. 703, 108 A. L. R. 1330:

" 'But it was recognized in the cases cited, as in many others, that freedom of contract is a qualified and not an absolute right. There is no absolute freedom to do as one wills or to contract as one chooses. The guaranty of liberty does not withdraw from legislative supervision that wide department of activity which consists of the making of contracts, or deny to government the power to provide restrictive safeguards. Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community.' Chicago, B. & Q. R. Co. v. McGuire, 219 U. S. 549, 567.

"This power under the Constitution to restrict freedom of contract has had many illustrations. That it may be exercised in the public interest with respect to contracts between employer and employee is undeniable."

And in Brotherhood of Railroad Shop Crafts v. Lowden, *supra*, it was said: "The fact that the parties here were bound by an existing contract at the time the act became effective is no basis upon which to invoke the due process clause of the Fifth Amendment. The privilege of contract is not unrestricted. The right to make contracts which relate to interstate commerce must be exercised subject to the paramount power of Congress to enact appropriate legislation touching the subject matter. Any other rule would proscribe Congress in the exercise of its constitutional prerogative to regulate commerce among the states."

"* * * the Fifth Amendment, * * *, is not a guarantee of untrammeled freedom of action and of contract. In the exercise of its power to regulate commerce, Congress can subject both to restraints not shown to be unreasonable." Virginian Ry. Co. v. System Federation No. 40, *supra*.

"Wherever private contracts conflict with its functions, they obviously must yield or the Act would be reduced to a futility." J. I. Case Co. v. National Labor Relations Board, *supra*.

"The mere existence of such differences does not make them invalid." Ford Motor Co. v. Huffman, 345 U. S. 330, 73 S. Ct. 681, 97 L. Ed. 1048.

"* * * collective bargaining agreements do not create a permanent status, give an indefinite tenure, or extend rights created and arising under the contract, beyond its life, when it has been terminated in accordance with its provisions." System Federation No. 59 v. Louisiana & A. Ry. Co., 119 F. 2d 509. See, also, Brotherhood of Railroad Shop Crafts v. Lowden, *supra*.

As these principles relate to the foregoing we think what Congress did in this regard was within its powers

and reasonable provided Congress could impose upon these employees the requirement compelling them to join a union as a condition of their continued employment for, by joining, all of the property rights of which appellees claim they will be deprived would be saved to them. We shall hereinafter discuss the question of the power of Congress to impose such a requirement and, if it could be said that it has such power, the reasonableness thereof.

Appellees also claim that the amendment is unreasonable because Congress therein imposed in subsection (c) certain limitations applicable in union shop contracts relating to employees in the operating crafts, having to do with a prohibition against a contractual requirement of membership in more than one union, whereas, it did not make the same limitation applicable in union shop contracts relating to the employees in the nonoperating crafts. They say it authorizes contracts requiring nonoperating employees to join and pay fees, dues, and assessments to each union representing a craft or class in which such employees may have employment and that one employee may have employment in more than one craft or class, whereas, operating employees are required to belong to only one union and must be permitted to choose any union national in scope, admitting to membership operating employees, and are not required to join the particular union which is their collective bargaining representative. They contend this arbitrarily discriminates between operating and nonoperating employees. This limitation was placed in the Act because of the problem of "ebb and flow" of employees between two crafts, which problem is particularly acute in the operating crafts, and relatively insignificant in the nonoperating crafts. Classification of railroad employees into operating and nonoperating groups is traditional on railroads, and certainly is reasonable as a basis of classification for purposes of railroad legislation.

As already stated herein, the Fifth Amendment does not require that everyone be equally affected by an Act of Congress in order for it to be within the due process requirement thereof. The classification here made by Congress, considering the problems involved, seems reasonable under all of the circumstances.

As stated in Pfeiffer Brewing Co. v. Bowles, 146 F. 2d 1006: "Equal protection of the law is the constitutional right of every American citizen. Indeed, it has frequently been said to be essential to due process of law guaranteed by the constitution. Amendment 5. In other words, legislation must be general in character upon the subjects to which it is related and enforceable in the usual modes adapted to the facts in the case. Dent v. West Virginia, 129 U. S. 114, 9 S. Ct. 231, 32 L. Ed. 623. Class legislation discriminating against some and favoring others is prohibitive. But the rule does not prohibit or prevent classification which is reasonable, for, while the law must affect alike all persons in the same class and under similar conditions, classification based upon substantial distinction, with a proper relation to the objects classified and the purposes sought to be achieved, if it does operate alike on all members of the class, is not special, discriminatory or class legislation. Obviously, classifications must embrace all who belong in the same category and may not be capricious or arbitrary. But if the statute is uniform in the obligation of all members of a legitimate class, to which it is made applicable, no one can complain of denial of equal protection of the laws."

"'* * * the attempted classification "must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis." Gulf, Colorado & Santa Fe Ry. v. Ellis, 165 U. S. 150, 155.' (Louisville Gas & Electric Co. v. Coleman, 277 U. S. 32, 48 S. Ct. 423, 72 L. Ed. 770.)" Hartford Steam Boiler Inspection & Insur-

ance Co. v. Harrison, 301 U. S. 459, 57 S. Ct. 838, 81 L. Ed. 1223.

Appellees contend the amendment permits discrimination between those the union say must join and those they will excuse from joining. This relates to subsection (a) of the amendment which has hereinbefore been set forth. This subsection simply affords a guarantee to all employees who are refused admission to or expelled from the contracting union for any reason other than failure to tender initiation fees, dues, or assessments that they will not be deprived of their employment because of nonmembership in the union. Such a provision is certainly reasonable and desirable for without it the union could arbitrarily defeat an employee's continued right to work.

It is further contended this delegates to the union the power to decide who shall and who shall not be compelled to join and pay money to such labor organization in the way of initiation fees, dues, and assessments. As already stated herein, the Fifth Amendment does not require that everyone be equally affected by an act of Congress.

"Because of the necessity to have strong unions to bargain on equal terms with strong employers, individual employees are required by law to sacrifice rights which, in some cases, are valuable to them. See J. I. Case Co. v. Labor Board, 321 U. S. 332 (1944)." American Communications Assn. v. Douds, *supra*. See, also, Steele v. Louisville & N. R. R. Co., *supra;* Currin v. Wallace, *supra;* Wilson v. New, *supra*.

Appellees further complain that if they are required to pay initiation fees, dues, and assessments that the amount they will be required to pay will not necessarily be based on the cost of collective bargaining for the funds so collected could be used for any purpose decided upon by the union and thus they would be deprived of their money without due process. We will hereinafter discuss this issue.

In addition to the foregoing contentions specifically dealt with others of like character are referred to by appellees. We think the following principle has application to all of them: "* * * legislative authority, exerted within its proper field, need not embrace all the evils within its reach. The Constitution does not forbid 'cautious advance, step by step,' in dealing with the evils which are exhibited in activities within the range of legislative power." National Labor Relations Board v. Jones & Laughlin Steel Corp., *supra.* See, also, Steele v. Louisville & N. R. R. Co., *supra;* Currin v. Wallace, *supra;* Wilson v. New, *supra;* Secretary of Agriculture v. Central Roig Refining Co., *supra;* West Coast Hotel Co. v. Parrish, *supra.*

And as stated in Lincoln Federal Labor Union v. Northwestern Iron & Metal Co., 335 U. S. 525, 69 S. Ct. 251, 93 L. Ed. 212, 6 A. L. R. 2d 473: "Under this constitutional doctrine the due process clause is no longer to be so broadly construed that the Congress and state legislatures are put in a strait jacket when they attempt to suppress business and industrial conditions which they regard as offensive to the public welfare."

Appellees contend this amendment to the Railway Labor Act, together with the contracts it authorizes, compels railway employees to become members of an association (labor organization) against their will and thus deprives them of freedoms guaranteed by the First Amendment to the Constitution of the United States. They claim the right of the freedom of association, the freedom to join or not to join, as a First Amendment freedom.

The First Amendment to the Constitution of the United States provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

As stated in West Virginia State Board of Education v. Barnette, 319 U. S. 624, 63 S. Ct. 1178, 87 L. Ed. 1628, 147 A. L. R. 674: "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."

We think the freedom of association, the freedom to join or not to join in association with others for whatever purposes such association is lawfully organized, is a freedom guaranteed by the First Amendment.

We also think the right to work is one of the most precious liberties that man possesses. Man has as much right to work as he has to live, to be free, to own property, or to join a church of his own choice for without freedom to work the others would soon disappear. It is a fundamental human right which the due process clause of the Fifth Amendment protects from improper infringement by the federal government. To work for a living in the occupations available in a community is the very essence of personal freedom and opportunity that it was one of the purposes of these amendments to make secure. Liberty means more than freedom from servitude. The constitutional guarantees are our assurance that the citizen will be protected in the right to use his powers of mind and body in any lawful calling. Smith v. State of Texas, 233 U. S. 630, 34 S. Ct. 681, 58 L. Ed. 1129, L. R. A. 1915D 677, Ann. Cas. 1915D 420; Truax v. Raich, *supra.*

These rights should only be susceptible of restriction to prevent grave and immediate danger to interests which the government is obligated to protect. West Virginia State Board of Education v. Barnette, *supra;*

Thomas v. Collins, 323 U. S. 516, 65 S. Ct. 315, 89 L. Ed 430.

As stated in Thomas v. Collins, *supra:* "The case confronts us again with the duty our system places on this Court to say where the individual's freedom ends and the State's power begins. Choice on that border, now as always delicate, is perhaps more so where the usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment. Cf. Schneider v. State, 308 U. S. 147; Cantwell v. Connecticut, 310 U. S. 296; Prince v. Massachusetts, 321 U. S. 158. That priority gives these liberties a sanctity and a sanction not permitting dubious intrusions. And it is the character of the right, not of the limitation, which determines what standard governs the choice."

We find no condition to have existed at the time the amendment was adopted to authorize any restriction of these rights. Consequently we think Congress was without authority to impose upon employees of railroads in Nebraska, contrary to our Constitution and statutory provisions, the requirement that they must become members of a union representing their craft or class as a condition for their continued employment. It improperly burdens their right to work and infringes upon their freedoms. This is particularly true as to the latter because it is apparent that some of these labor organizations advocate political ideas, support political candidates, and advance national economic concepts which may or may not be of an employee's choice.

However, the labor organizations contend that Congress, by the amendment, merely repealed the restrictive provision put in the Act in 1934; that Congress, by doing so, did not make any change in the terms and conditions of the employment of appellees; that impairment of rights, if any resulted therefrom, were brought about by private union shop agreements permitted as

a result of the amendment; and that such private agreements are enforcible.

On the other hand appellees contend Congress, by the amendment, did not merely repeal the restriction against union shops placed in the 1934 Act, and thus permit private union shop agreements, but, in order to make such union shop agreements effective in the 17 states that had restrictive laws against union shop agreements, which included Nebraska, struck down such laws; that, as a result thereof, every union shop contract entered into thereunder depends for its validity in these 17 states upon the act of Congress; and that, because thereof, every such contract involves governmental action and therefore is subject to the due process clause of the Fifth Amendment.

We agree with appellees. If Congress had merely repealed the restrictive provision of the 1934 Act then the labor organizations' position would be correct. But to do so would have left 17 states with restrictive laws as to union shops. These laws Congress affirmatively sought to strike down. Such action on the part of Congress is a necessary part of every union shop contract entered into on the railroads as far as these 17 states are concerned for without it such contracts could not be enforced therein.

For the sake of discussion let us assume that the right to require employees in interstate commerce to become members of a union falls under the general power of Congress to regulate interstate commerce rather than under the freedoms guaranteed by the First and Fifth Amendments. Whether legislative action under this power transcends the limits of due process guaranteed by the Fifth Amendment depends upon whether it is reasonable and whether or not the means selected have a real and substantial relation to the objects sought to be obtained. See authorities hereinbefore cited. It is apparent that the purpose of the amendment was to get rid of free-riders. A free-rider is an

employee who receives all of the benefits of collective bargaining but in return does not bear any of the costs thereof because he does not belong to the union which negotiated and secured such benefits. Assuming it would be reasonable to require free-riders to pay their proportionate share of the cost of collective bargaining carried on in their behalf by labor organizations, we do not think the means selected has any real and substantial relation to the object sought to be obtained. First, and primarily, because an employee's freedom of association, that is the right to join or not to join a union, has no relationship to the object sought, and second, because by requiring him to pay initiation fees, dues, and assessments he is required to pay for many things besides the cost of collective bargaining. In this regard we are aware of what has been said in Colgate-Palmolive-Peet Co. v. National Labor Relations Board, *supra;* and Radio Officers' Union v. National Labor Relations Board, 347 U. S. 17, 74 S. Ct. 323, 98 L. Ed. 455.

A labor organization, under the Railway Labor Act, represents all of the employees of a class or craft on a carrier whom it is designated and authorized to represent. Steele v. Louisville & N. R. R. Co., *supra;* Wallace Corp. v. National Labor Relations Board, *supra.*

It has the exclusive power to negotiate and enter into agreements with the carrier concerning rates of pay, rules, and working conditions as they affect the employees of the class or craft it represents. A. F. of L. v. American Sash & Door Co., 335 U. S. 538, 69 S. Ct. 258, 93 L. Ed. 222, 6 A. L. R. 2d 481.

And, in dealing with the carrier in regard thereto, it must act fairly, impartially, and in good faith. Steele v. Louisville & N. R. R. Co., *supra;* Ford Motor Co. v. Huffman, *supra;* Lewellyn v. Fleming, 154 F. 2d 211; Wallace Corp. v. National Labor Relations Board, *supra.*

Even though Congress has seen fit to clothe labor organizations on the railroads with the above powers and assuming it would be reasonable for it to require all

employees receiving benefits from collective bargaining agreements to contribute their proportionate share of the cost thereof, a question not before us and one which we do not decide, we are, nevertheless, of the opinion that it cannot be done in the manner in which it was here attempted. To require all employees receiving benefits from collective bargaining agreements to pay the labor organizations obtaining them initiation fees, dues, and assessments is to require them to make contributions to any and all of the varied objects and undertakings in which such labor organizations are or may become engaged and which have no substantial relation to the object here sought to be obtained.

In view of what has been herein said we affirm the judgment of the district court.

AFFIRMED.

CARTER, J., concurring.

I am in full accord with the result reached by the majority. It seems to me, however, that the fundamental constitutional question should be pointed up in a more specific manner.

It must be conceded at the outset that if Congress lacks the power to compel union membership because of constitutional guarantees or prohibitions, the validity of Article XV, section 13, of the Constitution of Nebraska, is not subject to question. See Lincoln Federal Labor Union v. Northwestern Iron and Metal Co., 149 Neb. 507, 31 N. W. 2d 477. As the majority opinion states, the purpose sought to be accomplished was to eliminate free-riders by compelling them to pay their proportionate shares of the cost of representation in the collective bargaining process. For the purposes of this discussion it will be assumed that the object was a lawful one which the Congress could bring about without offending constitutional provisions. The majority opinion correctly holds that there was no reasonable relation between the purpose to be accomplished and the legislative method invoked to bring it about.

I fail to see any relation, whatever, between compelling union membership and enforcing payments by employees for benefits received from collective bargaining. Assuming that contributions can be compelled for the representation required in securing benefits accruing to nonunion employees as well as those belonging to the union, compulsory union membership exceeds the necessities of the case and compels an employee to join and support an association of persons with whose purposes and concepts he may be in total disagreement. The Constitution protects an individual against legislation having this effect.

If an employee is compelled to join a union against his will in order to continue in his employment, he not only pays his share of the cost of the union's bargaining processes, but he is compelled to support many other principles, policies, programs, and activities to which he may not subscribe. Some unions support a form of life insurance which pays death benefits; some support a welfare fund for the benefit of needy members. Some unions maintain a strike fund to protect employees when on strike; some establish funds to be used in the furtherance of economic and political principles in which an employee may have no confidence. In some instances compulsory membership would compel support, financial and otherwise, of policies which an employee might deem objectionable from the standpoint of free government and the liberties of the individual under it. An employee may neither desire the benefits of such programs nor desire to contribute to their support. He may object to certain programs and activities of the union for reasons of his own and, consequently, not desire to contribute to their promulgation. To compel an employee to make involuntary contributions from his compensation for such purpose is a taking of his property without due process of law.

We have prided ourselves in this country on the right of free speech and free thought, rights which have been

guaranteed to us by constitutional provision. Compulsory unionism infringes upon these rights and often encroaches upon the right of an individual to be free from coercion by others. To compel him to contribute to the support of economic or political programs adopted by a union, which may be abhorrent to him, is as constitutionally wrong as if similar programs were compelled by the employer. The Fifth Amendment protects against the forced appropriation of one's property for the support of ideals which he may desire to oppose. The right to work and to be compensated therefor is a fundamental principle in our democratic thinking. To force contributions against one's will in the manner here employed is a violation of his fundamental rights and privileges. It is a violation of "nor be deprived of life, liberty, or property, without due process of law," contained in the Fifth Amendment of the Constitution of the United States.

Constitutional guarantees exist in fair weather and in foul. They may be asserted by the minority against the majority, and by the individual even against the power of government. They may be asserted by an employee against his employer or a labor union, or both. An employee not only has a right to work, but he has the guaranteed right to have his earnings protected against confiscation against his will. Forcing an employee to join a union and to compel him to financially support principles, projects, policies, or programs in which he does not believe and does not want, is clearly a taking of his property without due process.

If this be true, the constitutional provision here questioned is declaratory of the rights guaranteed to plaintiffs under the Constitution of the United States and, consequently, is not subject to the attack made upon it by these defendants.

I am authorized to say that SIMMONS, C. J., is in accord with this concurrence.

JOYCE WHOLESALE COMPANY, APPELLANT, V. NORTHSIDE LUMBER & MANUFACTURERS, INC., A CORPORATION, APPELLEE.

71 N. W. 2d 186

Filed July 1, 1955. No. 33691.

1. **Appeal and Error.** In an action at law tried to a court without a jury the findings of fact will not be disturbed on appeal to this court unless they are clearly wrong.
2. **Sales.** As a general rule where the seller of goods sends them by railroad to a purchaser, title passes to the purchaser on arrival at the designated point of delivery to the purchaser.
3. ———. This general rule does not apply if a contrary intent appears.
4. ———. As a general rule a sale is incomplete without delivery.

APPEAL from the district court for Dodge County: RUSSELL A. ROBINSON, JUDGE. *Affirmed in part, and in part reversed and remanded with directions.*

Spear & Lamme, for appellant.

Sidner, Lee, Gunderson & Svoboda, for appellee.

Heard before CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

YEAGER, J.

This is an action at law by Joyce Wholesale Company, a corporation, plaintiff and appellant, against Northside Lumber & Manufacturers, Inc., a corporation, defendant and appellee, to recover what the plaintiff claims is the balance due on a quantity of lumber claimed to have been sold and delivered to the defendant.

For cause of action the plaintiff pleaded that the defendant ordered lumber described as follows: "100 Pc. 4′ x 8′ x ¼″ A-3 Birch Plywood, 200 Pc. 4′ x 6″ x ¼″ A-3 Birch Plywood, 100 Pc. 4′ x 8′ x ⅝″ CD Fir Plywood," which lumber and 12 additional sheets of 4′ x 6′6″ x ¼″ A-3 Birch plywood was delivered to the defendant all of which was of the reasonable value of $2,691.76; and that of this amount $1,000 was paid leav-

ing a balance due and owing in the amount of $1,691.76. The action is to recover this balance. Obviously the description of the 200 pieces should be 4′ x 6′6″ x ¼″. This becomes apparent by reference to the exhibits in evidence. By answer the defendant admitted that it ordered the lumber described by plaintiff as having been ordered but denied that it had ever received all of it. It pleaded that it received only 100 pieces of 4′ x 8′ x ⅝″ plywood and 200 pieces of 4′ x 6′6″ x ¼″ Birch plywood, the price and value of which was $1,647.20 on account of which they paid $1,000. They admitted liability for an additional charge of $28.90 making a total of $676.10 still due and owing by the defendant to plaintiff. By the answer the defendant offered to confess judgment for $647.20 and costs, but obviously from the pleading the intention was to confess judgment for $676.10.

The parties are in accord that if the defendant had received full delivery under the order and had also received the lumber which plaintiff says it did receive in addition thereto, it would be obligated to also pay therefor. In this light this situation requires no further comment herein.

After the issues were joined a jury was waived and the case was tried to the court at the conclusion of which the court accepted the theory of the defendant and rendered judgment in favor of plaintiff pursuant to the offer of the defendant to confess in the amount of $676.10. The costs which accrued after the date of the offer to confess judgment were taxed to the plaintiff. Following the rendition of judgment the plaintiff filed a motion for new trial which has been treated by the parties as having been overruled although the transcript does not contain the order. From the judgment and the order overruling the motion for new trial the plaintiff has appealed.

The brief of plaintiff contains seven assignments of error as grounds for reversal. They will not be referred to by number. As a whole they present the question of

the sufficiency of the evidence to sustain the judgment; the legal effect of the transportation of the lumber particularly after its arrival at Fremont; the matter of delivery of 44 sheets of lumber for which no payment was made; and a claimed error in arithmetical computation.

As pointed out this is an action at law and it was tried without a jury. A controlling principle therefore in the determination upon the questions of fact is that the findings will not be disturbed unless they are clearly wrong. Flaherty v. Carskadon, 155 Neb. 853, 53 N. W. 2d 756.

The evidence discloses that on or about July 25, 1953, the defendant ordered from the plaintiff the three classifications of lumber described in the petition. The order was filled by the Georgia-Pacific Plywood Company of Olympia, Washington. It together with another order was loaded in a Union Pacific freight car in Olympia, Washington. One was designated on a chart or plan which was placed in the car as lot one and the other as lot two. There was a mingling of the lots but the mingled portions bore the proper lot designations. There was nothing on the chart to show to whom the separate lots were being shipped. The car was consigned to plaintiff at Omaha with permission for stoppage at Fremont, Nebraska, for the purpose of unloading the lumber which had been ordered by defendant from plaintiff. When the car arrived at Fremont the representatives of the defendant, with permission, broke the seal on the car and proceeded to unload the lumber. A witness for defendant testified in substance that they found the chart showing the manner of loading and caused to be unloaded 100 pieces of 4′ x 8′ x 5/8″ plywood and 200 pieces of 4′ x 6′6″ x 1/4″ Birch plywood. He testified further in substance that there was other lumber in the car of the kind and character ordered but that it was so placed that great difficulty would be entailed in unloading; that at the time a representative of the

plaintiff was in Fremont; that in agreement with him the car was closed and the remainder left in the car for removal to Omaha from where it would be returned by plaintiff to Fremont with transportation charges to be paid by defendant; but that it was never returned.

There is no substantial dispute as to this testimony except in one particular. The witness for plaintiff testified that there was a discussion with regard to shipment of the balance of the lumber on to Omaha and reshipment back to Fremont but in effect his testimony was that he consented to the movement but assumed no responsibility in relation thereto on behalf of the plaintiff.

In the light of the rule already hereinbefore set forth the court had the right to accept the version of defendant's evidence in this connection as it did.

Apparently the plaintiff claims that if it is not entitled to recover on the cause of action as pleaded it is entitled to recover for the lumber unloaded and lumber in the car which it claimed went to Omaha and which later came back to the defendant for which it did not pay. It sought to prove that 44 sheets did go to Omaha which were returned to defendant.

There is evidence that the defendant did receive 44 sheets of lumber which may have been originally a part of the lumber contained in the original order. There is evidence as to the source from which it came but there is none that it was actually a part of the shipment. It did not come to defendant from plaintiff and there is no evidence that the defendant did not pay for it at the source from which it was received. The most that may be said as to this from an evidentiary viewpoint is that the defendant received from Commodore Mobile Homes 44 sheets of lumber of a kind which had been ordered by defendant from plaintiff.

This evidence was insufficient to sustain a right of recovery by plaintiff against the defendant.

The plaintiff asserts that when the shipment arrived

at Fremont and the car was opened for delivery as it was, title to the lumber passed to the defendant and the defendant assumed the risk of loss thereafter and that in consequence plaintiff is entitled to payment for all lumber ordered.

It is the general rule that where the seller of goods sends them by railroad to a purchaser, title passes to the purchaser on arrival at the designated point of delivery to the purchaser. § 69-419, rule 5, R. R. S. 1943; § 69-422, R. R. S. 1943; Storz Brewing Co. v. Brown, 154 Neb. 204, 47 N. W. 2d 407; 77 C. J. S., Sales, § 143, p. 857.

This rule has an exception as is apparent from the authorities cited. The exception is that the general rule does not apply if a contrary intent appears.

Without doubt there was an attempted delivery at Fremont which was in part effective. As to the rest of the shipment the evidence of the defendant, which was capable of belief and believed by the court, was to the effect that there was an agreement for later delivery at Fremont with the defendant paying the shipping charges back from Omaha, which delivery was never made. The exception therefore is applicable here rather than the general rule.

Of course delivery by plaintiff was an essential obligation of the plaintiff in this instance. No one questions this. The applicable general rule is that no sale can be completed without delivery. 77 C. J. S., Sales, § 131, p. 840; Dant & Russell v. Grays Harbor Exportation Co., 26 F. Supp. 784, affirmed 106 F. 2d 911, 125 A. L. R. 1302.

In view of the fact that no delivery was made of the lumber taken under agreement to Omaha there is no basis for judgment for the value thereof in favor of plaintiff and against the defendant.

The plaintiff contends that there was an error favorable to the defendant in the computation of the value of some of the lumber which was received at Fremont

in the amount of $93.50. The contention appears to be valid.

The judgment of the district court for the amount awarded is affirmed. The cause is remanded to the district court with directions to render judgment additionally for $93.50.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

ELDON A. PETERSON, APPELLANT, V. JOE VAK ET AL., APPELLEES.

71 N. W. 2d 186

Filed July 1, 1955. No. 33742.

SUPPLEMENTAL OPINION

APPEAL from the district court for Perkins County: VICTOR WESTERMARK, JUDGE. *On motion for rehearing, former opinion and judgment modified.*

George B. Hastings, John E. Dougherty, and *John Brogan,* for appellant.

Marvin A. Romig and *Halligan & Mullikin,* for appellees.

Heard before SIMMONS, C. J., CARTER, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ., and KOKJER, District Judge.

BOSLAUGH, J.

Appellees in a motion for rehearing contend that the opinion of this court, Peterson v. Vak, *ante* p. 450, 70 N. W. 2d 436, incorrectly ordered the district court "to render and enter a judgment in the cause in harmony with this opinion."

This is an equity case. A motion of appellees for a dismissal of the case for insufficiency of the evidence of appellant was made at the conclusion of the evidence

of appellant. The motion was by the trial court sustained and the case was dismissed. The contention of appellees in the respect above stated is correct and the words "with directions to render and enter a judgment in the cause in harmony with this opinion" should be and they are deleted from the last paragraph of the opinion. Lucas v. Lucas, 138 Neb. 252, 292 N. W. 729. There should be and there is substituted in the place of the above deleted part of the last paragraph of the opinion the following words: "for further proceedings according to law."

ROSELLE AHERN, APPELLEE AND CROSS-APPELLANT, V. BOARD OF EQUALIZATION OF THE COUNTY OF RICHARDSON, STATE OF NEBRASKA, APPELLANT AND CROSS-APPELLEE.
71 N. W. 2d 307

Filed July 1, 1955. No. 33773.

1. **Taxation.** All nonexempt property in Nebraska is subject to taxation and for that purpose must be valued at its actual value, which means its value in the market in the ordinary course of trade.
2. ———. Ordinarily the valuation by the assessor is presumed to be correct, however if the assessor does not make a personal inspection of the property, but accepts valuations thereof fixed by a professional appraiser, the presumption does not obtain, and in such case the burden is upon the protesting party to prove that the assessment is excessive.
3. ———. The presumption obtains that a board of equalization has faithfully performed its official duties, and in making an assessment it acted upon sufficient competent evidence to justify its action.
4. ———. The presumption that a board of equalization in making an assessment acted upon sufficient competent evidence to justify its action disappears when there is competent evidence on appeal to the contrary, and from that point on the reasonableness of the valuation fixed by the board becomes one of fact based upon evidence, unaided by presumption, with the burden of showing such value to be unreasonable resting upon the party complaining.

APPEAL from the district court for Richardson County: VIRGIL FALLOON, JUDGE. *Reversed and remanded with directions.*

Henry F. Schepman and *Archibald J. Weaver,* for appellant.

F. A. Hebenstreit, for appellee.

Heard before SIMMONS, C. J., CARTER, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ., and FLORY, District Judge.

YEAGER, J.

This action is an appeal by the Board of Equalization of the County of Richardson, Nebraska, defendant and appellant, from the judgment of the district court fixing the value for taxing purposes of certain real estate belonging to Roselle Ahern, plaintiff and appellee, and a cross-appeal of the plaintiff from the same judgment.

The background of the action is as follows: At the time for the regular assessment of real estate the plaintiff was the owner of the real estate in question. The actual valuation placed upon it by the county assessor was $14,390. The value for taxation became and was fixed by the assessor at one-half of that amount or $7,195. From this valuation the plaintiff appealed to the board of equalization. The board confirmed the assessment made by the assessor. From the action of the board the plaintiff appealed to the district court.

The action was tried in the district court where the judgment was rendered from which the appeal and the cross-appeal were taken to this court. By that judgment the value of the property was reduced from $14,390 to $12,500 which of course effectuated a value for taxation purposes of $6,250.

Both parties filed motions for new trial which were overruled.

The appeal, as the parties agree, presents alone the determination of the true value of this property for the

purposes of taxation. The defendant says that the value placed upon it by the assessor and confirmed by the board of equalization should be restored, and on the other hand the plaintiff urges that it should be reduced below the value fixed by the judgment of the district court.

The proper determination of this question depends upon the facts as disclosed by the record and the applicable legal principles.

One principle is that all nonexempt property in Nebraska is subject to taxation and for that purpose must be valued at its actual value, which means its value in the market in the ordinary course of trade. See, § 77-201, R. S. Supp., 1953; Nebraska State Bldg. Corp. v. City of Lincoln, 137 Neb. 535, 290 N. W. 421; Eppley Hotels Co. v. City of Lincoln, 138 Neb. 347, 293 N. W. 234.

One principle is that ordinarily the valuation by the assessor is presumed to be correct, however if the assessor does not make a personal inspection of the property, but accepts valuations thereof fixed by a professional appraiser, the presumption does not obtain, and in such case the burden is upon the protesting party to prove that the assessment is excessive. See Gamboni v. County of Otoe, 159 Neb. 417, 67 N. W. 2d 489.

Another principle is that the presumption obtains that a board of equalization has faithfully performed its official duties, and in making an assessment it acted upon sufficient competent evidence to justify its action. See, Weller v. Valley County, 141 Neb. 69, 2 N. W. 2d 606; Watson Industries v. County of Dodge, 159 Neb. 311, 66 N. W. 2d 589; Gamboni v. County of Otoe, *supra.*

Still another principle is that the presumption that a board of equalization in making an assessment acted upon sufficient competent evidence to justify its action disappears when there is competent evidence on appeal to the contrary, and from that point on the reasonableness of the valuation fixed by the board becomes one of fact based upon evidence, unaided by presumption, with

the burden of showing such value to be unreasonable resting upon the party complaining. See, Weller v. Valley County, *supra;* Watson Industries v. County of Dodge, *supra.*

In this case the defendant may claim no benefit from the rule that valuations made by county assessors are ordinarily presumed to be correct. It clearly and conclusively appears that the assessor did not inspect the property. He arrived at his valuation by reference to a valuation fixed by professional appraisers. He did not accept the value placed on this property by the appraisers. In actuality the appraisers fixed a value upon all of the real estate and thereafter the assessor placed a value upon all of this real estate 35 percent below the appraisers' values. The value therefore was a reflection of value fixed by the appraisers and not by the assessor. The valuation was not based upon an inspection of the property.

Apparently the board of equalization resorted to and based its valuation upon that fixed by the assessor. This valuation was, under the rules cited, controlling upon the district court in the absence of evidence that it was unreasonable and excessive.

On the trial in the district court the plaintiff produced two witnesses who qualified sufficiently to be permitted to give testimony as to the value of the property in question for the purpose of taxation within the meaning of the rules. One of these gave it as his opinion that the value was $10,750. The other gave it as his opinion that it was $10,800.

Thus the presumption that the board of equalization in making the assessment on this property acted upon sufficient competent evidence to justify its action disappeared, and the question of value became one of fact unaided by presumption. And thus the burden devolved upon the plaintiff to show that the valuation made by the board was unreasonable.

The evidence of plaintiff as to value to which attention

has been called was not controverted by any competent evidence of value within the meaning of the rule that taxable value means value in the market in the ordinary course of trade.

The defendant called a witness who gave testimony related to the question of value. At no place did he give or attempt to give testimony as to the true value of the property. He placed a value upon the property, it is true, but it is clear that it was arbitrary and arbitrarily arrived at.

This witness was an employee of the firm of appraisers which appraised all of the real estate in Richardson County. He testified substantially that the property was examined as was all other property and after this was done comparative values were placed upon this and the other properties. There is testimony that in fixing the valuations reproduction costs were taken into consideration, but there is no testimony whatever that actual value within the meaning of law in its application to the taxation of property was ever taken into consideration. There was no other evidence of value.

The evidence therefore of the plaintiff as to actual value stood alone uncontradicted and unimpeached. It clearly had probative value. It follows that she sustained the burden of showing that the value fixed by the board of equalization was unreasonable and excessive. Her evidence in this respect showed that the actual value of this property did not exceed $10,800. This, if accepted, would cause the value for tax purposes to be one-half of that amount or $5,400. The conclusion is that this should be accepted as the proper value.

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

REVERSED AND REMANDED WITH DIRECTIONS.

ANNA M. WRIGHT, APPELLEE, V. LINCOLN CITY LINES, INC., ET AL., APPELLANTS.
71 N. W. 2d 182

Filed July 1, 1955. No. 33776.

1. **Trial.** It is the duty of the trial court, without request, to submit to and properly instruct the jury upon all the material issues presented by the pleadings and the evidence.
2. ———. A litigant is entitled to have the jury instructed as to his theory of the case as shown by the pleadings and evidence, and a failure to do so is prejudicial error.
3. **Pleading.** A party may at any time invoke the language of the pleading of his adversary on which the case is tried on a particular issue as rendering certain facts indisputable; and in so doing he is neither required nor permitted to offer the pleading in evidence.
4. ———. An admission made in a pleading on which the trial is had is more than an ordinary admission. It is a judicial admission and constitutes a waiver of all controversy so far as the adverse party desires to take advantage of it, and is therefore a limitation of the issues.
5. **Trial.** It is prejudicial error to instruct a jury that all material allegations of an answer must be established by evidence where material allegations thereof have been alleged in the petition and admitted in the answer. A party is entitled to have the jury told that material facts have been admitted by the pleadings and that the necessity of further proof of such admitted facts is not necessary or permitted.
6. **Torts.** Where the independent tortious acts of two or more persons combine to produce an injury indivisible in its nature, any one or more of such tortfeasors may be held liable for the entire damage on the theory that his or their acts are considered in law as a cause of the injury.

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

Doyle & VerMaas and *Cline, Williams, Wright & Johnson,* for appellants.

Chambers, Holland & Groth, for appellee.

Heard before SIMMONS, C. J., CARTER, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ., and FLORY, District Judge.

CARTER, J.

Plaintiff brought this action against Lincoln City Lines, Inc., La Verne O. Gieber, and LeRoy S. Miller to recover damages for injuries sustained by plaintiff while riding on a bus owned by the Lincoln City Lines, Inc., and operated by Gieber. The plaintiff dismissed the action against Miller with prejudice prior to the commencement of the trial. The jury returned a verdict for $15,000 against the two remaining defendants. The defendants Lincoln City Lines, Inc., and La Verne O. Gieber appeal.

The evidence shows that plaintiff boarded the bus at Thirteenth and N Streets in Lincoln on November 3, 1953, at approximately 7:30 a. m. Before plaintiff obtained a seat in the bus it moved forward and collided with an automobile owned and operated by LeRoy S. Miller, causing plaintiff to be thrown against objects in the bus and causing the injuries of which complaint is made. The nature of the assignments of error do not make a more detailed account of the accident necessary.

The petition was filed on November 20, 1953. It set forth various acts of negligence on the part of Gieber, the operator of the bus. It also alleged that Miller was guilty of negligence in the operation of his automobile. On February 11, 1954, the Lincoln City Lines and Gieber filed a joint answer in which they denied any negligence on their part and admitted the specified acts of negligence on the part of Miller. It appears that in paragraph 5 of the original answer the plaintiff was charged with specific acts alleged to constitute contributory negligence. Some time after the filing of the answer paragraph 5 was amended by leave of court. The amendment alleged that the action was originally instituted against the answering defendants and LeRoy S. Miller; that the action as to Miller was dismissed with prejudice on December 7, 1953; and that Miller settled the claim of the plaintiff against him and thereby released the answering defendants from liability. The answer

further asserts that the negligent acts of Miller specified in the petition were the proximate cause of the accident and the injuries to plaintiff resulting therefrom. The reply of plaintiff was a general denial.

The instruction of the court, briefly stated, charged the jury as follows: By instruction No. 1 the charges of negligence on the part of Lincoln City Lines and Gieber were specifically set forth, together with the description of the injuries suffered by the plaintiff and the damages resulting therefrom. The allegations of negligence on the part of Miller, as alleged in the petition, were not submitted to the jury. By instruction No. 2 the trial court instructed the jury that the answering defendants alleged that Miller was guilty of negligence in certain specified respects and that such negligence was the sole proximate cause of the accident and the resulting damages. The instruction did not inform the jury that such acts of negligence were alleged in plaintiff's petition and that the answering defendants admitted in their answer the negligence of Miller as charged in the petition.

The answering defendants tendered an instruction to the effect that plaintiff alleged acts of negligence by Miller and that defendants admitted such acts of negligence on the part of Miller in their answer, and that the jury should consider such acts of negligence as admitted by plaintiff and the answering defendants during their deliberations. This instruction was refused and no similar instruction was given which covered the subject matter of the tendered instruction. The defendants contend that this was prejudicial error.

The purpose of pleadings in a case is to frame the issues upon which the case is to be tried. It is the duty of the trial court, without request, to submit to and properly instruct the jury upon all the material issues presented by the pleadings and the evidence. Pongruber v. Patrick, 157 Neb. 799, 61 N. W. 2d 578. A litigant is entitled to have the jury instructed as to his theory of the

case as shown by the pleadings and evidence, and a failure to do so is prejudicial error. Harsche v. Czyz, 157 Neb. 699, 61 N. W. 2d 265.

In the case at bar plaintiff alleged that Miller, the driver of the automobile involved in the collision, was guilty of specified acts of negligence. The answer admits the negligence of Miller. This is a judicial admission of which advantage can be taken by adverse parties and constitutes a limitation of the issues. Rodgers v. Jorgensen, 159 Neb. 485, 67 N. W. 2d 770; Barkalow Bros. Co. v. English, 159 Neb. 407, 67 N. W. 2d 336. It follows that a party may at any and all times invoke the language of his opponent's pleading on an admitted issue as rendering the admitted facts indisputable and, in so doing, he is neither required nor allowed to offer the pleading in evidence in the ordinary manner, nor forbidden to comment thereon in argument without having made a formal offer. When such facts, admitted by the pleadings, are material to the issues to be decided by the jury, the trial court is required to instruct the jury with reference thereto. In the case here presented, the defendants admitted the negligence of Miller as the plaintiff had alleged it. It was a part of the defendants' theory of the case. They were not required to make further proof thereof. Defendants specifically requested an instruction informing the jury of the undisputed facts resulting from the admission. Defendants were entitled to have the jury so instructed and it was prejudicial error for the trial court to refuse to do so.

The theory of defendants' case was that Miller was guilty of negligence as alleged by the plaintiff and admitted by the defendants, and that Miller's negligence was the sole proximate cause of the accident. The claim of the plaintiff necessarily was based on the legal principle that where the independent tortious acts of two or more persons combine to produce an injury indivisible in its nature, either tortfeasor may be liable for the entire damage on the theory that his own act of negligence is

deemed in law to have been the cause of the injury. Stark v. Turner, 154 Neb. 268, 47 N. W. 2d 569. The defendants in defending against the invocation of such rule by the plaintiff were entitled to the benefit of any allegations contained in the plaintiff's petition. The effect of the court's instructions was to treat the allegations of negligence on the part of Miller as denied when they were in fact admitted. In a case where a similar situation arose this court said: "This, of course, overlooks the admissions in the answer, and it also leaves the jury in the dark as to what are the material allegations of the petition. In Dunbier v. Day, 12 Neb. 596, 608, it is said that a party has the right to have the jury told that the material facts are admitted when this is the case. Surely, it is still more essential that the jury should not be told that plaintiff must prove material facts which are admitted." O'Donnell v. Chicago, R. I. & P. Ry. Co., 65 Neb. 612, 91 N. W. 566.

The plaintiff contends that there was no error in refusing defendant's tendered instruction No. 2 for the reason that plaintiff's right to recover was not affected by any negligence on the part of Miller since the sole question was whether defendants were guilty of negligence which was a proximate cause of the accident. This contention overlooks the fact that defendants pleaded that the negligence of Miller was the sole proximate cause of the accident. The admission established the negligence of Miller without any additional evidence. While defendants were required to prove that the negligence of Miller was the sole proximate cause of the accident to establish their defense, they were entitled to rely upon the admission as establishing the negligence of Miller and to have the jury so instructed, it being a matter essential to their defense.

The plaintiff relies upon the rule that the instructions should be considered as a whole in determining if error exists. The rule is correct, but there is no place in the court's instructions where the jury was told that Miller's

negligence was an admitted fact. Defendants were entitled to invoke plaintiff's pleading on this point. They attempted to do so by tendering defendants' requested instruction No. 2. A consideration of the instructions as a whole does not reveal that the erroneous refusal to give defendants' requested instruction No. 2 was otherwise cured. The error is prejudicial to the rights of the defendants and requires a reversal.

The judgment of the district court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

JOHN F. GERNANDT, APPELLANT, V. THOMAS W. BECKWITH, APPELLEE.

71 N. W. 2d 303

Filed July 1, 1955. No. 33791.

1. **Appeal and Error.** In a case where there is no bill of exceptions and no facts for review the only question presented is whether or not the pleadings support the judgment.
2. **Automobiles.** When two motor vehicles collide in an ordinary city or country intersection and there is no evidence of a substantial difference in the speed of the vehicles, it is generally self-evident that they approached the intersection at approximately the same time under the rule of right-of-way at intersections under section 39-728, R. R. S. 1943.

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

Schrempp & Lathrop, for appellant.

Wear, Boland & Mullin, for appellee.

Heard before SIMMONS, C. J., CARTER, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ., and FLORY, District Judge.

FLORY, District Judge.

This is an action brought by plaintiff and appellant against defendant and appellee for personal injuries and

property damages sustained by plaintiff as the result of an intersection collision at Thirty-seventh and R Streets in Omaha between plaintiff's motorcycle and defendant's automobile. Defendant was on plaintiff's right but plaintiff claims to have entered the intersection first. The allegations of the pleadings are hereinafter set forth.

At the conclusion of plaintiff's evidence, defendant moved that the case be dismissed for want of evidence, which motion was sustained by the court and the jury discharged and case dismissed. Motion for new trial was filed by the plaintiff, and on the 1st day of February 1955, the motion for new trial was overruled. On the same date notice of appeal to the Supreme Court was filed by the plaintiff.

No extension of time was asked for or granted for the preparation, service, and settling of the bill of exceptions. The bill of exceptions was not settled by the trial judge until the 3d day of June 1955, and on the same date it was filed in the district court for Douglas County and in this court. This court will take judicial notice of the fact that the bill of exceptions was not settled within the time provided by statute, and therefore cannot be considered on this appeal. Bednar v. Bednar, 146 Neb. 726, 21 N. W. 2d 438.

As we may not review the evidence, the only question remaining is whether or not the pleadings support the order of dismissal. Fred Egger Sons v. Welch, *ante* p. 124, 69 N. W. 2d 366.

Plaintiff alleges that when his motorcycle had reached a point at the center of the intersection defendant's automobile collided with him, and further alleges that both Thirty-seventh and R Streets are paved streets intersecting at right angles.

Defendant in his answer alleges that he was operating his automobile in a careful and prudent manner approaching the intersection from plaintiff's right, and that after he had entered the intersection the plaintiff

drove his motorcycle into and against the left side of defendant's automobile. Defendant further alleges that the collision was the direct and proximate result of the negligence of the plaintiff in operating his motorcycle at a rate of speed greater than was reasonable and proper under the circumstances; in failing to accord the right-of-way to the defendant who was on plaintiff's right notwithstanding that the defendant had entered the intersection before the plaintiff; in failing to keep a proper lookout; in turning his motorcycle into and against the left side of defendant's automobile at a time when the defendant was more than halfway across the intersection; and in failing to seasonably apply the brakes on his motorcycle or turn aside to avoid colliding with defendant's automobile.

From plaintiff's allegation that the collision occurred near the center of the intersection, and in the absence of evidence which can be considered, the pleadings sustain the order of the trial court in dismissing plaintiff's case.

Section 39-728, R. R. S. 1943, provides that vehicles approaching an intersection from the right shall have the right-of-way over those approaching from the left when they reach the intersection at approximately the same time, and that in all other cases the vehicle reaching the intersection first shall have the right-of-way. This does not mean that drivers of motor vehicles are permitted to race or to gamble on which vehicle may enter the intersection a few feet ahead of the other. When a collision occurs in the ordinary city or country intersection, unless there is evidence that one of the vehicles was traveling at a very much greater rate of speed than the other, it is self-evident that the vehicles were reaching the intersection "at approximately the same time."

As already pointed out, the pleadings on which the order of the trial court is based are sufficient to support the order, accordingly it is affirmed.

AFFIRMED.

LAWRENCE GATES, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.

71 N. W. 2d 460

Filed July 8, 1955. No. 33648.

1. **Criminal Law.** Venue is a jurisdictional fact and in this state Article I, section 11, of the Constitution of Nebraska, and section 29-1301, R. R. S. 1943, give the defendant in a criminal prosecution the right to be tried by an impartial jury in the county where the alleged offense was committed.
2. ———. The venue of an offense may be proven like any other fact in a criminal case. It need not be established by direct testimony, nor in the words of the information, but if from the facts in evidence the only rational conclusion which can be drawn is that the crime was committed in the county alleged, the proof is sufficient.
3. **Appeal and Error.** Before an error requires a reversal it must be determined that it was prejudicial to the rights of the defendant and, as a result, a substantial miscarriage of justice occurred.
4. **Criminal Law: New Trial.** In a criminal case, a new trial may be granted for newly discovered evidence which is competent, material, and credible, which might have changed the result of the trial and which the exercise of due diligence could not have discovered and produced at the trial.

ERROR to the district court for Pawnee County: VIRGIL FALLOON, JUDGE. *Affirmed.*

John C. Mullen and *Schrempp & Lathrop,* for plaintiff in error.

Clarence S. Beck, Attorney General, and *Homer G. Hamilton,* for defendant in error.

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

WENKE, J.

This is an error proceeding from the district court for Pawnee County. Plaintiff in error Lawrence Gates, whom we shall hereinafter refer to as defendant, was therein convicted of auto theft and, after his motion for

a new trial had been overruled, sentenced to serve 6 years in the State Penitentiary.

Defendant was charged with having, on February 19, 1954, stolen a 1951 black Plymouth sedan, motor No. P-2369642, the property of Mollie Mosteller, from her premises in Pawnee County, Nebraska. The sufficiency of the proof to establish the defendant's guilt is not questioned, consequently we will not set out the facts except as we find it is necessary to do so in connection with our discussion of the errors assigned.

Defendant contends the trial court erred in retaining jurisdiction of the cause and submitting it to a jury when there was a complete lack of proof of the jurisdictional fact of venue, that is, defendant contends the State failed to prove the offense was committed in Pawnee County. This question was submitted to the jury as an issue of fact for its determination.

"Venue is a jurisdictional fact and in this state the Constitution, art. I, sec. 11, and statute, Comp. St. 1929, sec. 29-1301 (now § 29-1301, R. R. S. 1943), give the defendant in a criminal prosecution the right to be tried by an impartial jury in the county where the alleged offense was committed." Robeen v. State, 144 Neb. 910, 15 N. W. 2d 69.

"The venue of an offense may be proven like any other fact in a criminal case. It need not be established by direct testimony, nor in the words of the information, but if from the facts in evidence the only rational conclusion which can be drawn is that the crime was committed in the county alleged, the proof is sufficient." Weinecke v. State, 34 Neb. 14, 51 N. W. 307. See, also, Medley v. State, 156 Neb. 25, 54 N. W. 2d 233.

The State introduced evidence that Du Bois, Nebraska, is in Pawnee County and that the farm, from which the car was stolen, is just 40 rods north thereof on the west side of and adjacent to State Highway No. 50. State Highway No. 50 runs north and south and follows the main street of Du Bois as it traverses the village.

We think, in view of the foregoing, the following discussion in Weinecke v. State *supra,* is apropos here: "The venue of an offense may be proven like any other fact in a criminal case. It need not be established by positive testimony, nor in the words of the information; but if from the facts appearing in evidence the only rational conclusion which can be drawn is that the offense was committed in the county alleged, it is sufficient. It will be presumed that the trial court and jury knew the boundaries of the county where the trial took place and that the town of Chapman was in such county. Suppose, upon a trial of a criminal cause in Lancaster county, it be proven that the alleged offense was committed within one-half mile of the city of Lincoln, would not the venue be as completely established as if a witness had testified that the precise place was in Lancaster county? To ask the question is to evoke an affirmative answer."

We find this contention to be without merit.

Defendant contends the court erred in overruling his objection to the following answer of Joseph Divis, sheriff of Saunders County, on the ground that it is hearsay. Sheriff Divis had made an investigation the morning of February 19, 1954, because the stolen car had been found abandoned in Wahoo about 8:30 a. m. that day. He testified: "Then later I found — or figured that whoever had driven it into Wahoo had to have some way to get out of town, or else they were still in town. So I checked all the hotels to see if any one had registered, and finding there were none, I checked the bus depot, because I knew that a bus would be leaving shortly, and I found out that two strangers had been in the bus depot and that they had inquired when the next bus left for Omaha."

The rule excluding hearsay is primarily based on the principle that such evidence is not subject to the ordinary tests required by law for ascertaining the truth, that is, the person actually giving the information is not under oath and in the presence of the court and jury where he

can be cross-examined in regard thereto. But the foregoing answer has none of the characteristics of hearsay. It does contain an opinion and a conclusion of the witness which should have been stricken had proper motion been made for that purpose.

But let us assume, for the purpose of discussion, that the court erred in not sustaining the objection as made. Every error does not require a reversal. § 29-2308, R. R. S. 1943; Watson v. State, 109 Neb. 43, 189 N. W. 620; Piercy v. State, on rehearing, 138 Neb. 905, 297 N. W. 137.

As stated in Piercy v. State, *supra:* "Before the error requires a reversal, it must be determined that it was prejudicial to the rights of the defendant, and that as a result a substantial miscarriage of justice occurred."

The only part of the answer that could in any way be material is the following: "* * * I found out that two strangers had been in the bus depot and that they had inquired when the next bus left for Omaha."

Hilda Resek, an employee in the City Cafe in Wahoo, testified defendant and another man entered that cafe about 7 a. m., or shortly thereafter, on February 19, 1954, while she was on duty; that the other man was injured; that the two men stayed in the cafe about 40 to 45 minutes; that while in the cafe they inquired as to the bus service to Omaha; that they made a phone call; and that when they left the cafe they walked to the west. The City Cafe is in the same building with the bus depot and is operated in connection therewith.

Dorothy Luehrs, also of Wahoo, testified that shortly before 8 a. m. on February 19, 1954, she was in Clara's Cafe in Wahoo drinking coffee. This cafe is north across the street and west of the City Cafe, there being a street intersection between them. She testified that while she was sitting at the counter drinking her coffee defendant and another man entered the cafe; that they sat down at the counter and ordered coffee; that the other man was holding a handkerchief to his left eye; that a car drove

by; that they jumped up and left without drinking their coffee; that she walked out behind them; that they ran across the intersection and got in a car parked near the City Cafe; and that they left the cafe about 7:55 a. m.

We think this evidence sufficient, if believed by the jury, to establish the presence of defendant and another man in Wahoo on February 19, 1954, between the hours of 7 and 7:55 a. m., both of whom were strangers in that community. In view thereof we think the admission of this testimony, assuming it to be incompetent, was harmless error.

Section 29-2101, R. R. S. 1943, provides, in part, as follows: "A new trial, after a verdict of conviction, may be granted, on the application of the defendant, for any of the following reasons affecting materially his substantial rights: * * * (5) newly discovered evidence material for the defendant which he could not with reasonable diligence have discovered and produced at the trial; * * *."

"In a criminal case, a new trial may be granted for newly discovered evidence which is competent, material, and credible, which might have changed the result of the trial and which the exercise of due diligence could not have discovered and produced at the trial." Duffey v. State, 124 Neb. 23, 245 N. W. 1.

"For many years applications for new trials on the ground of newly discovered evidence have not been favored by our courts. Smith v. Goodman, 100 Neb. 284; Fitzgerald v. Brandt, 36 Neb. 683.

"The reason is that the moving party had ample opportunity to carefully prepare his case and to secure all of the evidence before the trial. After the case is lost he is always aroused to diligent activity, which should much better have been put forth before the trial.

"While smarting under defeat and disappointment, he is under the strongest temptation to make a plausible showing for a new trial and thus reopen the case. People v. Taminago, 35 Cal. App. 238. But it has always been

the policy of the law to make such efforts well nigh hopeless and to grant a new trial only in exceptional cases, to the end that counsel will expend more vigorous efforts in making the fullest preparation before the trial and be vigilant and diligent in securing all their evidence without a mental reservation that, if anything is overlooked now, I can easily get a new trial in case of defeat." Wiegand v. Lincoln Traction Co., 123 Neb. 766, 244 N. W. 298.

Defendant filed a motion for new trial on the basis of newly discovered evidence which he contends is material to his defense and which he claims he could not, with reasonable diligence, have discovered and produced at the trial. He contends the court erred in overruling this motion.

In Wiegand v. Lincoln Traction Co., *supra,* we asked the question, "What is reasonable diligence?" Then we answered it by saying: "Facts and circumstances must be clearly set out by the affidavits of the attorneys as well as of the party appealing, from which the court may determine whether the party did in truth use reasonable diligence in searching for this newly discovered evidence before the former trial. Todd v. City of Crete, 79 Neb. 677. In fact, the party must negative every circumstance from which a lack of diligence might be inferred. Axtell v. Warden, 7 Neb. 186. He must show that all proper efforts had been made to discover it before the first trial. Brazil v. Moran, 8 Minn. 236, 83 Am. Dec. 772. * * *

"Defendant must show that the evidence came to him since the trial, and was not equally available to him previous to that trial, and was not simply discovered by exercise of belated diligence.

"The hardship of a particular case cannot weigh against the rule preventing one who has had a full and fair opportunity to prepare his case from dragging out the litigation by bringing in evidence which, with due diligence, he ought to have discovered before the trial. Toledo Scale Co. v. Computing Scale Co., 261 U. S. 399."

It is surprising how quickly after the trial defendant was able to contact all of the witnesses he now says were not then available to him. We do not think defendant, by his testimony, has established that he or his counsel exercised reasonable diligence to discover and produce these witnesses at the trial. We shall, however, discuss the motion on its merits.

Defendant's defense was what is referred to as an alibi. It was properly submitted to the jury. In support thereof he produced the testimony of himself, his wife, Mrs. William Connor, Thomas E. Milbourn, Don L. De Rod, Lee Page, and Earl Marler to establish his presence either in Omaha or Plattsmouth, Nebraska, at all times material to when the Mosteller car was stolen. This was to overcome the testimony of the State showing his presence in a beer tavern in Du Bois about 4 p. m. on Thursday, February 18, 1954, and his presence in Wahoo between 7 and 7:55 a. m. on Friday, February 19, 1954. The stolen car had been abandoned in Wahoo sometime during the early morning of that day.

In order to fully understand the significance of the foregoing we set forth the following from the record:

The State produced evidence to the effect that when defendant left the tavern in Du Bois about 4 p. m. on February 18, 1954, he got into and drove off in a Kaiser car which early the next morning, shortly after 3 a. m., was found abandoned just north of Du Bois on State Highway No. 50; that this car, a 1949 4-door blue Kaiser sedan, had been abandoned because the motor had ceased to function; and that the Mosteller car was stolen from the garage on their farm which is only a short distance to the north and west of where the Kaiser car had been abandoned. The title to the Kaiser car, as well as the title to a 1950 black Mercury club coupé which was found abandoned in Du Bois early the same morning, was in defendant's name.

The State's evidence further shows that about 3 a. m. on February 19, 1954, Marvin Hays discovered someone

breaking into his liquor store located in Du Bois; that he observed the party leave the store, go east across the main street, and get into a Kaiser car; that thereafter the Kaiser car was immediately driven to the north; that Hays and his son, who were armed with a shotgun and 30.06 rifle, attempted to stop the car by firing into it; that one of the bullets from the rifle severed the gas line between the fuel pump and carburetor; and that, because thereof, the car stopped and was abandoned just north of the village of Du Bois on State Highway No. 50.

At the trial defendant testified in detail as to where he was on the morning of February 19, 1954. He testified he got up shortly before 7 a. m.; that shortly thereafter he drove from his home at 1202 South Seventy-second Street to his garage and used car lot located at 606 South Nineteenth Avenue in Omaha; that he then drove to Plattsmouth; that he arrived there about 8 a. m.; and that when he arrived in Plattsmouth he went to Earl's Bar. He then fully described what he did in Plattsmouth prior to his return to Omaha, leaving Plattsmouth for Omaha between 9:30 and 10 a. m. After reaching Omaha he testified he returned to his garage and stayed there the balance of the morning.

At the hearing, in support of his motion for new trial, defendant offered the testimony of Edward Collins and Ervin Steinhoff, both of Nebraska City. Their testimony relates to the contents of the records of the City Cab Company of Nebraska City. This evidence was offered for the purpose of showing that Ervin Steinhoff, one of the cab drivers for the City Cab Company, drove defendant in one of its cabs from the Grand Hotel in Nebraska City to Union, Nebraska, about 7:45 a. m. on February 19, 1954. Just how defendant considers this evidence, which impeaches his own testimony, is material to his defense is difficult to understand but certainly it constitutes no basis for granting a new trial.

Defendant also offered the affidavit of C. L. Page, an employee of the Loyal's Auto Exchange of Omaha who

had testified at the trial under the name of Lee Page, about buying a car from defendant about 3 p. m. on February 18, 1954, and in connection therewith had seen defendant on defendant's used car lot in Omaha. Page had previously testified that he had seen defendant in Omaha during that afternoon and as late as 7 p. m. that night. How the fact that he forgot to relate this incident of buying the car would be grounds for a new trial is hard to conceive. He had full opportunity to testify and if he forgot to relate something, or defendant's counsel forgot to ask him in regard thereto, that is just one of the ordinary incidents connected with any trial. It certainly does not relate to any material matter.

Defendant also offered the affidavit of Leonard Winkler in support of his motion. Winkler was, on February 18, 1954, an employee of Loyal's Auto Exchange, being a salesman or "lot man." The Loyal's Auto Exchange used car lot joins that of defendant. Winkler in his affidavit stated he saw defendant in Omaha about 4 p. m. on February 18, 1954, at his (defendant's) used car lot in connection with defendant's sale and delivery of a 1941 Chevrolet club coupé to C. L. Page. The evidence is cumulative only. Page had testified at the trial that defendant was in Omaha at his (defendant's) place of business that afternoon.

"This court has held many times that, when the new evidence is merely cumulative, it will not warrant a new trial. Hoffine v. Ewings, 60 Neb. 729; Hill v. Helman, 33 Neb. 731. For it is clear that, if the new evidence will simply add a few more witnesses to the same question of fact to which others have testified, it does not warrant a new trial, for the jury should not be controlled by the mere number of witnesses who testify to any given fact." Wiegand v. Lincoln Traction Co., *supra*. See, also, Browne v. State, 115 Neb. 225, 212 N. W. 426.

The United States Department of Commerce Weather Bureau's report of precipitation at its Omaha station between the hours of 7 a. m. and midnight on February 19,

1954, would fall in the same category and further, it is immaterial.

"It is first required that the evidence be competent, relevant and material to the issues." Wiegand v. Lincoln Traction Co., *supra.*

We come then to the testimony of E. A. Ernst and R. J. Andrews together with the affidavit of Joseph F. Libershal. Their testimony would only be cumulative of the fact that defendant was in Plattsmouth sometime during the forenoon of February 19, 1954, and made a phone call from there to someone in Omaha. This is cumulative of evidence produced at the trial. Significant in this respect is the fact that their testimony indicates defendant was in Plattsmouth at a later hour than he testified to at the trial. The record of the telephone company as to the call to Omaha on which defendant seeks to rely shows it was made at 9:15 a. m. At the trial he said he made it about 8:15 a. m. If he made it at 9:15 a. m. it was entirely possible for him to have done so within the scope of the State's evidence which placed him in Wahoo shortly before 8 a. m. that same day. We make this observation in view of the fact that we have said if the probable result of the new evidence would be a different verdict, a new trial should be granted. See Wiegand v. Lincoln Traction Co., *supra.* Such is not the situation here.

As stated in Wiegand v. Lincoln Traction Co., *supra:* "It has been held that new cumulative evidence must be so potent that, by strengthening evidence already offered, a new trial would probably result in a different verdict." We do not think the cumulative evidence here offered to be of that character.

We have carefully examined the record and think the defendant had a fair and impartial trial. In this respect we have not overlooked the fact that on several occasions there were demonstrations of applause by the spectators present. However, in each instance, the court cautioned them in regard thereto and defendant's coun-

sel made no objection, at that time, to the manner in which it was handled. In view of what we have said we affirm the judgment of the trial court denying a new trial.

AFFIRMED.

ELVIN J. HALSEY, APPELLEE, V. MERCHANTS MOTOR FREIGHT, INC., A CORPORATION, APPELLANT, IMPLEADED WITH THE SNOW CORPORATION, APPELLEE.

71 N. W. 2d 311

Filed July 8, 1955. No. 33730.

1. **Carriers.** In the absence of evidence, the presumption is that goods transported by a carrier arrived at their destination in the same condition in which they were shipped.
2. **Negligence: Master and Servant.** Absolute safety is unattainable, and employers are not insurers. They are liable for the consequences, not of danger, but of negligence, and the unbending test of negligence in methods, machinery, and appliances is the ordinary usage of the business.
3. **Negligence: Trial.** Negligence is ordinarily a question of fact which may be proved by circumstantial evidence and established physical facts. If such facts and circumstances, and the inferences that may be drawn therefrom, indicate with reasonable certainty the existence of the negligent act complained of, it is sufficient to sustain a verdict by the jury.
4. **Evidence: Trial.** Circumstantial evidence cannot be said to be sufficient to sustain a verdict or to require submission of a case to a jury depending solely thereon for support, unless the circumstances proved by the evidence are of such a nature and so related to each other that the conclusion reached is the only one that can fairly and reasonably be drawn therefrom.
5. **Negligence.** Negligence is never presumed, and cannot be inferred from the mere fact that an accident happened.
6. **Trial.** In a case where a motion has been made at the close of all of the evidence for a directed verdict, which motion should have been sustained but was overruled and the case was submitted to a jury which returned a verdict contrary to the motion, and a motion for judgment notwithstanding the verdict is duly filed, it is the duty of the court to sustain the motion and render judgment in accordance with the motion for a directed verdict.

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

McCormack & McCormack and *Joseph H. McGroarty,* for appellant.

Shrier & Shrier and *Fischer, Fischer & Fischer,* for appellee.

Heard before SIMMONS, C. J., CARTER, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ., and FLORY, District Judge.

SIMMONS, C. J.

This is an action for damages for personal injuries arising from an accident in unloading goods from a truck of defendant, Merchants Motor Freight, Inc. The action is based on its alleged negligence as hereinafter recited. This corporation will hereinafter be referred to as the carrier. The consignee of the goods is the defendant, the Snow Corporation, hereinafter referred to as Snow. Plaintiff was an employee of Snow.

Snow answered that, as plaintiff's employer, it had paid him workmen's compensation, joined in the prayer of plaintiff's petition, and prayed for subrogation.

The carrier answered, denied generally, alleged that the unloading was under the supervision and direction of Snow, denied negligence on its part, and alleged that plaintiff was negligent.

Trial was had. At the close of all evidence, the carrier moved for a directed verdict. The motion was overruled. The jury returned a verdict for plaintiff upon which judgment was rendered.

The carrier moved for a judgment notwithstanding the verdict, or, in the alternative, for a new trial. These motions were overruled. The carrier appeals.

We reverse the judgment of the trial court and remand the cause with directions to sustain the motion of the carrier for judgment notwithstanding the verdict.

The carrier presents here two contentions. First, that there was no negligence shown and, if there was negligence causing plaintiff injury, that the carrier was not responsible for it.

All evidence recited herein, excepting the tariffs relied on by the carrier, is found in plaintiff's case-in-chief.

On March 19, 1953, the carrier received a shipment billed as 178 pieces of steel wire weighing 21,525 pounds destined to Snow as consignee. Carriage was by motor transport in a trailer 32 feet long. The transport arrived at Snow's place of business in Omaha on March 23, 1953. The transport was placed at Snow's place of business with the trailer perpendicular to a door opening therein and about 5 or 6 feet therefrom. The trailer sloped down toward the entrance. The 178 pieces were bundles of steel rods coated with oil or grease, and weighing from 100 to 125 pounds each. These bundles in turn were in larger bundles made up of from 15 to 20 of the small bundles, banded together by steel bands. They were in the forward end of the trailer and accordingly at a distance in the truck away from the open end at the Snow warehouse. Snow's foreman, two employees of Snow, and the driver, undertook to unload the goods. One of the employees was in the trailer with the driver. The foreman and the plaintiff were outside.

The men in the trailer cut the bands around the larger bundles using a hammer and chisel furnished by Snow. Snow also furnished a truck with two wheels on one end and legs on the other for moving the goods from the front end of the trailer to the rear. A picture of the two-wheel truck is in evidence. It appears that the legs and wheels are about of equal height or, stated otherwise, when resting on the wheels and legs, the top of the truck is parallel with the surface on which it rests. The handles project beyond the legs, and without other support, for a distance about half the

length of the truck between the wheels and legs. Such a truck was ordinarily used in such an operation.

The two men in the trailer loaded 8 to 10 of the small bundles on the truck, wheeled it to the rear end, and turned it around with the handles facing the door and the legs about a foot from the end of the trailer. The hammer and a block of wood were then put behind the wheels to prevent the truck moving.

Plaintiff and the foreman would then take the bundles, one at a time from the truck, carry them to the building, and place them on a conveyor going into the Snow warehouse. The men on the trailer would push the bundles one at a time toward the men on the ground, using their knees or hands to hold the remaining bundles, and when the men on the ground were ready for another bundle they would release the pressure from their knees and slide another bundle forward. The men in the trailer "would use their judgment as to whether they would have to hold any of those back to keep them from flying down and hitting us."

That procedure was followed for several hours without mishap. In the afternoon, the two-wheel truck with 8 or 10 bundles on it had been placed at the rear of the trailer. Two bundles had been removed. A third bundle had been removed, and plaintiff and the foreman had their backs toward the trailer placing a bundle on the conveyor, when the remaining bundles fell from the truck, hit plaintiff, and seriously injured him. No one testified as to how or in what manner they slid or fell. Immediately prior to the accident, the two men in the truck "were just standing there." After the accident, the legs of the two-wheel truck were over the edge of the trailer.

The trial court instructed the jury that it was the duty of the carrier to unload the truck.

The trial court submitted the cause on the plaintiff's allegation that the carrier was negligent in failing to securely anchor the truck so that it could not move or

tip while it was being unloaded by the plaintiff.

As to the liability of the carrier, plaintiff relies upon the provision of the controlling tariff that requires delivery "to a consignee at a dock, platform, doorway or other facility directly accessible to motor vehicle."

The carrier relies on an exception which provides that "Where an article (or articles) in a single container or shipping form tendered, weighs 500 lbs. or more, * * * loading or unloading shall be performed by the shipper or consignee, as the case may be." Plaintiff construes this tariff to mean that the shipment when "tendered" for loading must be shown to have weighed 500 pounds or more before the consignee is required to unload. There is no proof that the small bundles were in the larger bundles when tendered for loading.

In the absence of evidence, the presumption is that goods transported by a carrier arrived at their destination in the same condition in which they were shipped. 13 C. J. S., Carriers, § 254, p. 538.

In the absence of evidence that the "single container or shipping form" had been changed in transit by the carrier, we think it patent under the tariff provision that Snow was required to unload the shipment. In fact it appears that Snow so construed the tariff and undertook to perform that duty. This is strengthed by the further provision of the tariff that "If requested, carriers will undertake, in behalf of the shipper or consignee, as the case may be, to employ additional help. No charge will be made for labor performed by the truck driver, * * *." Here obviously the truck driver was helping Snow unload the shipment.

But plaintiff argues that the waybill reciting that 178 pieces were shipped meets the contention of the carrier that the exception of the tariff controls. That contention is answered by the exception. It refers not to an article in a single container, but to "article (or articles) in a single container or shipping form." Here the pieces (or small bundles) were articles in a "single

* * * shipping form." That the large bundles weighed in excess of 500 pounds is not in dispute.

We think it clear under this evidence that the duty of unloading the shipment rested on Snow; that Snow was performing that duty; and that the plaintiff when injured was an employee of Snow and not an employee of Snow loaned to the carrier.

Plaintiff's contention that there was evidence of negligence sufficient to sustain a jury's verdict on the issue submitted is not sustainable.

There is evidence that in the unloading of merchandise from trailers where the merchandise was in the front end of the trailer, that ordinarily the two-wheel truck was used.

In Weed v. Chicago, St. Paul, M. & O. Ry. Co., 5 Neb. (Unoff.) 623, 99 N. W. 827, it was held: "Absolute safety is unattainable, and employers are not insurers. They are liable for the consequences, not of danger, but of negligence, and the unbending test of negligence in methods, machinery, and appliances is the ordinary usage of the business."

It is stated in 56 C. J. S., Master and Servant, § 267, p. 1031, that: "A master who employs the usual and customary methods employed by prudent and careful men engaged in similar business is generally not liable for injuries to a servant, provided such methods do not disregard the servant's safety." See, also, 35 Am. Jur., Master and Servant, § 124, p. 553.

We have repeatedly followed this rule. We call particular attention to our decision in Brown v. Swift & Co., 91 Neb. 532, 136 N. W. 726.

Plaintiff relies on our rule as stated in Gilliland v. Wood, 158 Neb. 286, 63 N. W. 2d 147, wherein we held: "Negligence is ordinarily a question of fact which may be proved by circumstantial evidence and established physical facts. If such facts and circumstances, and the inferences that may be drawn therefrom, indicate with reasonable certainty the existence of the negligent act

complained of, it is sufficient to sustain a verdict by the jury."

Plaintiff also relies on our rule as stated in Taylor v. J. M. McDonald Co., 156 Neb. 437, 56 N. W. 2d 610, wherein we held: "'All that plaintiff was required to do was to establish, to a reasonable probability, that the accident happened in the manner alleged in his petition, and where facts and circumstances are established from which the way the accident happened could be logically inferred, it was not error to submit that issue to the jury.' Circumstantial evidence may properly be considered by the jury in connection with the direct evidence offered in determining if the defendant was negligent and, when controlling rules of law are properly complied with, circumstantial evidence alone may be sufficient to sustain a verdict. * * * Nor is a plaintiff required to exclude the possibility that the accident might have happened some other way."

The carrier relies on our rule stated in Jones v. Union Pacific R. R. Co., 141 Neb. 112, 2 N. W. 2d 624, and followed in In re Estate of Bingaman, 155 Neb. 24, 50 N. W. 2d 523, as follows: "Circumstantial evidence cannot be said to be sufficient to sustain a verdict or to require submission of a case to a jury depending solely thereon for support, unless the circumstances proved by the evidence are of such nature and so related to each other that the conclusion reached is the only one that can fairly and reasonably be drawn therefrom."

The rules are not in conflict.

There is another rule that is applicable here: "Negligence is never presumed, and cannot be inferred from the mere fact that an accident happened." In re Estate of Bingaman, *supra*.

Is there circumstantial evidence indicating with reasonable certainty that this accident arose because the carrier failed to securely anchor the two-wheel truck so that it could not move or tip while it was being

unloaded? Is that the only conclusion that can fairly and reasonably be drawn from the evidence?

Plaintiff relies on three facts shown by the evidence: (1) The location of the two-wheel truck at the rear of the trailer anchored by the hammer and block of wood; (2) that the small bundles fell from that truck and hit the plaintiff; and (3) that after the accident the legs of the two-wheel truck were off the edge of the trailer.

This argument is necessarily premised on the contention that the two-wheel truck moved so that its legs slipped off the end of the trailer bed and caused the bundles to fall upon the plaintiff. There is no evidence to sustain such a contention. The two men working in the trailer did not testify. All that the evidence shows is the location of the two-wheel truck before and after the accident. Whether it moved before the bundles fell on the plaintiff, and caused that falling, or whether it moved during the shifting of the bundles, or whether it was moved after the event and during the excitement caused by the accident, can only be in the field of speculation and conjecture.

Is the conclusion that the accident happened in the way claimed by the plaintiff the only one that can fairly and reasonably be drawn from the evidence? We think not.

The evidence suggests another conclusion as to what happened which is just as reasonable as the one which plaintiff pleaded and upon which his cause was submitted to the jury.

The evidence shows that the trailer did slope materially downward toward the end from which the bundles were being taken. Obviously the load-carrying surface of the two-wheel truck sloped in the same direction. There was nothing on the two-wheel truck at the lower end to prevent the bundles from responding to the forces of gravity and sliding or rolling off the two-wheel truck.

The evidence is that these bundles were coated with grease and oil. A cross section of the bundles would show a rather round bundle. The evidence is that during the unloading process before the accident the men in the truck would use their legs to hold the bundles remaining on the truck to "keep them from flying down and hitting" the men on the ground. At the time of the accident "They were just standing there." It is just as reasonable, if not more reasonable, to conclude that the accident happened in the way that the employees anticipated one could happen and was guarded against earlier in the work of unloading, as to conclude that it happened from a tipping or moving of the truck. As was said in Brown v. Swift & Co., *supra*, "A servant of mature years and of ordinary intelligence should, in performing the duties of his employment, take notice of the ordinary operation of familiar laws of gravitation and govern himself accordingly."

In O'Neill v. Chicago, R. I. & P. Ry. Co., 66 Neb. 638, 92 N. W. 731, 60 L. R. A. 443, we quoted with approval this sentence: "The average untrained mind is apt to take the fact of injury as sufficient evidence of negligence." Here the plaintiff established only the fact of an accident and injury. We further said: "Whatever may be the theological consequences of an 'honest doubt,' it can not be sufficient ground for recovery in a civil action for damages." Plaintiff, at best here, has established only an honest doubt as to how this accident happened.

It follows that plaintiff failed to prove facts and circumstances indicating with reasonable certainty the existence of the negligence complained of.

The trial court erred in not sustaining the motion of the carrier for a directed verdict on both of the grounds advanced by the carrier.

We held in Krepcik v. Interstate Transit Lines, 152 Neb. 39, 40 N. W. 2d 252, that: "In a case where a

motion has been made at the close of all of the evidence for a directed verdict, which motion should have been sustained but was overruled and the case was submitted to a jury which returned a verdict contrary to the motion, and a motion for judgment notwithstanding the verdict is duly filed, it is the duty of the court to sustain the motion and render judgment in accordance with the motion for a directed verdict."

The judgment of the trial court is reversed and the cause remanded with directions to sustain the carrier's motion for judgment notwithstanding the verdict.

REVERSED AND REMANDED WITH DIRECTIONS.

JOHN E. AULNER, JR., PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.
71 N. W. 2d 305

Filed July 8, 1955. No. 33749.

1. **United States: Automobiles.** A motor truck owned by a private person and used to carry mail under contract with the United States Post Office Department is required to pay the registration fee to which commercial trucks are subject under the statutes of the State of Nebraska.
2. ———: ———. For a violation of subdivision (1) of section 39-723.03, R. S. Supp., 1953, the owner of a motor truck used to carry mail under contract with the United States Post Office Department is subject to the penalty or penalties provided in section 39-723.05, R. S. Supp., 1953.

ERROR to the district court for Cass County: JOHN M. DIERKS, JUDGE. *Affirmed.*

Cropper & Cropper, John E. Cleary, and *James J. Holmberg,* for plaintiff in error.

Clarence S. Beck, Attorney General, and *Ralph D. Nelson,* for defendant in error.

Heard before SIMMONS, C. J., CARTER, YEAGER, CHAP-

PELL, WENKE, and BOSLAUGH, JJ., and FLORY, District Judge.

YEAGER, J.

Here are two criminal actions which by agreement were consolidated for trial and tried in the district court. A jury was waived and the trial was to the court. At the conclusion of the trial the defendant there, who is plaintiff in error here, was found guilty in both cases. In one he was sentenced to pay a fine of $16 and costs and in the other to pay a fine of $30 and costs. After the sentences were imposed he duly filed motion for new trial which was overruled. He seeks reversal of these judgments and sentences and the order overruling the motion for new trial in this court. For this purpose he has filed a petition in error. The cases come here consolidated the same as in the district court.

For convenience the plaintiff in error will be hereinafter referred to as the defendant and the State of Nebraska as the State.

There were two prosecutions originally instituted against the defendant by complaint filed in the county court of Cass County, Nebraska. In one it was charged that on August 22, 1954, the defendant unlawfully caused to be operated a commercial motor truck upon the public highways of Nebraska in the County of Cass carrying a load of more than 20 percent in excess of the carrying capacity for which the registration fee on the vehicle had been paid, and the maximum tolerance of 20 percent of load weight exceeded 1,000 pounds contrary to law. In the other the charge was the same except that the date of the offense was August 30, 1954.

There was a trial and conviction in both cases in the county court. An appeal was taken therefrom to the district court. The proceeding here flows from the appeal of the two cases.

There is no dispute about any material fact in this case. In the bill of exceptions is a stipulation setting

forth in substance all of the material facts. In effect it is conceded that if the statutes under which the actions were prosecuted were valid and applicable to the defendant under the circumstances the adjudication of guilt was proper.

The weight of the empty truck involved was 8,840 pounds. On August 22, 1954, the truck with its load had a total weight of 15,280 pounds. On August 30, 1954, the total weight was 15,220. The truck was licensed to carry 2 tons or 4,000 pounds.

The definitive statutory provisions which provide the basis of the prosecutions are contained in sections 39-723.03 and 60-331, R. S. Supp., 1953. The penalty provision is contained in section 39-723.05, R. S. Supp., 1953.

The applicable portion of section 39-723.03, R. S. Supp., 1953, is the following: "It shall be unlawful to operate upon the public highways of this state any motor truck * * * carrying a load (1) of more than twenty per cent in excess of the carrying capacity on which the registration fee on such vehicle has been paid, and the maximum tolerance of twenty per cent shall not exceed one thousand pounds, * * *."

The applicable portion of section 60-331, R. S. Supp., 1953, is the following: "The registration fee on commercial trucks shall be based upon the load to be hauled; * * *."

The penalty provided by section 39-723.05, R. S. Supp., 1953, for violation of subdivision (1) of section 39-723.03, R. S. Supp., 1953, is a fine of not less than $10 and not more than $100 for the first or second offense.

It becomes clear from the agreed facts that if these statutes are applicable to the defendant he was guilty as charged and that appropriate penalties were imposed.

One contention of the defendant is that section 39-723.03, R. S. Supp., 1953, carries within its terms no penalty provisions and that section 39-723.05, R. S. Supp., 1953, has no application since it applies only to commercial freight-carrying vehicles whereas his was not a

commercial freight-carrying truck. The theory is incomprehensible. The description contained in section 39-723.03, R. S. Supp., 1953, as to what the provision shall apply is "any motor truck * * * carrying a load." The description of the vehicles to which the penalty provision shall apply is "any commercial freight-carrying vehicle, bus, truck." His was unquestionably a truck within the meaning of the two statutory provisions.

Next the defendant contends that he was not required to have his truck licensed at all under the laws of the State for the reason that he was engaged in the performance of a function of the United States government and that registration would amount to a tax upon the federal government.

The facts in this connection were that he was engaged in the business of transporting mail from Omaha, Nebraska, to Falls City, Nebraska, and return and to other points between these two cities under contract with the United States Post Office Department. He was engaged as what is commonly referred to as a contract carrier of mail. As such he provided his own transportation vehicles and had full and complete control over their operation.

He largely relies upon Louwein v. Moody (Tex. App.), 12 S. W. 2d 989, wherein the Commission of Appeals of Texas, Section A, overruled the Court of Civil Appeals in Moody v. Louwein (Tex. Civ. App.), 300 S. W. 957, and upon Searight v. Stokes, 3 How. 150, 11 L. Ed. 537, to sustain this contention.

It is true that Louwein v. Moody (Tex. App.), 12 S. W. 2d 989, does appear to be in his favor.

Analysis however discloses that the court caused its conclusion to depend for the most part upon what it conceived to be the holding in Searight v. Stokes, *supra*.

What the court actually and substantially held in Searight v. Stokes, *supra*, was that where it reasonably appeared that the United States government had an agreement with a state that the United States mail could pass

free over a road through a state, the state could not burden the vehicle used to transport the mail with a toll charge even though it carried passengers in addition to mail.

Very specifically and affirmatively the court pointed out in the opinion that no such rule applied in a case such as this one. In fact the effect of the opinion is to say that a fee such as is exacted by our statute is valid. It was said: "If the state had made this road herself, and had not entered into any compact upon the subject with the United States, she might undoubtedly have erected toll-gates thereon, and if the United States afterwards adopted it as a post-road, the carriages engaged in their service in transporting the mail, or otherwise, would have been liable to pay the same charges that were imposed by the state on other vehicles of the same kind." Thus the Texas case loses its force.

The case of State v. Wiles, 116 Wash. 387, 119 P. 749, 18 A. L. R. 1163, is one which in all substantial particulars in point of fact is the same as the one at bar. No purpose is perceived why anything should be said in review of it other than that there the court upheld the validity of a registration tax upon a vehicle used by a contract carrier of United States mail.

The conclusion is that there is no merit to the reasons advanced as grounds for reversal of the two judgments of the district court. They are accordingly affirmed.

AFFIRMED.

CELIA PORTER DOLEMAN ET AL., APPELLANTS, V. DON BURANDT, APPELLEE.
71 N. W. 2d 521

Filed July 8, 1955. No. 33755.

1. **Trial.** It is the duty of the trial court to determine the issues upon which there is competent evidence and submit them, and them only, to the jury. The submission of issues upon which

the evidence is insufficient to sustain an affirmative finding is prejudicial.

2. **Appeal and Error.** Where there is no evidence upon which to base an instruction given, although correct as a legal proposition, it is ground for reversal if it has a tendency to mislead the jury.

3. **Automobiles: Negligence.** Where plaintiff's automobile is standing still in the highway when defendant, driving on icy pavement in a blinding snowstorm, first sees it, the only issue on contributory negligence of the plaintiff is whether plaintiff should have, under the circumstances, removed his car from the pavement or given warning.

4. ———: ———. Under such circumstances, instructing the jury that it was the duty of the plaintiff to keep a reasonably careful lookout, to operate his vehicle at such a speed and keep it under such control that he could plainly see what was visible before him, and to so drive that when he saw an object in his path he could stop in time to avoid it, is prejudicially erroneous.

5. ———: ———. When an automobile is owned jointly and one of the two co-owners entrusts its use to the other, any negligence of the owner driving the automobile is imputed to the other owner in an action brought by the owners as plaintiffs against a third party for property damage to their jointly owned automobile.

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

Albert Detmer and *Hubka & Hubka*, for appellants.

Sackett, Brewster & Sackett, for appellee.

Heard before SIMMONS, C. J., CARTER, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ., and FLORY, District Judge.

FLORY, District Judge.

This is an action brought by plaintiffs and appellants against the defendant and appellee. The action is for damages to the plaintiffs' automobile alleged to have been caused by defendant's automobile colliding with the automobile of the plaintiffs which was standing in the highway. The jury returned a verdict for the defendant

and judgment was entered thereon. Plaintiffs filed motion for a new trial, and from the overruling thereof plaintiffs appeal.

The accident occurred on or about the 25th day of November, 1952, between 3 and 3:30 p. m., on U. S. Highway No. 77 near Cortland, Nebraska, where the highway runs east and west. Plaintiffs' car was standing still in the highway facing northwest and defendant's car approached from the east running into the rear of plaintiffs' automobile.

William C. Doleman, who will hereafter be referred to as the plaintiff, had been driving west on said highway following a Plymouth car in a severe snowstorm on icy roads. Plaintiff had chains on his car. The Plymouth ran into a car stalled in the road and plaintiff collided with the Plymouth. Plaintiff and another young man riding with him got out of their car to examine the damage, finding minor damage to the front end of the car. Plaintiff's car was then standing with the front end near the right-hand edge of the road and the rear end approximately in the middle of the road. As they were standing there, a Ford came down the road from the east and rolled into the ditch but did not strike any of the other cars. Then a few minutes later plaintiff saw the lights of the defendant's car coming through the snow 75 or 80 feet away at a speed which he estimated at around 45 miles an hour. Defendant's car struck the rear end of the plaintiff's car allegedly causing severe damage thereto.

The situation surrounding the accident is quite clearly described in the testimony of the defendant who states that as he was approaching the scene of the accident it was "Snowing and blowing, you could hardly see"; that the surface of the highway was "Icy"; that he was driving his 1952 Dodge 15 to 20 miles an hour; that he could see ahead "I would say 25 or 30 feet"; and that he had his lights on. When asked what occurred he stated: "I seen four cars across the road. There was no way to get

around. I slapped on the brakes and slid into them." Also, when asked how far he was from these cars when he first saw them his answer was "Not over two car lengths. * * * I would say 30 feet." The question was then asked: "What was the effect of the application of the brakes? A. Didn't seem to be any." Defendant then testified that he collided with the car in front, and was asked: "Was it moving or was it standing? A. It was standing."

In view of the conclusion hereinafter reached that instructions Nos. 9, 10, and 12 are prejudicially erroneous, it is not considered necessary to set forth at any further length the evidence describing the various positions of the cars subsequent to this collision and later collisions, and the various elements of damage resulting from these collisions.

The evidence establishes conclusively that plaintiff's car was standing still in the highway at the time defendant's car collided with it. In view of this evidence, we discuss these three instructions.

Instruction No. 9 reads as follows: "You are instructed that the law requires the driver of a motor vehicle to keep a reasonably careful lookout, to operate it at such a speed and have it under such control that he can by the exercise of due care avoid collision with other vehicles, assuming that the drivers thereof will exercise due care.

"If you find from the evidence that the foregoing requirements of the law were *violated by the plaintiff, William C. Doleman,* or by the defendant or by the drivers of any of the other motor vehicles involved in the accident in question, you are instructed that such violation was not in and of itself negligence but a circumstance which you may take into consideration in determining whether or not any of said persons was guilty of negligence." (Emphasis supplied.)

Instruction No. 10 gives the statute on speed of a motor vehicle—reasonable and proper under conditions then existing—60 miles an hour—and decreased speed

when special hazards exist, and then states: "If you find from the evidence that the foregoing requirements of the law *were violated by the plaintiff, William C. Doleman,* or by the defendant or by the drivers of any of the other motor vehicles involved in the accident in question * * *." (Emphasis supplied.)

Instruction No. 12 is the customary instruction that a driver of an automobile must keep such a lookout that he can see what is plainly visible before him and drive so that when he sees an object in his path he can stop in time to avoid it, and that the existence of blowing snow which affects visibility makes it his duty to stop until visibility is restored or to reduce his speed and have his car under such control that he can stop immediately if necessary. This instruction then states: "It is for you to determine from all the facts and circumstances in evidence as you find them to have been at the time of the accident whether or not the *plaintiff, William C. Doleman,* the defendant or the drivers of any of the other vehicles involved in the accident in question violated the duty imposed by this rule of law." (Emphasis supplied.)

By instruction No. 9, the jury was instructed that it was the duty of plaintiff, William C. Doleman, to keep a reasonably careful lookout and to operate his vehicle at such a speed and keep it under such control that he could by the exercise of due care avoid a collision with other vehicles.

Instruction No. 10 instructed the jury that if the speed law quoted was violated by the plaintiff, William C. Doleman, it would be evidence of negligence.

Instruction No. 12 instructed the jury that it was the duty of William C. Doleman, the plaintiff, to keep such a lookout that he could see what was plainly visible before him, and to so drive his automobile that when he saw an object in his path he could stop his automobile in time to avoid it.

The undisputed evidence is that the plaintiff's automobile, at the time of the collision involved in this case,

was standing still on the highway. He was not driving his automobile. The plaintiff, having been out of his automobile for several minutes and standing beside it at the time defendant's car collided with plaintiff's car, was under no obligation to keep a reasonably careful lookout, have his automobile under such control that he could avoid a collision, drive it at a reasonable speed, or drive so that he could stop when he saw an object in his path, all of which he was required to do under these instructions Nos. 9, 10, and 12.

In this particular case these instructions were especially prejudicial because of the fact that a few minutes prior to the collision involved in this case the plaintiff's car had collided with a Plymouth car traveling in front of him. These instructions might very well have caused the jury in its deliberations to consider whether or not plaintiff had violated some one or all of the rules stated therein at the time of the collision with the car in front of him.

That previous collision was not, insofar as the question of liability here is concerned, a proximate cause of the collision involved in this action. It could only be considered in connection with the amount of damages to plaintiff's car resulting from the collision.

From the undisputed evidence, the only negligence upon which the question of contributory negligence could be submitted to the jury would be whether or not the plaintiff was negligent in leaving his car on the highway, or whether he had time and opportunity to remove it or give warning to approaching cars. Had the defendant been following the plaintiff while plaintiff's car was moving, and plaintiff's car suddenly been stopped because of its collision with the car ahead of it, then these questions might have been involved. The defendant's evidence, however, precludes this situation when he testifies that plaintiff's car was standing still when he first saw it.

The situation involved in this case was not materially

different because of the fact that plaintiff's car had had a slight collision with the car ahead of it several minutes before defendant came upon the scene, than it would have been had the plaintiff-driver stopped his car immediately behind the Plymouth without touching it. The situation was that when defendant came upon the scene, as defendant himself testified: "There was three cars, one ahead of the one we hit and two on the north side of the road, one just north of the one we hit and another one just ahead of it." There is a conflict in the testimony as to whether the plaintiff's car was in the north or south lane of the highway, but in view of defendant's testimony, the highway ahead of plaintiff's car was blocked by other cars and consequently it would be immaterial whether plaintiff had a slight collision with the car he was following or whether he had stopped before hitting it.

This court has often pointed out that it is error to submit issues upon which there is no evidence to sustain an affirmative finding. It is the duty of the trial court to determine the issues upon which there is competent evidence and submit them, and them only, to the jury. The submission of issues upon which the evidence is insufficient to sustain an affirmative finding is generally very prejudicial and invariably results in a second trial. See, Johnson v. Anoka-Butte Lumber Co., 141 Neb. 851, 5 N. W. 2d 114; Simcho v. Omaha & C. B. St. Ry. Co., 150 Neb. 634, 35 N. W. 2d 501.

Where there is no evidence on which to base an instruction given, although correct as a legal proposition, it is ground for reversal if it has a tendency to mislead the jury. Heiden v. Loup River Public Power Dist., 139 Neb. 754, 298 N. W. 736.

As the giving of the foregoing instructions requires a reversal and retrial of the case, other assignments of error will be considered.

Plaintiff complains of that part of instruction No. 1 covering the allegations of the defendant's answer in

which the jury was instructed that the defendant alleged "that said accident resulted solely and proximately by reason of the careless and negligent manner in which the plaintiff William C. Doleman operated his automobile at the time and place involved and the careless and negligent manner in which one Hays operated his automobile at said time and place and the negligence of other persons unknown to the defendant." In view of our previous discussion of instructions Nos. 9, 10, and 12, this issue should not have been submitted to the jury. The same reasoning would apply to the statement concerning the negligence of Hays later in instruction No. 1.

Plaintiff next objects to instruction No. 5, which instructs the jury that the allegation of contributory negligence is affirmative and must be established by the defendant by a preponderance of the evidence, and then in stating the essential elements in such affirmative defense, the court said "that said plaintiff William C. Doleman was guilty of negligence" without adding the concluding phrase "in one or more of the particulars as set out in defendant's answer" as was done in (1) of instruction No. 4 defining the burden of proof placed upon the plaintiffs. We think this objection to instruction No. 5 is good in this respect and will be corrected on retrial. Here again the jury was permitted to consider general acts of negligence of which it might have believed the plaintiff guilty in connection with his previous collision with the Plymouth car ahead of him.

Plaintiff objects to instruction No. 3 which states that if the jury finds that the plaintiff, William C. Doleman, was guilty of negligence that said negligence would be imputed to plaintiff Celia Porter Doleman, co-owner of the automobile. We believe this instruction states a correct rule in this particular case in which the co-owners are plaintiffs in an action to recover damages to their automobile. When the automobile is owned jointly and one of the two co-owners entrusts its use to the other, he must accept the risk of damage to his own property

caused by the negligence or contributory negligence of his co-owner. Otherwise, we might have the anomalous situation of one co-owner recovering for damages to the jointly owned property even in a case where there was concededly contributory negligence in sufficient degree to bar recovery by the co-owner who was driving.

We adopt this rule only in the above situation where the action is brought by the co-owners as plaintiffs against a third party. It would not necessarily apply in all cases, especially where the co-owners are parties defendant and one owner operating the car. In such a case the question of imputable negligence would still require proof of the relationship of principal and agent, joint enterprise, or some community of interest. Snyder v. Russell, 140 Neb. 616, 1 N. W. 2d 125; Hansen v. Lawrence, 149 Neb. 26, 30 N. W. 2d 63.

Under the present record and in view of our holding that the question of contributory negligence of the plaintiff is confined to the issue of his automobile being parked on the highway, on retrial the only question will be whether the evidence then presented is sufficient to submit the question of contributory negligence of the plaintiff to the jury. It cannot be disputed that the highway was blocked by three other cars, and the only question would be whether the plaintiff should have removed his car from the highway, or given warning, in the exercise of reasonable care, in the few minutes intervening between the time he stopped and the occurrence of the collision.

The defendant, by his own testimony, is guilty of negligence as a matter of law. In Buresh v. George, 149 Neb. 340, 31 N. W. 2d 106, it was held: "* * * a driver of an automobile is legally obligated to keep such a lookout that he can see what is plainly visible before him and that he cannot relieve himself of that duty. And, in conjunction therewith, he must so drive his automobile that when he sees the object he can stop his automobile in time to avoid it." In Remmenga v. Selk,

150 Neb. 401, 34 N. W. 2d 757, this court held: "As to the second cause of action the court should have instructed the jury that the defendant was guilty of negligence as a matter of law but that the plaintiff's right to recover thereon was subject to the defense of contributory negligence, * * *. Of course, * * * the quantum of recovery would be a question of fact for the jury." The above is controlling here.

Because of the prejudicial instructions hereinbefore discussed, motion for new trial should have been granted, and the judgment is reversed and the cause is remanded for new trial.

REVERSED AND REMANDED.

GILBERT B. LANG ET AL., APPELLANTS, V. SANITARY DISTRICT OF NORFOLK, MADISON COUNTY, NEBRASKA, ET AL., APPELLEES.

71 N. W. 2d 608

Filed July 8, 1955. No. 33768.

1. **Municipal Corporations.** Municipal corporations possess and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; and third, those essential to the declared objects and purposes of the corporation—not simply convenient, but indispensable.
2. ———. Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be entrusted to them. The number, nature, and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the state.
3. **Statutes.** In construing statutes, the legislative intention is to be determined from a general consideration of the whole act with reference to the subject matter to which it applies and the particular topic under which the language in question is found, and the intent so deduced from the whole will prevail over that of a particular part considered separately.
4. ———. The fundamental principle of statutory construction

is to ascertain the intent of the Legislature, and to discover that intent from the language of the act itself, and it is not the court's duty nor within its province to read a meaning into a statute that is not warranted by legislative language.

5. ———. In enacting a statute, the Legislature must be presumed to have had in mind all previous legislation upon the subject. In the construction of a statute, courts must consider the preexisting law together with any other laws relating to the same subject, which, although enacted at different times, are in pari materia therewith.

6. ———. When the Legislature subsequently enacts legislation making related preexisting laws applicable thereto, it will be presumed that it did so with full knowledge of such preexisting legislation and the judicial decisions of this court construing and applying it.

7. **Statutes: Municipal Corporations.** Statutes which authorize the issuance of bonds by minor political subdivisions of the state are subjects for strict construction when an interpretation is necessary, and where, from a study and analysis of the whole act and its several parts, the meaning and intent is doubtful, the doubt should be resolved in favor of the public or taxpayers.

APPEAL from the district court for Madison County: LYLE E. JACKSON, JUDGE. *Reversed and remanded with directions.*

Ernest L. Reeker and *Emory P. Burnett,* for appellants.

Hutton & Hutton, for appellees.

Heard before SIMMONS, C. J., CARTER, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ., and KOKJER, District Judge.

CHAPPELL, J.

Plaintiffs, Gilbert B. Lang, Earl W. Shipley, and Edward W. Barr, who are residents, owners of property, and taxpayers within defendant Sanitary District of Norfolk, brought this action against such defendant and its three named trustees, seeking to enjoin the issuance of $38,000 of bonds by them "for the purpose of paying for improving the channel of the North Fork of the Elkhorn River (also called the Norfolk River) * * *." After trial on the merits, a judgment was rendered,

finding and adjudging the issues generally in favor of defendants and dismissing plaintiffs' action at plaintiffs' costs. Plaintiffs' motion for new trial was overruled, and they appealed, assigning that the trial court erred in so finding and adjudging the issues. We sustain the assignment.

The facts are not in dispute, having all been stipulated by the parties. Summarized, they are as follows: The three individually named defendants constitute the entire board of directors of defendant district. On October 16, 1952, an election was held in the district for the purpose of voting on a proposed bond issue not exceeding $50,000 for the purpose aforesaid. The calling and holding of the election and the counting, canvassing, declaring, and publishing of its results were all according to law. At the election 63.163 percent of all electors voting on the proposition voted in favor thereof. It was stipulated that unless restrained defendant district will, through its trustees, issue $38,000 of bonds, which will create a liability against such district and it will cause to be levied and collected annually a tax by valuation of all taxable property in the district sufficient in rate and amount to pay the interest and principal of the bonds as they become due. It was agreed that the only issue presented in deciding whether said bonds could be lawfully issued and sold is whether or not the percent of electors voting for the purpose was sufficient to meet applicable statutory requirements. In other words, is a favorable vote of 63.163 percent of the electors voting on such a proposed bond issue by such a sanitary district sufficient to lawfully authorize issue and sale of the bonds? We conclude that it is not.

Defendant district was organized under the provisions of Chapter 31, article 5, R. R. S. 1943, which was originally enacted by Laws 1891, c. 36, p. 287, entitled: "AN ACT to provide for the organization of sanitary districts, and to define their powers." Its constitutionality was affirmed in Whedon v. Wells, 95 Neb. 517, 145 N.

W. 1007. In that opinion it was said: "In Neal v. Vansickle, 72 Neb. 105, it was held that the legislature may provide for the creation of drainage or reclamation of large swamp, or overflowed, or submerged lands by the creation of local administrative organizations or political corporations. To the same effect is Campbell v. Youngson, 80 Neb. 322, State v. Hanson, 80 Neb. 724."

In that connection, section 31-510, R. R. S. 1943, permits sanitary districts to borrow money for corporate purposes and issue bonds therefor at not more than 6 percent interest, but provides that they "shall not become indebted in any manner or for any purpose to an amount in the aggregate in excess of four per cent of the assessed valuation of property in the district for county purposes." Also, section 31-511, R. R. S. 1943, provides: "At the time of or before incurring any bonded indebtedness the question shall be submitted to the people in the manner provided by law in cases of borrowing money for internal improvements." In case any sanitary district should be discontinued, section 31-541, R. R. S. 1943, provides in part: "The county board of the county within which such district is located * * * shall discharge the duties *within the territorial limits of such district imposed by law upon the district.*" (Italics supplied.) However, contrary to defendants' contention, the very wording of such provision gives it no controlling significance in this case.

The manner of issuing bonds to aid in the construction of or improving of works of internal improvement is generally provided in Chapter 10, article 4, R. R. S. 1943. In that regard, sections 10-401 to 10-405, R. R. S. 1943, were originally enacted by Laws 1869, p. 92. Section 10-401, R. R. S. 1943, authorizes any "county or city * * * to issue bonds to aid in the construction of any railroad, or other work of internal improvement, to an amount to be determined by the county board of such county or the city council of such city, not exceeding ten per cent of the assessed valuation of all

taxable property in said county or city; Provided, the county board or city council shall first submit the question of the issuing of such bonds to a vote of the legal voters of said county or city, *in the manner provided by law, for submitting to the people of a county the question of borrowing money.*" (Italics supplied.) Such proviso doubtless refers to sections 23-126 to 23-129, R. R. S. 1943, a general law which requires, with one exception unimportant here, that two-thirds of the total number of votes cast upon the proposition shall be in favor thereof. However, comparable with the situation in State ex rel. Polk County v. Marsh, 106 Neb. 760, 184 N. W. 901, section 10-404, R. R. S. 1943, contains a special controlling provision that: "Upon sixty per cent of the votes cast being in favor of the proposition submitted, the county board, in the case of a county, and the city council, in the case of a city, shall cause the proposition and the result of the vote to be entered upon the records of said county or city, and a notice of its adoption to be published for two successive weeks in any newspaper in said county or city, if there be one, and if not, then without such publication; *and shall thereupon issue said bonds, which shall be and continue a subsisting debt against such county or city* until they are paid and discharged; * * *." (Italics supplied.)

Section 10-405, R. R. S. 1943, then provides that: "It shall be the duty of the proper officers of such county or city to cause to be annually levied, collected and paid to the holders of such bonds a special tax on all taxable property within said county or city sufficient to pay the annual interest as the same becomes due. When the principal of said bonds becomes due such officers shall in like manner levy and collect an additional amount sufficient to pay the same as it becomes due; * * *."

Laws 1869, § 4, p. 92 (now section 10-404, R. R. S. 1943), originally authorized the issuance of such bonds upon a majority vote. Laws 1875, p. 87, by amend-

ment, increased it to require a two-thirds majority vote. However, in Report of Attorney General, Nebraska, 1905-1906, p. 73, it was held that such an amendment was void for want of a repealing clause, and noted that the editor of the Compiled Statutes for 1905 had for such reason omitted the act of 1875. Nevertheless, Cobbey's Annotated Statutes of Nebraska, 1911, included the 1875 act as section 11247, and annotated the opinion of the Attorney General aforesaid, together with an opinion appearing in Report of Attorney General, Nebraska, 1909-1910, p. 292, citing Reineman v. Covington, Columbus & Black Hills R. R. Co., 7 Neb. 310, and Wilbur v. Wyatt, 63 Neb. 261, 88 N. W. 499, holding that, as provided in the 1875 act, a two-thirds majority vote was required. However that may be, the Revised Statutes of Nebraska, 1913, section 408, restored the provision requiring a majority vote. It was so carried in Compiled Statutes of Nebraska, 1922, as section 325, p. 216. Thereafter, Laws 1923, c. 69, § 1, p. 206, amended that section to require a 60 percent majority vote. That provision now appears in section 10-404, R. R. S. 1943. It will be noted that in all respects the section is a general act specifically limited to counties and cities. A sanitary district is in law and fact neither a county nor a city. Sanitary districts have never been mentioned in and never have been legislatively included as such in sections 10-401 to 10-405, R. R. S. 1943. Further, the authority to organize such districts was enacted as early as 1891, some 22 years after the enactment of Laws 1869, p. 92, and during the period between 1875 and 1913, when a two-thirds majority vote was continually required.

Section 10-409, R. R. S. 1943, originally enacted by Laws 1885, c. 58, § 1, p. 268, now authorizes "Any precinct, township, city of the second class, or village, organized according to law * * * to issue bonds in aid of works of internal improvements, such as improving streets in cities of the second class and villages, high-

ways, bridges, courthouses, jails, municipal libraries, city and town halls, high schools, county high schools, school dormitories, and the drainage of swamp and wet lands, within such municipal divisions, and for the construction or purchase of a telephone system for use of the inhabitants thereof, * * * in the manner hereinafter directed, namely:

"(1) A petition signed by not less than fifty freeholders of the precinct, township, city of the second class, or village, shall be presented to the county board, city council of cities of the second class, board of trustees of villages, or the board authorized by law to conduct the business of such precinct, township, city of the second class, or village." The petition was required to set forth the nature of the work, amount of the proposed bonds, rate of interest not to exceed 6 percent, and length of time the bonds are to run, in no event less than 5 nor more than 20 years. The petitioners were required to give bond, to be approved by the county board, city council of cities of the second class, or board of trustees of villages, for payment of the expenses of the election should the proposition fail to receive 60 percent of the votes cast. Subsection (2) provided that upon receipt of the petition, the county board, city council of cities of the second class, or board of trustees of villages, shall give notice and call an election in the precinct, township, city of the second class, or village, as the case may be. *"Said notice, call and election shall be governed by the laws regulating the election for voting bonds for a county;* Provided, that when a proposition is submitted for the issuance of bonds for the acquisition of a site or the construction of a single building for the purpose of housing the municipal public library, or to be used as a city hall, auditorium, or community house in cities of the second class * * * sixty per cent of the votes cast shall be in favor of such proposition." (Italics supplied.)

It will be noted that section 10-409, R. R. S. 1943,

under which defendant district concededly proceeded, appears to be a catch-all, generally including authority for minor political subdivisions to issue bonds in aid of works of internal improvements such as improving designated classifications thereof. In that connection, such section was amended by Laws 1899, c. 49, § 1, p. 261; Laws 1907, c. 76, § 1, p. 286; Laws 1921, c. 58, § 1, p. 241; Laws 1931, c. 23, § 1, p. 96; Laws 1939, c. 5, § 1, p. 64; Laws 1947, c. 15, § 6, p. 81; and Laws 1953, c. 287, § 1, p. 925, which generally added thereto other described minor political subdivisions and described classifications of authority conferred upon them, some of which were by special provision therein designated as exceptions requiring only 60 percent majority. Sanitary districts were not specifically mentioned in any of such acts.

However, in speaking of the election, all of such acts provided that: "Said notice, call and election shall be governed by the laws regulating the election for voting bonds for a county." Further, section 10-401, R. R. S. 1943, provides that the election shall be held "in the manner provided by law, for submitting to the people of a county the question of borrowing money." See, sections 23-126, 23-127, 23-128, and 23-129, R. R. S. 1943, originally enacted by Laws 1879, §§ 27 to 30, pp. 363, 364, which has always required a two-thirds majority vote. Such provisions are general and applicable to all such bonds when there is no controlling special provision. State v. Cornell, 54 Neb. 72, 74 N. W. 432. Further, relevant section 10-410, R. R. S. 1943, originally enacted by Laws 1885, c. 58, § 2, p. 269, and amended by Laws 1899, c. 49, § 2, p. 262, and Laws 1917, c. 8, § 1, p. 62, always has, except as specifically provided by section 10-409, R. R. S. 1943, required a two-thirds majority vote to give validity to such bonds. Thus it will be noted that when sanitary districts were authorized to be organized in 1891, what are now sections 10-404, 10-410, and 23-129, R. R. S. 1943, all required a two-thirds majority vote, and no legislative changes

have ever been made authorizing sanitary districts to issue bonds unless the proposition submitted has received a favorable majority of two-thirds of the votes cast.

Section 10-411, R. R. S. 1943, provides: "The county boards, city councils of cities of the second class, or boards of trustees of villages or the person charged with levying the taxes, shall each year until the bonds issued under the authority of section 10-409 be paid, levy upon the taxable property in the precinct, township, city of the second class or village, a tax sufficient to pay the interest and five per cent of the principal as a sinking fund; and at the tax levy preceding the maturity of any such bonds, levy an amount sufficient to pay the principal and interest due on said bonds."

Further, with section 10-401, R. R. S. 1943, specifically limited to counties and cities, and section 10-409, R. R. S. 1943, established as a catch-all, the Legislature in 1891 authorized the creation of sanitary districts and gave them the power to issue bonds, referring to earlier legislation for the specific requirements that must be met before the bonding power may be exercised. In doing so, the Legislature of 1891 must be presumed to have had full knowledge of the earlier legislation and intent of the different legislatures enacting it.

As held in Halligan v. Elander, 147 Neb. 709, 25 N. W. 2d 13: "When the Legislature subsequently enacts legislation making related preexisting laws applicable thereto 'as nearly as may be' it will be presumed that it did so with full knowledge of such preexisting legislation and the judicial decisions of this court construing and applying it." See, also, Chicago & N. W. Ry. Co. v. County Board of Dodge County, 148 Neb. 648, 28 N. W. 2d 396.

Thus, when it was provided in section 31-511, R. R. S. 1943, that "the question" shall be submitted to the people in the manner provided by law in cases of borrowing money for internal improvements, and it was

provided in section 10-401, R. R. S. 1943, that "the question" should be submitted "in the manner provided by law, for submitting to the people of a county the question of borrowing money" and it was provided in section 10-409, R. R. S. 1943, that "Said notice, call and election shall be governed by the laws regulating the election for voting bonds for a county" it must be presumed that the Legislature knew that there were two groups of laws dealing with the question and that with exceptions specifically made therein, sections 23-126 through 23-129, R. R. S. 1943, should be controlling.

Sanitary districts are political subdivisions oftentimes designated as municipal, public, or quasi-public corporations. In Nelson-Johnston & Doudna v. Metropolitan Utilities Dist., 137 Neb. 871, 291 N. W. 558, this court said: "A noted text-writer defines a municipal corporation as follows: 'We may, therefore, define a municipal corporation in its historical and strict sense to be the incorporation, by the authority of the government, of the inhabitants of a particular place or district, and authorizing them in their corporate capacity to exercise subordinate specified powers of legislation and regulation with respect to their local and internal concerns. This power of local government is the distinctive purpose and the distinguishing feature of a municipal corporation proper. The phrase "municipal corporation" is used with us in general in the strict and proper sense just mentioned; but sometimes it is used in a broader sense that includes also public or quasi corporations, the principal purpose of whose creation is as an instrumentality of the state, and not for the regulation of the local and special affairs of a compact community.' 1 Dillon, Municipal Corporations, 59. * * *

"The rule has long been established in this state that a municipal corporation 'possesses, and can exercise, the following powers, and no others: First, those granted in express words; second, those necessarily or

fairly implied in or incident to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation — not simply convenient, but indispensable.' Christensen v. City of Fremont, 45 Neb. 160, 63 N. W. 364. See, also, Consumers Coal Co. v. City of Lincoln, 109 Neb. 51, 189 N. W. 643; Schroeder v. Zehrung, 108 Neb. 573, 188 N. W. 237."

Also, as held in County of Johnson v. Weber, *ante* p. 432, 70 N. W. 2d 440: "Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be entrusted to them. The number, nature, and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the state."

As stated in 64 C. J. S., Municipal Corporations, § 1833, p. 325: "A municipal corporation may incur indebtedness or create obligations binding on it when and only when the power to do so is expressly conferred on it by constitution, statute, or charter, or is necessarily or reasonably implied from the powers expressly granted, or is essential to the objects for which the corporation was created." See, also, § 1869, p. 422, where it is said: "Municipal corporations have no inherent power to borrow money; when authorized by constitutional or statutory provisions to do so, a municipal corporation must comply with all the requirements of such provisions."

In Allen v. Tobin, 155 Neb. 212, 51 N. W. 2d 338, this court held: "In construing statutes, the legislative intention is to be determined from a general consideration of the whole act with reference to the subject matter to which it applies and the particular topic under which the language in question is found, and the intent so deduced from the whole will prevail over that of a particular part considered separately.

"The fundamental principle of statutory construction is to ascertain the intent of the Legislature, and to dis-

cover that intent from the language of the act itself, and it is not the court's duty nor within its province to read a meaning into a statute that is not warranted by legislative language."

In Placek v. Edstrom, 148 Neb. 79, 26 N. W. 2d 489, 174 A. L. R. 856, we held: "In enacting a statute, the Legislature must be presumed to have had in mind all previous legislation upon the subject. In the construction of a statute courts must consider the pre-existing law and any other laws relating to the same subject." In the opinion we said: "It is fundamental in this jurisdiction that statutes relating to the same subject, although enacted at different times, are in pari materia and should be construed together." See, also, Enyeart v. City of Lincoln, 136 Neb. 146, 285 N. W. 314.

As stated in Brooks v. MacLean, 95 Neb. 16, 144 N. W. 1067: "This court in the past has, for the protection of the taxpayer, consistently and repeatedly stood upon and required the letter of the law in such proceedings to be strictly complied with." In Township of Midland v. County Board of Gage County, 37 Neb. 582, 56 N. W. 317, it is said: "The statute regulating the voting of bonds by townships, counties, cities, etc., to aid in the construction of works of internal improvement, should be strictly construed in favor of the electors." See, also, State ex rel. School Dist. v. Moore, 45 Neb. 12, 63 N. W. 130, wherein this court held: "Statutes which authorize the issuance of bonds by the minor political subdivisions of the state are subjects for strict construction when an interpretation is necessary, and where, from a careful study and analysis of the whole act and its several parts, the meaning and intent is doubtful, the doubt should be resolved in favor of the public or taxpayers."

In the light of such rules, if we assume for purpose of argument that a doubt exists as to whether or not the Legislature intended that sanitary districts should be

governed by the 60 per cent vote requirement of section 10-404, R. R. S. 1943, or the two-thirds vote requirement of sections 10-410 and 23-129, R. R. S. 1943, the latter sections must control. Therefore, we conclude that the favorable vote actually cast in the case at bar was insufficient to confer authority upon the district through its trustees to issue and sell the bonds involved.

For reasons heretofore stated, the judgment of the trial court should be and hereby is reversed, and the cause is remanded with directions to render judgment for plaintiffs as prayed by them. All costs are taxed to defendants.

REVERSED AND REMANDED WITH DIRECTIONS.

VIRGINIA LEE MILLER, NOW VIRGINIA LEE MUTZ, APPELLEE, V. AL W. MILLER, JR., APPELLANT.
71 N. W. 2d 478

Filed July 8, 1955. No. 33775.

1. **Divorce.** In an action for divorce the court may in its discretion require the husband to pay an amount necessary to enable the wife to carry on or defend the suit during its pendency.
2. ———. A divorce case is pending within the contemplation of section 42-308, R. R. S. 1943, until all matters involved therein or incidental thereto are determined and satisfied.
3. **Divorce: Attorney and Client.** If a husband in an action for divorce fails to satisfy a judgment for alimony in favor of the wife according to its terms and the wife employs counsel to enforce it, and this is accomplished with or without court proceeding, the court in which the judgment was rendered may by virtue of the statute referred to above require the husband to pay to the wife a reasonable amount as compensation for the services of her counsel.
4. **Judgments.** A proceeding for revivor of a judgment is not the commencement of an action but is a continuation of the suit in which the judgment was rendered, and an order of revivor continues the vitality of the original judgment with all its incidents from the time of its rendition.

5. **Appeal and Error.** This court on the trial de novo of a case in which the evidence is all in writing will consider and decide it uninfluenced by what was done or concluded in the case before it was presented to this court.

APPEAL from the district court for Lancaster County: HARRY R. ANKENY, JUDGE. *Reversed and remanded with directions.*

Stewart & Stewart, for appellant.

Jacob H. Jaffe and *Sterling F. Mutz*, for appellee.

Heard before SIMMONS, C. J., CARTER, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ., and FLORY, District Judge.

BOSLAUGH, J.

This litigation concerns the validity of an allowance adjudged to be paid by appellant to appellee as compensation of her counsel for their services in securing satisfaction of the unpaid and past due part of an alimony award required to be paid to her by appellant.

A decree was rendered January 11, 1944, by the district court for Lancaster County granting appellee an absolute divorce from appellant and requiring him to pay appellee the sum of $75 each month thereafter as alimony. The requirements of the decree were satisfied by appellant to September 2, 1944, an additional $509.64 was applied on it December 24, 1946, and no other payment was made on the decree until October 5, 1953. Appellee filed a motion to revive the judgment for alimony August 1, 1953. A conditional order was made requiring appellant to show cause against the revivor of the judgment not later than September 14, 1953, and notice thereof was duly given to him. He made no contest. The application for revivor was heard September 15, 1953, and the court found that the statements made therein were true; that the judgment should be revived; and that there was due and owing thereon, including the installment which matured September 1, 1953, $9,729.51.

A final order of revivor was rendered and execution on the judgment was awarded. Appellant paid to the clerk of the district court October 5, 1953, the amount of the judgment, the accrued interest, and the balance of court costs in the total sum of $9,771.17.

A notice of lien was that date filed with the clerk of the court by Jaffe and Green, attorneys of 228 North La-Salle Street, Chicago, Illinois. It recited that they had been employed by appellee to collect the judgment for an agreed compensation of not less than 25 percent of any amount recovered before "actual trial" and 33⅓ percent of any amount recovered after suit commenced and trial thereof begun, and that they claimed a lien in accordance therewith. The lien claimed by Jaffe and Green was discharged November 25, 1953, as to the amount paid to the clerk of the court as above stated in satisfaction of the judgment except the sum of $2,400 and as to that amount the lien was continued. The clerk was authorized to pay the excess above $2,400 to appellee. The clerk retained $2,400 of the amount paid him on the judgment because of the claim of lien and allocated the balance of the amount to appellee on the date that the partial release of the lien was filed.

A motion was filed in the case December 8, 1953, by appellee for an order directing appellant to pay to her a reasonable amount of "attorneys' fees incurred by the plaintiff (appellee) in enforcing collection of the amounts due under and pursuant to the decree in this cause * * *." Objections to the allowance sought were made by appellant on the ground that neither the law, equity, nor the facts authorized an allowance of fees to compensate the attorneys for appellee to be paid by appellant for the services described in the motion of appellee. The district court granted the motion of appellee and adjudged that she should recover from appellant the sum of $1,500 "as attorney fees herein." This appeal contests the legality of that adjudication.

The factual matters relied upon by appellee were ex-

hibited by an affidavit of Jacob H. Jaffe of Chicago, an Illinois attorney with 43 years experience in the practice of law and a member of the firm of Jaffe and Green, and an affidavit of Sterling F. Mutz of Lincoln, a Nebraska attorney who had been engaged in law work for 42 years. The former, identified herein as affiant, asserted the following matters: He accepted employment May 19, 1953, by appellee to collaborate with Sterling F. Mutz, hereafter referred to as Mutz, in the collection of the alimony judgment in her favor against appellant. He was furnished by Mutz on May 23, 1953, a certified copy of the record of the judgment, information concerning the location, business, assets, income, and finances of appellant, was advised that Nebraska law permitted appellee to recover attorney's fees incident to the enforcement of the judgment, and that the Uniform Enforcement of Foreign Judgments Act was effective in Nebraska and might be relied on if Illinois had a similar act. Affiant investigated the law of Illinois on this subject and found that state had adopted a contrary view. He made inquiry if such a recovery could be had in the Nebraska court where the judgment was rendered and was advised by Mutz that it could. Affiant was concerned about the 5-year statute of limitations barring recovery of any installment of the judgment due more than 5 years before an action was commenced thereon in Illinois. He found that the law of that state was to that effect and he made inquiry as to the situation in that regard in Nebraska, and was told by Mutz that the Nebraska statute of limitations was not applicable to a judgment for alimony. Affiant then suggested that the judgment be revived in Nebraska and that the unpaid past due amount of it be ascertained and adjudicated in and by the revivor proceeding. The question as to whether the marriage of appellee after the decree of divorce adversely affected the judgment was considered and investigated, and it was decided that the proceedings

had on the application of appellant to modify the decree foreclosed this question.

Appellant was advised by affiant that he was employed to collect the judgment and he was referred to Harold W. Norman, a Chicago attorney, named herein as Norman, who represented the appellant, with whom affiant conferred. He advised Norman concerning the judgment, the amount claimed due thereon, and that suit would be brought on it unless some arrangement was made to satisfy it. Thereafter consideration was given to a possible proceeding in Nebraska or Illinois against appellant for contempt on account of his failure to pay appellee as the decree required with the result that it was believed that a suit in Illinois on the judgment after it was revived was more advisable. Affiant then contacted Norman and he requested reasonable time to communicate with Lincoln attorneys concerning the case, and to make a search and study of the case in the Nebraska court for any defect therein that would afford appellant a defense against enforcement of the judgment. Consent to a reasonable time was given. Mutz advised affiant June 23, 1953, that Norman and appellant were in Lincoln, had conferred with Stewart and Stewart, and had suggested to Mutz the possibility of a settlement of the judgment should be explored, and that Mutz had agreed thereto. He told affiant that he would have a discussion with appellee in reference thereto and that further conferences would be had in Chicago. Three days thereafter affiant said he talked with Norman and decided that a settlement was unlikely and that a suit should be prepared and commenced on the judgment in Chicago. Affiant questioned whether the Chicago court would have power to reduce or disturb any accrued payment and upon inquiry he learned from Mutz 2 days later that the Nebraska court had decided that this could not be done. Mutz sent affiant an outline of legal questions which might arise in a suit on the judgment in Illinois and this was pondered on by affiant.

Sometime after July 3, 1953, Norman objected to the claim of appellee for compound interest and affiant referred this to Mutz and was advised that only simple interest at 6 percent per annum could be legally demanded. Affiant July 23, 1953, suggested to Mutz possible additional problems which might arise in a suit on the revived judgment and advised that any suit brought should be in the United States District Court in Chicago. An application for revivor of the judgment was received by affiant July 31, 1953, and he secured service on appellant of the conditional order of revivor made by the district court in Nebraska. Affiant had two futile conferences with Norman prior to September 3, 1953. Information of the revivor of the judgment was received by affiant September 16, 1953, with instructions to bring suit thereon in Chicago unless settlement was made by appellant. Norman advised affiant September 24, 1953, that he had been instructed by appellant to take steps to have the judgment set aside and to resist any proceeding brought on it, but October 6, 1953, affiant was told by Norman that the amount of the judgment had been sent to Lincoln to satisfy it, and Mutz told affiant by letter received October 8, 1953, that the judgment had been paid to the clerk of the district court in Lincoln. Affiant expressed the opinion that $1,500 was a reasonable charge for the services he had rendered appellee.

The substance of the Mutz affidavit is: He was retained by his wife to enforce the alimony judgment against appellant. He had negotiations with Stewart and Stewart, Lincoln attorneys for appellant, in an effort to collect the amount owing appellee and concluded payment thereof would not be made unless action was brought on the judgment against appellant in Chicago. In May 1953 Mutz secured the assistance of Jaffe, and furnished him a copy of the judgment, necessary information to sufficiently advise him in the premises including the fact that an allowance of reasonable attorney's fees

could be secured against appellant under Nebraska law, and that the judgment for alimony was not subject to the statute of limitations of Nebraska. He furnished authorities to Jaffe to this effect May 29, 1953. Jaffe told Mutz that the 5-year statute of limitations of Illinois would apply to an action brought on the judgment in that state, and he suggested to Jaffe that this could be avoided by reviving the judgment in Nebraska and it would then be entitled to full faith and credit in Illinois. Mutz had a conference with Norman and Don Stewart June 22, 1953, concerning the proposed litigation against appellant and he promptly informed Jaffe of this. He wrote Mutz June 25, 1953, further concerning the statute of limitations and Mutz made and sent to Jaffe an outline of questions which might arise if a suit was commenced on the judgment in Illinois. Jaffe insisted the judgment should be revived in Nebraska, and Mutz prepared an application therefor, procured a conditional order of revivor, and sent a certified copy of it to Jaffe for service on appellant. He did not contest a revivor of the judgment and a final order was rendered including an adjudication of the amount due and unpaid on the judgment September 15, 1953. A copy of a letter of Norman to Jaffe was received by Mutz September 24, 1953, stating matters appellant intended to rely upon to oppose any action brought against him in Chicago. These were considered by Mutz and he decided they were foreclosed by litigation the parties had in the divorce case in Nebraska and could not be successfully urged by appellant. On September 25, 1953, Mutz sent his conclusions as to them to Jaffe. He advised Mutz of the futile negotiations had with Norman, and Mutz secured exemplified copies of the record of the judgment and the order of revivor, and sent them to Jaffe with instructions to bring suit on the judgment in Chicago against appellant if the judgment was not paid. Jaffe responded September 29, 1953, that he had concluded that suit should be brought in the Circuit Court

in Chicago and that a summary judgment could probably be secured therein. Mutz wrote Jaffe of his approval of the suggestion but October 6, 1953, Mutz was informed by Jaffe that the amount of the judgment had been sent by Norman to Lincoln for payment of it. Mutz learned October 7, 1953, that the judgment had been satisfied by payment to the clerk of the district court. Mutz stated that a reasonable charge for his services to appellee in connection with the enforcement of the judgment was $750.

The proof made by appellant was an affidavit of Harold W. Norman of Chicago, an Illinois attorney for 33 years, hereafter referred to as affiant, and an affidavit of Don W. Stewart of Lincoln, a Nebraska attorney for more than 38 years. The substance of these is the following: Affiant was first advised of the matter by a letter from appellant with which was enclosed a letter from Jaffe and Green to him. The office of affiant maintains complete and accurate records of all telephone conversations and personal conferences. These records do not show that he had any personal conference with Jacob H. Jaffe, hereafter named Jaffe, or any member of Jaffe and Green, and to the best of the knowledge and recollection of affiant there was no such conference concerning the judgment referred to herein. Affiant had telephone conferences with Jaffe June 26, June 30, July 13, and August 20, 1953, and at no other times. The conferences were each brief and none lasted more than 2 or 3 minutes. The only legal question discussed was the contention of appellant that the settlement papers in the divorce proceeding had been fraudulently changed to eliminate a provision originally embodied therein that alimony payments to appellee would terminate in the event that appellee remarried. The other conversations between affiant and Jaffe were all devoted to questions of the amount due and the possibility of a settlement of it. Affiant or his client or any one acting for him did not after May 27, 1953, refuse

to pay the judgment. Affiant and those associated with him were after that date engaged in good faith efforts to negotiate a settlement of the judgment. Affiant and Don W. Stewart June 22, 1953, discussed the possibility of a settlement with Mutz and thereafter until September 21, 1953, when affiant received a letter from Jaffe stating a deadline for a payment of the judgment he had every reason to believe and he did believe from the conversations with Mutz and Jaffe that a settlement could be reached for an amount less than the face amount of the judgment with interest. Affiant wrote Jaffe September 21, 1953, on receipt of his letter: " 'I have your letter of September 21, 1953, and I am somewhat disappointed as I had believed from our telephone discussions and correspondence that you were going to submit a proposition for settlement.' " There was no occasion for any legal services on the part of counsel for appellee after May 27, 1953, other than with respect to the negotiation of a settlement of the amount to be paid on account of the judgment.

The affidavit of Don. W. Stewart, the Lincoln attorney for appellant, hereafter referred to as Stewart, states he had no conversation with anyone concerning the judgment of appellee for alimony from December 26, 1952, until May 29, 1953, when he received a letter from Norman which included a copy of a letter from Jaffe to appellant stating Jaffe had been requested by appellee to enforce payment of alimony under the decree. About June 17, 1953, Stewart was requested by the Chicago attorney of appellant to arrange with Mutz for a conference June 22, 1953, which he did. There was a conference that date of Mutz, Norman, appellant, and Stewart at which the possibility of the settlement of all liability of appellant to appellee was considered. Mutz said he desired to discuss the proposal with appellee, that he would do so, and advise Stewart of the result. About a week later Mutz told Stewart that he and appellee had considered the suggestions of set-

tlement and Mutz had written Jaffe and as soon as he had a reply he would inform Stewart the kind of a settlement appellee would accept. Stewart heard nothing further from Mutz, but August 8, 1953, he learned from Norman that appellant had been served with notice of a revivor proceeding and that the amount claimed to be due on the judgment included compound interest. Norman inquired of Stewart if compound interest was proper and he advised that only simple interest could be collected. The judgment was revived September 15, 1953, without contest, and the court in finding the amount due thereon disregarded compound interest and allowed only simple interest. After the revivor Mutz mentioned the matter of settlement and said he had written Jaffe, and when he replied Mutz would inform Stewart what appellee would do in reference thereto. Mutz also said an obstacle to settlement was the fact appellee thought she should have an allowance from appellant to compensate her attorneys. Norman wrote Stewart about October 2, 1953, that Jaffe had informed him that the judgment must be paid by October 5, 1953, or suit would be filed that date. Payment of it was made on that date by Stewart with a remittance from appellant. Stewart filed with the clerk the notice of attorneys' lien claimed by Jaffe and Green which was enclosed with the remittance. The negotiations of Stewart with Mutz concerned only settlement of past and future liability of appellant and whether compound interest was collectible.

Appellant argues that there was no proceeding in court incidental to procuring satisfaction of the alimony judgment and that there is neither statute nor uniform course of procedure which authorizes the allowance made to appellee. This contention may not be sustained. If a defendant in a divorce case fails to satisfy a judgment for alimony rendered therein in favor of the plaintiff according to its terms, and the plaintiff employs counsel to enforce it and this is accomplished

with or without court proceeding, the court in which the judgment was rendered has discretionary power by virtue of section 42-308, R. R. S. 1943, to require the defendant to pay to the plaintiff a reasonable sum as compensation for the services of her counsel in obtaining satisfaction of the judgment. The relevant part of section 42-308, R. R. S. 1943, provides: "In every suit brought * * * for a divorce * * * the court may, in its discretion, require the husband to pay any sum necessary to enable the wife to carry on or defend the suit during its pendency; and it may decree costs against either party * * *." In Lippincott v. Lippincott, 152 Neb. 374, 41 N. W. 2d 232, it is said: "* * * the trial court has discretionary power and authority in a divorce action to require the husband to pay any sum necessary to enable the wife to carry on or defend the suit during its pendency, and decree costs against either party. § 42-308, R. S. 1943. Actions for divorce are conducted in the same manner as other suits in courts of equity, and the trial court has authority to decree costs and enforce its decrees as in other cases. § 42-307, R. S. Supp., 1949. * * * The action at bar was * * * a proceeding in the original action during its pendency, to obtain an allowance of expenses and attorneys' fees as a judgment for costs, necessitated in order to enforce and make effective the provisions of the court's decree, which defendant had * * * refused to perform * * *. In that connection, the court retained jurisdiction of the divorce proceedings at all times, whether the decree so provided or not, to enforce its decree with regard to compliance with the award of alimony. * * * Contrary to defendant's contention, dissolution of the marital relations by the divorce decree did not terminate the authority of the court to allow such expenses and attorneys' fees." See, also, Miller v. Miller, 153 Neb. 890, 46 N. W. 2d 618; Nowka v. Nowka, 157 Neb. 57, 58 N. W. 2d 600. A divorce case is pending continuously and indefinitely until all matters involved

therein or incidental thereto are satisfied and terminated. §42-324, R. R. S. 1943; Lippincott v. Lippincott, *supra.*

The judgment was rendered January 11, 1944. The record does not show that an execution had been issued thereon. § 25-1515, R. R. S. 1943. Appellee commenced proceedings to revive it on August 1, 1953. A final order of revival was rendered September 15, 1953, and the court adjudged the amount due thereon as of September 1, 1953. § 25-1420, R. R. S. 1943. The reason for this was that appellant had become a permanent resident of and was engaged in business in Chicago and appellee contemplated that it would be necessary to obtain a judgment against him in that state. It is the law of Illinois that the 5-year statute of limitations is applicable to a suit brought in that state on a judgment of another state, and this would have prevented recovery of judgment in an action brought there for any installment of the alimony judgment that accrued more than 5 years before the commencement of the action. Britton v. Chamberlain, 234 Ill. 246, 84 N. E. 895; Truscon Steel Co. v. Biegler, 306 Ill. App. 180, 28 N. E. 2d 623. The proceeding for revival of the judgment was not the commencement of an action but a continuation of the suit in which the judgment was rendered. An order of revival is a mere continuation of the original action and continues the vitality of the original judgment with all of its incidents from the time of its rendition. Tierney v. Evans, 92 Neb. 330, 138 N. W. 140; McDonald v. Thomas County, 89 Neb. 494, 131 N. W. 1021; Bankers Life Ins. Co. v. Robbins, 59 Neb. 170, 80 N. W. 484; Eaton v. Hasty, 6 Neb. 419, 29 Am. R. 365. The remedies, proceedings, and processes available to enforce other judgments may be taken advantage of to compel satisfaction of an alimony judgment. The existing situation in the matter made it advisable for appellee to have a revival of the judgment and it was an appropriate incident to the effort

to enforce the judgment. §§ 42-319, 42-320, R. R. S. 1943; Lippincott v. Lippincott, *supra*.

The trial of this cause in this court is de novo. There was no oral evidence given. The entire proof consists of affidavits introduced in the trial court as exhibits and they appear in the record in the exact condition they were in the trial court. The obligation of this court is to consider and determine this appeal uninfluenced by what was done or concluded in the case before it was presented here. Grandin v. First Nat. Bank of Chicago, 70 Neb. 730, 98 N. W. 70; Nelson v. City of Florence, 94 Neb. 847, 144 N. W. 791; Allen v. Allen, 121 Neb. 635, 237 N. W. 662.

The record does not show that counsel for appellee in performance of their engagement to enforce the judgment against appellant were required to consider novel, difficult, obscure, or undetermined legal problems. The time and effort necessarily required to be devoted to their undertaking in behalf of appellee proved to be quite limited. The circumstances of the case convince that the allowance made by the district court is too large and that a reasonable allowance to appellee as compensation for her counsel for their services in the premises to be paid by appellant is the sum of $500.

The judgment of December 15, 1954, involved in this appeal should be and it is reversed and the cause is remanded to the district court for Lancaster County with directions to allow appellee the sum of $500 to be paid by appellant as compensation of counsel of appellee for their services, and that costs of this appeal be taxed to appellee.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. LEONARD DUNKER, RESPONDENT.

71 N. W. 2d 502

Filed July 8, 1955. No. 33778.

1. **Attorney and Client.** Lawyers who are granted licenses to practice their profession in this state thereby voluntarily assume certain obligations and duties as officers of the courts, and in the performance thereof they must conform to certain standards in relation to clients, to the courts, to the profession, and to the public.
2. **Divorce: Attorney and Client.** Generally, a contract executed before decree is rendered for payment of attorney's fees in a divorce action contingent upon the amount of alimony to be subsequently obtained upon the award of a divorce is void as against public policy, since because of the lawyer's personal interest in the litigation it tends to prevent a reconciliation between the parties and destroy the family relationship.
3. **Attorney and Client.** The contract of employment as actually made between attorney and client is controlling, and the attorney is bound thereby even though he may have agreed to act for an inadequate amount, or for no fee at all, unless the agreement is made under a mistake of fact which the law recognizes.
4. ———. Under ordinary circumstances, an attorney who has contracted with his client as to the amount of his compensation for a specified service will not be allowed to contract for greater compensation for such service while the service is being rendered.
5. ———. A lawyer who, in the pursuit of his profession, executes an agreement which is void as against public policy is guilty of a breach of professional obligation and duty which may justify disciplinary action.
6. ——— Generally a lawyer who threatens criminal prosecution to enforce a civil claim for himself or his client thereby breaches his obligation and duty as a lawyer and officer of the court, which may justify disciplinary action.

Original Action. *Judgement of censure.*

Clarence S. Beck, Attorney General, and *Robert A. Nelson,* for relator.

Leonard Dunker, pro se.

Heard before SIMMONS, C. J., CARTER, YEAGER, CHAP-

PELL, WENKE, and BOSLAUGH, JJ., and FLORY, District Judge.

CHAPPELL, J.

This is a disciplinary proceeding initiated by relator in conformity with rules of this court against respondent, a lawyer duly admitted and licensed to practice his profession in this state.

The formal complaint contained two counts. The first count substantially alleged: That on April 14, 1954, respondent entered into a contingent fee contract with his client, the wife, who was plaintiff in a divorce action then pending in the district court; that such contract was entered into after all the evidence had been adduced and while the matter was under consideration by the trial court prior to announcement of its decision; and that at the time respondent was employed he agreed to accept such fee for his services as the court would allow, but after trial he told his client that the amount the court would allow would be inadequate for the services performed, and the contingent fee contract was then executed. The contract, attached to and made a part of the complaint, provided that respondent should represent his client in any necessary litigation then pending and to be concluded, including any appeal therefrom by defendant. The consideration to be paid for such services was 15 percent of the value of all property recovered by his client, excluding child support. Such 15 percent was to include all court costs, land appraisal charges, and similar expenses incurred by respondent in handling the litigation, but in any event his fee was to be not less than $1,000.

The second count substantially alleged: That on or about April 7, 1954, respondent wrote and mailed a letter to another lawyer. The letter, attached to and made a part of the complaint, recited in substance that certain named clients of the other lawyer had borrowed money from the United States government and given it a note

secured by a mortgage on some livestock; that they subsequently sold the livestock and kept the money paid therefor; that when the government learned of such sale, it demanded from the purchaser the proceeds thereof; that the purchasers' insurer, represented by respondent, paid the demand to the government; and: "My client and I are insisting that either the money be paid or that criminal proceedings be instituted against both parties under either the state laws or the United States laws. I have conferred with a government representative and he has been and is willing to be most cooperative. He and I both want to make an example of this matter by either full collection or prosecution so that this case will be a deterrent against similar occurrences in that area or elsewhere. * * *

"I feel that if nothing is done within the next two weeks that I will have no alternative but to demand prosecution under either the state or federal laws. Therefore, I will expect some action herein within that time or I will proceed without further notice." Relator prayed for such disciplinary action as is justified by the facts.

After respondent had entered his voluntary appearance herein, he filed an answer. Therein he admitted the facts set forth in the complaint. In justification he alleged substantially as follows: That a decree of separate maintenance was granted to his client on November 28, 1950, which decree was in full force and effect on April 14, 1954, when the contract, attached to and made a part of the complaint, was executed; that a divorce action was filed by respondent for his client on June 4, 1953, during the approximate month when he began to represent her; that on October 17, 1953, his client, as plaintiff therein, was allowed $125 temporary attorney's fee, and $75 suit money; that the divorce action was tried for 10 days during a period beginning December 1, 1953, and ending January 5, 1954; that legal and factual briefs requested by the court were submitted by

counsel for both plaintiff and defendant before the contract of April 14, 1954, was executed; and that a decree of divorce in favor of respondent's client was filed by the trial court on June 8, 1954, after the contract of April 14, 1954, was executed. The decree required defendant to pay court costs, appraisal fees, and the services and expenses of respondent; that such items were paid by defendant; and that after entry of the decree, no demand for payment under the contract of April 14, 1954, was ever made by respondent and no money was ever paid to him by his client as the result of its execution.

Respondent substantially alleged that the letter referred to in the second count of the complaint was addressed and sent by him to a lawyer about a claim against such lawyer's client at a time when the United States government already had all the information about the alleged violation referred to in the letter; and that no demand for prosecution was ever made by respondent or his client and no money was ever paid to them as a result of the letter, but that one of the persons who sold the mortgaged property was prosecuted by the United States government. Respondent prayed for dismissal of the complaint.

Relator, for reply to respondent's answer, admitted each and every allegation contained therein, and subsequently both relator and respondent joined in a motion for judgment on the pleadings pursuant to Rule 6 of the Rules for Disciplinary Proceedings promulgated by this court. Thus, all pertinent, well-pleaded facts contained in the pleading are admitted.

At the outset it should be said that the contract here involved is not one to collect alimony already awarded by a judgment of the court and unpaid, or to procure a settlement of property rights without divorce. As observed in authorities subsequently cited, such contracts are generally held not to be contrary to public policy.

In State ex rel. Nebraska State Bar Assn. v. Wiebusch, 153 Neb. 583, 45 N. W. 2d 583, we held: "The ethical

standards relating to the practice of law in this state are the canons of professional ethics of the American Bar Association and those which may from time to time be approved by the Supreme Court.

"Canons of ethics and rules governing professional conduct of lawyers are recognized and applied by this court in proper cases."

It is elementary that lawyers who are granted licenses to practice their profession in this state thereby voluntarily assume certain obligations and duties as officers of the courts, and in the performance thereof they must conform to certain standards in relation to clients, to the courts, to the profession, and to the public. State ex rel. Hunter v. Crocker, 132 Neb. 214, 271 N. W. 444.

The Canons of Professional Ethics contain no specific canon with relation to contracts for contingent fees in divorce cases. Canon 13 thereof does provide: "A contract for a contingent fee where sanctioned by law, should be reasonable under all circumstances of the case, including the risk and uncertainty of the compensation, but should always be subject to the supervision of a court, as to its reasonableness." However, there is nothing in the pleadings in the case at bar indicating that respondent ever failed or refused to submit the contract involved to the trial court for its inspection or supervision, and such canon has no controlling force in this case.

In that connection, it is generally held that a contract executed before decree is rendered providing for payment of attorney's fees in a divorce action contingent upon the amount of alimony to be subsequently obtained upon the award of a divorce is void as against public policy, since, because of the lawyer's personal interest in the litigation, it tends to prevent a reconciliation between the parties and destroy the family relationship. Annotation, 30 A. L. R. 188, cites and discusses authorities supporting such statement. They are too numerous to cite here. Jordan v. Westerman, 62 Mich. 170, 28 N. W. 826, 4 Am. S. R. 836, is the

leading case cited and relied upon in numerous opinions. See, also, McCurdy v. Dillon, 135 Mich. 678, 98 N. W. 746; 17 C. J. S., Contracts, § 235, p. 618; 5 Am. Jur., Attorneys at Law, § 166, p. 361. Respondent has cited but one case which seemingly holds otherwise. It is Manning v. Edwards, 205 Ky. 158, 265 S. W. 492. However, subsequently, Overstreet v. Barr, 255 Ky. 82, 72 S. W. 2d 1014, citing numerous authorities, distinguished Manning v. Edwards, *supra*, and held: "Contract with wife for attorney's fees contingent upon procurement of divorce and alimony and settlement of property rights, attorney to receive percentage of amount recovered, is void as against public policy." The contract involved in that case was in all respects comparable with that at bar.

In Thurston v. Travelers Ins. Co., 128 Neb. 141, 258 N. W. 66, this court held: "The contract of employment as actually made between attorney and client is controlling, and the attorney is bound thereby even though he may have agreed to act for an inadequate amount, or for no fee at all, unless the agreement is made under a mistake of fact which the law recognizes.

" 'Under ordinary circumstances, an attorney who has contracted with his client as to the amount of his compensation for a specified service will not be allowed to contract for greater compensation for such service while the service is being rendered.' Olson v. Farnsworth, 97 Neb. 407."

In the case at bar it appears that when respondent was employed he agreed to accept such fee as the court would allow as full compensation for his services. He was bound thereby, because it appears that such agreement was not made under any mistake of fact which the law could recognize.

Also, it is generally held that a lawyer who, in the pursuit of his profession, executes an agreement such as that at bar, which is void as against public policy, is guilty of a breach of professional obligation and duty

which may justify disciplinary action. 5 Am. Jur., Attorneys at Law, § 272, p. 424. See, also, In re Carleton, 33 Mont. 431, 84 P. 788, 114 Am. S. R. 826, which holds that failure to disclose or submit such a contract to the court before decree is rendered, is a more serious offense.

In such cases the discipline to be imposed depends upon the facts of each particular case. Herein, respondent's client already had obtained a decree of separate maintenance which was in full force and effect long before respondent filed her divorce action. No pleading herein alleges that there was any chance of a reconciliation or that respondent in any manner attempted to obstruct or prevent it. The case had been tried on its merits and submitted to the district court before the contract of April 14, 1954, was executed. The decree of divorce subsequently rendered became final. It would appear reasonable to conclude that under the circumstances reconciliation was impossible. Further, there is no evidence indicating that the contract was not made in good faith believing it to be valid. In that connection, after the divorce was granted and alimony allowed, no attempt was ever made by respondent to enforce the contract of April 14, 1954. He accepted and was paid as his fee only that amount allowed by the court in conformity with his original contract. There is no evidence or allegation that respondent was guilty of any fraud or dishonesty.

Under the circumstances, we conclude that respondent did violate his obligations and duty as a lawyer and officer of the court in not adhering to his original agreement and in executing the agreement of April 14, 1954, but that the imposition of censure therefor is ample disciplinary action.

With regard to the second count, it is generally the rule that a lawyer who threatens criminal prosecution to enforce a civil claim for himself or his client thereby breaches his obligation and duty as a lawyer and of-

ficer of the court, which may justify disciplinary action. 7 C. J. S., Attorney and Client, § 23, p. 760, and authorities cited. In the case at bar the letter was sent to a lawyer who doubtless knew all of the facts about the circumstances with relation to his client. Concededly, the government officials knew all the facts and prosecuted the lawyer's client without any demand therefor by respondent. The letter was not sent to the client but to his lawyer, and for aught we know from this record, the letter was never even seen by the client or used in any manner or in any way to overcome his will. Further, no money was ever paid in connection with the concededly existing claim. Respondent, under the record in this case, could not upon any theory be found guilty of blackmail or extortion.

Under the circumstances, we conclude that respondent did violate his obligations and duty as a lawyer and officer of the court in signing and mailing the letter here involved, but the imposition of censure therefor is ample disciplinary action.

The order of the court is that respondent should be and hereby is censured. Costs are taxed to respondent.

JUDGMENT OF CENSURE.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. LESTER M. PALMER, RESPONDENT.

71 N. W. 2d 491

Filed July 8, 1955. No. 33822.

1. **Attorney and Client.** The purpose of a disbarment proceeding is not so much to punish the lawyer as it is to determine in the public interest whether he should be permitted to practice.
2. ———. In admitting a lawyer, and granting him a license to practice law, it is on the implied understanding that the party receiving such license shall in all things demean himself in a proper manner and abstain from such practices as cannot fail

to bring discredit upon himself, the profession, and the courts.

3. ———. The oath taken by him, as required by section 7-104, R. R. S. 1943, requires a lawyer to faithfully discharge his duties; uphold and obey the Constitution and laws of this state; observe established standards and codes of professional ethics and honor; maintain the respect due to courts of justice; and abstain from all offensive practices which cast reproach on the courts and the bar.

4. ———. A lawyer owes his first duty to the court. He assumed his obligations toward it before he ever had a client. He cannot serve two masters, and the one he has undertaken to serve primarily is the court.

5. ———. The ethical standards relating to the practice of law in this state are the Canons of Professional Ethics of the American Bar Association and those which may from time to time be approved by the Supreme Court.

Original Action. *Judgment of Disbarment.*

Clarence S. Beck, Attorney General, and *Robert A. Nelson,* for relator.

Lester M. Palmer and *Herbert T. White,* for respondent.

Heard before SIMMONS, C. J., CARTER, CHAPPELL, WENKE, and BOSLAUGH, JJ., and FLORY, District Judge.

SIMMONS, C. J.

This is a proceeding brought by the State on the relation of the Nebraska State Bar Association praying for disciplinary action against the respondent, Lester M. Palmer.

We render judgment of disbarment.

The respondent has been for many years a member in good standing of the bar of this state, and likewise for many years an elected judge of the municipal court of the city of Omaha. At the time of the principal events mentioned herein, he was presiding over the traffic court of that city.

The Committee on Inquiry of the Fourth Judicial District conducted an inquiry regarding a "hit-and-run" accident involving property damage only, in which re-

spondent was involved in Douglas County in December 1953, and misdemeanor charges arising as a result of events that occurred in Council Bluffs, Iowa, in which respondent was involved in June 1954.

The Advisory Committee considered the charges. It did not investigate the Council Bluffs incident. It did investigate the matter of conduct and statements and representations made by respondent to the deputy county attorney of Douglas County between the time of the December 1953 accident and respondent being found guilty of a misdemeanor charge arising therefrom. It recommended that this court administer appropriate discipline.

See Rules of the Supreme Court, Integration of the Bar, Article XI, for the procedures here followed.

A transcript of the proceedings before the Advisory Committee and of its hearings was filed with this court.

The fact recital herein is taken from the proceedings before the Advisory Committee.

It appears that in the late afternoon of December 7, 1953, a car driven by respondent collided with a car owned by a man named Pilant, causing property damage. Respondent did not stop, but left the scene of the accident. A motorist following respondent reported the license number of respondent's car. Shortly after the accident respondent had a conversation with a Safety Patrol officer. Respondent testified that he told the officer "I was driving." The evidence is not disputed.

The county attorney's office was notified of the accident. Apparently this notice came from the Safety Patrol officer. A deputy county attorney was assigned to investigate. We will refer to him hereinafter as the county attorney.

During the evening the county attorney had found two witnesses who related that they saw the accident, and that there were two persons in respondent's car whom they did not then identify, although later one of the witnesses advised the county attorney that one of the parties

was respondent. Respondent's car was located in front of the home of an Omaha attorney, who does not otherwise appear in this matter. It was taken by orders of the county attorney and placed in a garage.

The next morning, December 8, 1953, between 4:30 and 5:30, respondent called a friend named Fulton on the telephone, related that he had been in a minor accident and, in effect, asked Fulton to take responsibility for the accident. Fulton agreed. Respondent also testified that about 8 a. m. that day he contacted the employer of Pilant, who reported that Pilant would be satisfied if respondent took "care of his car"; and that he then called his insurance company and told them the facts. He testified that at that time the patrolman, the insurance company, Pilant, and Pilant's employer knew that "I was the driver." That afternoon at 2:30 p. m. respondent went to the county attorney's office and gave an unsworn statement in which he stated, in effect, that he (respondent) was in the car half asleep, and that Fulton was driving.

After the statement was made, respondent asked the county attorney for advice as to what further to do and was told that he (respondent) should start telling the truth; that the county attorney knew respondent was driving the car; and that "by tomorrow we will be able to prove it." Respondent advised them that the next day Fulton would be in. Respondent then left the county attorney's office.

That evening (Tuesday) reporters called at the Fulton home and asked him for a statement about "your car accident." Fulton testified that the reporters told him that they knew he was not in the car and would be able to prove it "before morning." It appears that at that time or later it was definitely determined where Fulton had been during the day and evening of the accident. Fulton refused to give a statement and the reporters left. Fulton then called respondent and told him that the reporters had been there and he had re-

fused to give them a statement. Respondent told Fulton that they had an appointment the next morning with the county attorney "to make a statement." The next morning (Wednesday) Fulton made an appointment with his attorney, then he met respondent, and Fulton and respondent went to the scene of the accident, and Fulton "acquainted myself with it." They then went to the office of Fulton's attorney. Fulton testified that he went there prepared to testify that he had driven the car and to plead guilty to a charge, although he was not driving the respondent's car, was not in it, and was not anywhere near the scene of the accident when it occurred. Respondent testified that he (respondent) was going to pay the fine. Fulton's attorney interrogated them about who was driving the car. They both "just grinned." The attorney told Fulton that if he (Fulton) was going to testify that he was driving the car when he was not, that he could be held for perjury, and if he admitted driving the car that he might incriminate himself, and advised Fulton not to make a statement. Fulton and the attorney then went to the county attorney's office and Fulton refused to answer other than the preliminary questions.

The county attorney, then, on the basis of respondent's statement and Fulton's refusal to answer questions, prepared charges against Fulton for leaving the scene of an accident. The county attorney did not believe Fulton was the driver of the car, but preferred the charges against him to put the "squeeze" on respondent.

Fulton then went to the sheriff's office, posted bond, and was released.

The county attorney then advised respondent by telephone of what he had done; that he was endorsing respondent's name on the complaint as a witness; that if Fulton pleaded guilty he would file charges against both Fulton and respondent for obstructing justice; and that if respondent testified he would file perjury charges. Respondent agreed to come to the county attorney's

office. Fulton and his attorney then returned to the attorney's office where Palmer was waiting, "some discussion took place" between them, and respondent called the county attorney and advised him he was going to change his statement and "take my medicine." Respondent testified that he had made up his mind that "it wasn't going to go through." He went to the county attorney's office and gave them a statement that he (respondent) was driving the car.

Respondent testified that, after the statement was given, the county attorney said he "knew all the time" that respondent did it, and that respondent answered, "Why didn't you give me a hint about it then?" and if he had done so "I wouldn't have made that crazy statement."

The charges against Fulton were then dismissed, and respondent was charged with the offense.

Respondent pleaded not guilty. The facts were stipulated, a finding of guilt was made, and sentence was imposed and served.

The Advisory Committee found that respondent's conduct tended to impede or obstruct the administration of justice, and was in violation of canons 22, 29, 15, and 16.

Canon 22 provides in part that a lawyer is an officer of the law charged "with the duty of aiding in the administration of justice." Canon 29 provides in part: "He should strive at all times to uphold the honor and to maintain the dignity of the profession and to improve not only the law but the administration of justice."

The Advisory Committee found that respondent was his own client and charged with the same responsibility as if acting for a client and as such had violated canon 15 which provides in part: "The office of attorney does not permit, much less does it demand of him for any client, violation of law or any manner of fraud or chicane"; and canon 16 which provides: "A lawyer should use his best efforts to restrain and to prevent his clients

from doing those things which the lawyer himself ought not to do, particularly with reference to their conduct towards Courts, judicial officers, jurors, witnesses and suitors. If a client persists in such wrong-doing the lawyer should terminate their relation."

The Advisory Committee found also that respondent had violated section 7-105, R. R. S. 1943, as to the provisions that: "It is the duty of an attorney and counselor: * * * to employ, for the purpose of maintaining the cause confided to him, such means only as are consistent with the truth; * * * to abstain from all offensive practices * * *."

We agree with the conclusions of the Advisory Committee.

We have recently held: "The purpose of a disbarment proceeding is not so much to punish the lawyer as it is to determine in the public interest whether he should be permitted to practice.

"In admitting a lawyer, and granting him a license to practice law, it is on the implied understanding that the party receiving such license shall in all things demean himself in a proper manner and abstain from such practices as cannot fail to bring discredit upon himself, the profession, and the courts.

"The oath taken by him, as required by section 7-104, R. S. 1943, requires a lawyer to faithfully discharge his duties; uphold and obey the Constitution and laws of this state; observe established standards and codes of professional ethics and honor; maintain the respect due to courts of justice; and abstain from all offensive practices which cast reproach on the courts and the bar.

"A lawyer owes his first duty to the court. He assumed his obligations toward it before he ever had a client. He cannot serve two masters, and the one he has undertaken to serve primarily is the court.

"The ethical standards relating to the practice of law in this state are the canons of professional ethics of the American Bar Association and those which may

from time to time be approved by the Supreme Court." State ex rel. Nebraska State Bar Assn. v. Wiebusch, 153 Neb. 583, 45 N. W. 2d 583.

It is clear from this record that respondent sought at all times to avoid, not the penalty of the law for his act, but the impact of the publicity and notoriety upon himself as a lawyer and judge.

What he did was not the result of an impulse quickly regretted. Rather it was a designed plan, conceived by him alone, to manufacture false evidence, which was done; it was deliberately undertaken and carried out and persisted in until the futility of falsehood became quite apparent. The rigged evidence was not actually used in court, not because it was false, but because the truth "would out" and was out and respondent knew it. He told the truth, not because it was the truth, but because the time had come where the falsehood was no longer of service. We find nothing in this record to indicate other than that he told the truth because the falsehood "wasn't going to go through." The truth was used then, not to rectify what had been done, but to avoid the greater penalties which he had not contemplated. Had the truth not been developed and determined, we find nothing here to indicate that the false evidence would not have been used, but rather the record points clearly to the fact that it would have been so used.

Respondent led in this matter. Fulton followed. Fulton was the pliant participant in respondent's plan to debase the administration of justice. Each apparently had the same level of conception of the standards of the truth-seeking processes of our courts.

The controlling seriousness of what respondent did was the deliberate concocting of a false defense, his purpose being to use perjured testimony, if need be, to deceive the court, all to the end of escaping from the predicament in which he had placed himself. He desisted only under the compulsion of facts which proved the

complete falsity of his defense and the dangers of further prosecutions.

In the light of what has been heretofore said, we conclude that the admitted conduct of respondent disqualifies him for continuance as a member of the Bar of the State of Nebraska. Accordingly, the motion of relator for judgment of disbarment is sustained; respondent's order of admission to the Bar of the state is annulled; his license to practice therein is canceled; and his name is ordered stricken from the roll of lawyers in this state.

JUDGMENT OF DISBARMENT.

MILDRED BARTEK, APPELLEE, V. GLASERS PROVISIONS CO., INC., ET AL., APPELLANTS.
71 N. W. 2d 466

Filed July 15, 1955. No. 33661.

1. **Automobiles.** A person is liable for the negligent operation of an automobile by his servant or agent only where such servant or agent, at the time of the accident, was engaged in his employer's or principal's business with his knowledge and direction.
2. **Witnesses.** Before a witness, not a party to the suit, can be impeached by proof that he has made statements contradicting or differing from the testimony given by him upon the stand, a foundation must be laid by interrogating the witness himself as to whether he has ever made such statements.
3. ———. In order to lay a sufficient foundation for the introduction of evidence to contradict the statement of a witness, as to a statement alleged or denied by him, it is indispensable that the witness' attention be called to the declaration alleged or denied to have been made, and that the time and place, when and where, and the person to whom such statement should have been made be cited. All of which must be done with reasonable certainty.
4. **Automobiles.** The negligence of a husband while driving an automobile with his wife as a guest may not be imputable to her but she may be responsible for the consequences of her own negligence in failing to warn him of known approaching danger or for failure to protest against his recklessness.

5. ———. Ordinarily, the guest passenger in an automobile has a right to assume that the driver is a reasonably safe and careful driver; and the duty to warn him does not arise until some fact or situation out of the usual and ordinary is presented.
6. ———. Where the owner is a passenger in his own automobile while it is being operated by another, the negligence of the operator is not imputable to the owner, except where the operator is the owner's servant or agent, or where the operator and the owner are engaged in a joint enterprise, or where the owner assumes to direct the operation of the automobile and to exercise control over it.
7. Negligence. Where two persons unite in the joint prosecution of a common purpose so that each has authority, express or implied, to act for the other in respect to the control of the means to accomplish the common purpose, the negligence of one will be imputed to the other.
8. Automobiles. To constitute occupants of a motor vehicle joint adventurers there must be not only joint interest in the objects and purposes of the enterprise but also an equal right to direct and control the conduct of each other in the operation of the vehicle.
9. Negligence: Trial. Where contributory negligence is pleaded as a defense, but there is no evidence to support such defense, it is error to submit such issue to the jury.
10. Highways: Automobiles. A person traveling a favored street protected by a traffic signal, of which he has knowledge, may properly assume that oncoming traffic will obey it.

APPEAL from the district court for Douglas County: JAMES M. FITZGERALD, JUDGE. *Reversed and remanded with directions.*

Kennedy, Holland, DeLacy & Svoboda, J. A. C. Kennedy, Jr., and *Edward A. Mullery*, for appellants.

Tesar & Tesar, for appellee.

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

WENKE, J.

Mildred Bartek brought this action in the district court for Douglas County against Glasers Provisions Company, Incorporated, and Howard J. Tallman. We shall here-

inafter refer to these defendants as either Tallman or the company. There are two causes of action. The purpose of the first cause of action is to recover the damages plaintiff alleged she personally suffered because of injuries received in an accident involving a car being driven by Tallman and owned by the company. The second cause of action is to recover for damages to her car. The basis for both causes of action is the claim that Tallman was negligent in operating the car he was driving and that such negligence was the proximate cause of the accident which resulted in plaintiff's injuries and damage to her car. Plaintiff recovered a verdict of $3,750 and the trial court immediately entered judgment thereon. Thereafter the company filed a motion for a judgment notwithstanding the verdict or, in the alternative, for a new trial. Tallman filed a motion for a new trial. Both motions were overruled. This appeal was taken from the ruling thereon.

The accident here involved occurred about 6:45 p. m. on Saturday, January 17, 1953, in Omaha, Nebraska, at the intersection of Thirty-sixth and Q Streets, Thirty-sixth Street running north and south and Q Street running east and west. Immediately preceding the accident William F. Bartek, husband of appellee, was driving a 1949 Ford club coupé west on Q Street while, at the same time, Tallman was driving a 1950 Oldsmobile coach north on Thirty-sixth Street. Appellee was riding in the car her husband was driving. These two cars collided at about the center of the intersection. As a result plaintiff was injured and the 1949 Ford club coupé, title to which was in her name, was damaged. The intersection of Thirty-sixth and Q Streets was, at that time, controlled by four traffic signals, one at each corner. The signals were operating. Any further statement as to the facts will be made in connection with our discussion of the errors assigned.

The company contends the trial court erred when it overruled its motion for a judgment notwithstanding the

verdict. In considering this assigned error the following principles are applicable:

"A motion for directed verdict or for judgment notwithstanding the verdict must, for the purpose of decision thereon, be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the evidence." Stark v. Turner, 154 Neb. 268, 47 N. W. 2d 569.

"In an action where there is any evidence which will support a finding for a party having the burden of proof, the trial court cannot disregard it and direct a verdict against him." Stark v. Turner, *supra.*

As it relates to this assigned error the evidence is not in dispute. Tallman was, at the time of the accident, vice-president of the company and employed by it. The company is a Nebraska corporation engaged in the manufacture and sale of foods and provisions with its principal place of business located in Omaha. In January 1951 the company furnished Tallman a 1950 Oldsmobile coach to be used in connection with his work but also permitted him to use it for the pleasure of his family. Tallman kept this car in a garage at his home, which is located at 3821 Polk Street in Omaha. However, the company kept the title thereto in its name. This is the car Tallman was driving at the time of the accident.

Tallman's family consisted of himself, his wife, two sons, and a daughter. Shortly after 6:30 p. m. on January 17, 1953, Tallman and his two sons left their home in the Oldsmobile to attend a movie at the Chief Theatre. In going to the theatre Tallman drove north on Thirty-sixth Street, the intersection of Thirty-sixth and Q Streets being 2 blocks east and 11 blocks north of the Tallman home. The sole and only purpose for the trip was to enable Tallman and his two sons to attend the movies.

We said in Shaffer v. Thull, 147 Neb. 947, 25 N. W.

2d 755: "A person is liable for the negligent operation of an automobile by his servant or agent only where such servant or agent, at the time of the accident, was engaged in his employer's or principal's business with his knowledge and direction." See, also, Neff v. Brandeis, 91 Neb. 11, 135 N. W. 232, 39 L. R. A. N. S. 933; Ebers v. Whitmore, 122 Neb. 653, 241 N. W. 126; Wise v. Grainger Bros. Co., 124 Neb. 391, 246 N. W. 733; Witthauer v. Employers Mutual Casualty Co., 149 Neb. 728, 32 N. W. 2d 413.

And, as stated in Restatement, Agency, § 238, p. 535: "The master is liable only when the instrumentality is being used by the servant for the purpose of advancing the employer's business or interests, as distinguished from the private affairs of the servant. Thus, a master who purchases an automobile for the convenience of his servants is not subject to liability when a servant is using it for his own purposes; * * *."

In view of the foregoing principle, which is controlling of the situation disclosed by the record insofar as it relates to the company, we find the trial court erred in not sustaining the company's motion for a judgment notwithstanding the verdict and in failing to dismiss the action against it.

Appellants contend the trial court erred in allowing appellee to impeach certain of their witnesses by the introduction of testimony they had given prior thereto at a hearing in the South Omaha police station on January 24, 1953, at which hearing they testified about chasing a car up Railroad Avenue on the evening of January 17, 1953.

Appellants called police officer William G. Hopkins and patrolman James Elder of the Omaha police force as witnesses. They testified that on the evening of January 17, 1953, they were traveling about the streets of Omaha in a cruiser car checking traffic; that they were called to the accident herein involved at Thirty-sixth and Q Streets and arrived there about 6:50 p. m.; that when they arrived there they recognized the blue Ford

coupé involved in the accident as a car they had been chasing up Railroad Avenue; that they identified it through various means, including the license number; that when they were chasing this car up Railroad Avenue it was traveling at a very high rate of speed and being driven in a reckless manner, that is, swerving in and out among cars it was passing; and that they lost it at Twenty-fifth and U Streets when it passed a truck.

The only purpose this testimony could serve was to show the Ford coupé involved in the accident was being driven at a high rate of speed and in a reckless manner just before the accident. For that purpose this evidence was too remote both in time and distance and was clearly incompetent and immaterial.

In rebuttal appellee produced as a witness E. G. Woodbury, an official court reporter, who took the testimony of these two witnesses when they testified under oath at the hearing held in the South Omaha police station on January 24, 1953. At that hearing Woodbury states patrolman Elder testified they were only able to get part of the license number of the blue Ford they had been chasing north up Railroad Avenue on the evening of January 17, 1953, and that they had lost it at Twenty-fifth and W Streets. Woodbury also testified that police officer Hopkins stated that his testimony would be substantially the same and that he could not add anything to what patrolman Elder had testified to.

This evidence is clearly impeaching and was admissible for that purpose, subject to the following principle, if the evidence of the officers had been competent and material:

"Before a witness, not a party to the suit, can be impeached by proof that he has made statements contradicting or differing from the testimony given by him upon the stand, a foundation must be laid by interrogating the witness himself as to whether he has ever made such statements." Meyers v. State, 112 Neb. 149, 198 N. W. 871.

"In order to lay a sufficient foundation for the introduction of evidence to contradict the statement of a witness, as to a statement alleged or denied by him, it is indispensable that the witness's attention be called to the declaration alleged or denied to have been made, and that the time and place, when and where, and the person to whom such statement should have been made be cited. All of which must be done with reasonable certainty." Wood River Bank v. Kelley, 29 Neb. 590, 46 N. W. 86. See, also, Hanscom v. Burmood, 35 Neb. 504, 53 N. W. 371; Zimmerman v. Kearney County Bank, 59 Neb. 23, 80 N. W. 54.

As to police officer Hopkins we think these requirements were fulfilled with reasonable certainty but as to patrolman Elder they were not. However, before an error requires a reversal, it must be determined that it was prejudicial to the rights of the party against whom it was made for every error does not require a reversal. Here, as already stated, the testimony of these officers in this regard was incompetent and immaterial and for one of them to be improperly impeached in regard thereto cannot result in prejudicial error. While we find error occurred as to the impeachment of patrolman Elder we do not find it was prejudicial to appellants having had a fair trial.

Appellants complain of the fact that the court failed to fully submit the issue of contributory negligence. This complaint is based on two theories: First, that a wife as a guest in a car being driven by her husband may be responsible for the consequences of her own negligence, if any, and second, on the theory that her husband's conduct, under the circumstances here established, may be imputable to her.

We have said:

"The negligence of a person while driving an automobile with another as his guest may not ordinarily be imputable to the guest, but such guest may be responsible for the consequences of his own negligence."

Kuska v. Nichols Construction Co., 154 Neb. 580, 48 N. W. 2d 682. See, also, Davis v. Spindler, 156 Neb. 276, 56 N. W. 2d 107; Styskal v. Brickey, 158 Neb. 208, 62 N. W. 2d 854.

"The negligence of a husband while driving an automobile with his wife as a guest may not be imputable to her, but she may be responsible for the consequences of her own negligence in failing to warn him of known approaching danger or for failure to protest against his recklessness." Crandall v. Ladd, 142 Neb. 736, 7 N. W. 2d 642.

However, in this regard, we have said:

"Ordinarily, the guest passenger in an automobile has a right to assume that the driver is a reasonably safe and careful driver; and the duty to warn him does not arise until some fact or situation out of the usual and ordinary is presented." Lewis v. Rapid Transit Lines, 126 Neb. 158, 252 N. W. 804. See, also, Hamblen v. Steckley, 148 Neb. 283, 27 N. W. 2d 178.

"The duty of a guest riding in an automobile is to use care in keeping a lookout commensurate with that of an ordinarily prudent person under like circumstances. The guest is not required to use the same degree of care as devolves upon the driver. If the guest perceives danger, or if at certain times and places should anticipate danger, he should warn the driver. Ordinarily the guest need not watch the road or advise the driver in the management of the automobile." Styskal v. Brickey, *supra*. See, also, Kuska v. Nichols Construction Co., *supra*.

The car in which appellee was riding was being driven down a surfaced city street, the paved portion of which was 40 feet wide. While it was dark and cold there was nothing that seriously interfered with the driver's vision. As the car approached the intersection, which was controlled by traffic signals, the traffic signals were clearly visible and his driving was in no way interfered with by other traffic on Q Street. In other words the trip,

immediately prior to the accident, was proceeding as would the average trip and involved only such incidents as one would expect on a trip in a car down a city street after dark. Nothing happened that would cause a passenger in a car to anticipate danger about which she should warn the driver and certainly the corner they were approaching presented no such dangerous condition that she should have warned the driver thereof. We find nothing in the record that would justify submitting the issue of contributory negligence of appellee insofar as her conduct is concerned. It would have been error to have submitted it.

On the basis of the family purpose doctrine, joint enterprise and agency, appellants contend appellee was responsible for her husband's driving and that his negligence, if any, was imputable to her. On the basis of this contention appellants requested instructions to the above effect and also instructions on contributory negligence. They contend the trial court erred in denying their request therefor.

The family purpose doctrine does not have for its objective the purpose of defeating a claim for damages by a guest by imputing the negligence of a driver to such guest but rather to impose upon the owner of a car being used for family purposes the responsibility for its operation as a matter of public policy. It has no application here. We have stated these principles as follows:

"The owner of an automobile kept for family purposes is liable for injuries inflicted upon a stranger as a result of the negligent driving of one of his children, where the car is occupied by members of the family and is being used for one of the purposes for which it is kept." Stevens v. Luther, 105 Neb. 184, 180 N. W. 87. See, also, Jennings v. Campbell, 142 Neb. 354, 6 N. W. 2d 376.

"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." Jennings v. Campbell, *supra*.

"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." Jennings v. Campbell, *supra.*

"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." Jennings v. Campbell, *supra.*

The rule here applicable is as follows: "Where the owner is a passenger in his own automobile while it is being operated by another, the negligence of the operator is not imputable to the owner, except where the operator is the owner's servant or agent, or where the operator and the owner are engaged in a joint enterprise, or where the owner assumes to direct the operation of the automobile and to exercise control over it." Petersen v. Schneider, on rehearing, 154 Neb. 303, 47 N. W. 2d 863.

While other states have held to the contrary we have held that the negligence of a husband, while driving an automobile in which the wife is riding as a guest, may not, merely because of that relationship, be imputed to her (see, Stevens v. Luther, *supra;* Crandall v. Ladd, *supra;* Remmenga v. Selk, 150 Neb. 401, 34 N. W. 2d 757; Hendrix v. Vana, 153 Neb. 531, 45 N. W. 2d 429); that the owner of an automobile may be a guest in his own car (see, Petersen v. Schneider, *supra;* Davis v. Spindler, *supra*); and that the mere fact of ownership is not sufficient to impose that liability (see Petersen v. Schneider, *supra*).

As to joint enterprise we said in Ahlstedt v. Smith, 130 Neb. 372, 264 N. W. 889: "Where two persons unite in the joint prosecution of a common purpose so that each has authority, express or implied, to act for the other in respect to the control of the means to accom-

plish the common purpose, the negligence of one will be imputed to the other."

"To constitute occupants of a motor vehicle joint adventurers there must be not only joint interest in the objects and purposes of the enterprise but also an equal right to direct and control the conduct of each other in the operation of the vehicle." Remmenga v. Selk, *supra.*

As already stated, the title to the 1949 Ford club coupé the husband was driving at the time of the accident was in the name of appellee, it apparently having been purchased in March 1952 as a second-hand car. Appellee was not able to drive so her husband did the driving and, whenever she suggested going some place, he would usually take her. On January 17, 1953, appellee's sister Marie was in the University Hospital in Omaha. She was expecting. It had been planned for the family to visit her that evening. Late that afternoon, at appellee's suggestion, the husband drove to Forty-fifth and Harrison Streets and picked up appellee's parents, Mr. and Mrs. George Cherek, that being where they lived. The husband returned home to 7011 Railroad Avenue. There he picked up appellee and his cousin Stella Schiessl who was visiting them. They left the Bartek home sometime between 6:15 and 6:30 p. m. Mr. Bartek was driving, appellee was riding in the middle of the front seat, and Stella Schiessl to her right while the Chereks occupied the back seat. They first drove north on Railroad Avenue and then on Twenty-fifth Street, crossing Q Street while doing so.

That afternoon appellee had called her sister Betty, who lived at Forty-second and Q Streets, and told her they would pick her up and take her with them to the hospital. Apparently she had forgotten to tell her husband of this arrangement for he did not turn west on Q Street as he crossed it going north on Twenty-fifth Street. She did not think of it until they were approaching the intersection of Twenty-fifth and L Streets. At that time she mentioned to her husband that they had to

pick up her sister Betty by saying: "Oh, we forgot to pick up my sister Betty." Her husband then turned left at the next intersection onto L Street and proceeded west on L Street to Twenty-sixth Street; there he turned left onto Twenty-sixth Street and proceeded south on Twenty-sixth Street until he reached Q Street; then he turned right onto Q Street and proceeded west on Q Street to where it intersected with Thirty-sixth Street or the place of the accident.

We think this presents the ordinary family picture when it is decided to visit either some of the wife's or husband's relatives. In such case either the husband or wife usually makes all the arrangements, depending on whose relatives are to be visited. We certainly can see no agency in this arrangement within the meaning of the principle hereinbefore set forth nor were the parties engaged in a joint enterprise, within the meaning of our decisions, that would justify imputing the husband's negligence, if any, to the appellee. See Remmenga v. Selk, *supra.*

We find no error in the trial court's refusal to submit the issue of contributory negligence to the jury on the theory that the negligence of the husband, if any, could be imputed to appellee. In fact, as stated in Andersen v. Omaha & C. B. St. Ry. Co., 116 Neb. 487, 218 N. W. 135: " 'Where contributory negligence is pleaded as a defense, but there is no evidence to support such defense, it is error to submit such issue to the jury.' Koehn v. City of Hastings, 114 Neb. 106." See, also, Bay v. Robertson, 156 Neb. 498, 56 N. W. 2d 731.

The court should not have given instruction No. 6 nor that part of instruction No. 2 that sets out allegations relating to the claim that appellee was negligent. These are not errors of which appellants can complain but we point them out since a retrial of the case as to Tallman is required.

Appellants complain of the court's failure to give instructions concerning the duties of a driver entering

an intersection. It should be remembered that both drivers, and their corroborating witnesses, testified they entered the intersection on a green traffic signal. The court correctly instructed as to the rights of a driver proceeding into an intersection on a green traffic light and his duties in regard thereto. See instruction No. 7 given by the court and Styskal v. Brickey, *supra.*

However, in view of Tallman's testimony that as he entered the intersection on a green light he saw appellee's car approaching from the east we think the jury should have been advised of the following principle: "A person traveling a favored street protected by a traffic signal, of which he has knowledge, may properly assume that oncoming traffic will obey it." Angstadt v. Coleman, 156 Neb. 850, 58 N. W. 2d 507.

The other contentions in this regard made by the appellants need not be discussed as they were based on the proposition that Mr. Bartek's negligence, if any, would be imputed to appellee.

Appellants alleged the accident, together with the resulting injuries and damages, was not caused by any negligence on their part but was the direct and proximate result of the negligence of appellee's driver. In this regard they requested the following instruction: "You are instructed that if you believe and find from the evidence that the accident in question which is the subject matter of this lawsuit was caused solely by the negligence of the plaintiff's husband in the operation of plaintiff's automobile, then your verdict should be for the defendant."

We said in Bergendahl v. Rabeler, 133 Neb. 699, 276 N. W. 673: "Although the negligence of the driver of an automobile will not ordinarily be imputed to a passenger therein when the passenger has no control over the car or driver, the passenger may not recover from a third person for injuries suffered in a collision when the negligence of the driver is the sole proximate cause of the accident."

As already stated, both drivers contend they entered the intersection on a green light. However, appellee's driver admitted he did not see the car being driven by Tallman until almost the moment of the impact. Under this factual situation we think the trial court should have instructed on this issue and its failure to do so prevented Tallman from having a fair trial.

We therefore reverse the judgment of the district court and remand the cause with directions to dismiss the action as to the Glasers Provisions Company, Incorporated, and for retrial as to Howard J. Tallman.

REVERSED AND REMANDED WITH DIRECTIONS.

SIMMONS, C. J., dissenting.

I concur in the result.

I dissent from the holding of the court that the negligence of the husband driver of the car is not imputed to the plaintiff who was the owner of the car.

Plaintiff pleaded that the accident and her damages were the proximate result of the negligence of the defendants and each of them "without any negligence on the part of the plaintiff or the operator of plaintiff's car in which she was a passenger." Defendants, answering separately, denied generally, and alleged that the automobile in which plaintiff was riding was being driven by her husband as her agent; that the accident and injuries were the direct and proximate result of the negligence of the plaintiff and her driver; and that the negligence of plaintiff's driver was more than slight.

Plaintiff was the owner of the car in which she was riding, which was driven by her husband. The plaintiff does not drive a car and never has driven. The husband operated the car and drove the car for plaintiff whenever she had to go someplace. He was the only one in the family who drove the car. Before the accident, the husband had driven the car to the home of plaintiff's parents, got them, and brought them back to plaintiff's and his home. This was done at the request of the plaintiff. The plaintiff, the husband, his

cousin, and the plaintiff's parents then started to visit a sister of plaintiff who was a patient in an Omaha hospital. The husband was driving, the plaintiff was in the middle of the front seat, with the cousin on the right. Plaintiff's mother and father were in the back seat. They intended to pick up another sister of the plaintiff and take her to the hospital with them. They forgot to pick her up. They then turned their course to go to the sister's home to pick up the sister. The plaintiff asked the husband to pick up the sister. This evidence is undisputed and largely comes from the plaintiff.

Under these circumstances, defendants contend that the negligence, if any, of the driver of the car in which plaintiff was riding was imputable to plaintiff and that the jury should have been so instructed.

The court relies on the rule as stated in Petersen v. Schneider, 154 Neb. 303, 47 N. W. 2d 863. That rule recognizes that the negligence of the operator is imputable to the owner "where the operator is the owner's servant or agent, or * * * where the owner assumes to direct the operation of the automobile and to exercise control over it."

In Petersen v. Schneider, *supra,* we modified the holding in Sutton v. Inland Construction Co., 144 Neb. 721, 14 N. W. 2d 387, which was a case where the owner was riding in his car while it was driven by another. We there held that ownership alone is not sufficient to establish the existence of the relationship of principal and agent or master and servant, pointing out, however, that in the Sutton case there was evidence that the owner was directing the driver and exercising some control over the operation of the car. That evidence is here also.

The court also cites our decisions that the negligence of a husband while driving an automobile in which his wife is a guest is not imputable to her because of that relationship; that the owner of an automobile may be

a guest in his own car; and that the mere fact of ownership is not sufficient to impose that liability. These decisions do not reach to the facts of this case.

Our disagreement here is not as to the rule but its application to the facts as shown by the evidence of the plaintiff.

The court sets out no decision of ours which goes to the fact of the agency of the driver or the fact of the owner directing the operation of the automobile and exercising control over it such as we have here.

Other states have faced those fact questions and decided them contrary to the decision of the court in this case.

There are many cases dealing with this general problem. We have searched out those where we find comparable fact situations. Wilcott v. Ley, 205 Wis. 155, 236 N. W. 593, was a case where the plaintiff husband owned the car. His wife was driving at his request and because he was tired. They were returning from a dance. The court held: "The undisputed evidence discloses that plaintiff's wife, at the time of the accident, was driving his car at his request and rendering a service beneficial to him, which otherwise he would have been obliged to perform himself. We cannot escape the conclusion that she was plaintiff's agent and that her negligence is imputed to him." In reviewing this case in Rule v. Jones, 256 Wis. 102, 40 N. W. 2d 580, that court said that the person there "held to be the agent was performing a task which would devolve upon the principal if he wished to accomplish his immediate purpose." That is the situation here.

Foley v. Hurley, 288 Mass. 354, 193 N. E. 2, was a case where the plaintiff owned the car in which she was riding. It was being driven by a minor son. They were on their way to school, and the plaintiff went for the purpose of driving the automobile back to her home. Plaintiff gave the son no directions as to his operation of the automobile or the route he was to follow. (In the instant case there were directions given by the

plaintiff as to where the car was to be driven.) The question was whether or not the evidence sustained a finding that the son was the plaintiff's agent. The court held: "The fact that she gave no directions as to its operation or as to the route does not have a controlling influence in deciding that question. There is nothing to show that up to the time the collision was imminent any circumstances appeared which called for her exercise of the power of control. The test of the existence of the relationship of principal and agent is the right to control and not the actual exercise of control by the principal. * * * When the owner of an automobile is riding in it while another is driving, in the absence of controlling evidence to the contrary, the inference is warranted that the owner has retained the right to control its operation."

Angel v. McClean, 173 Tenn. 191, 116 S. W. 2d 1005, was a case where the wife owned the car. At the time of the accident the husband was driving, and the wife was occupying the front seat with him. He was going to his work, after which the wife was to take the car, park it, and then walk to the office of her physician for treatment. The accident happened en route to the place where the husband worked. The court extensively reviewed many authorities, and held that the driver's negligence was imputable to the owner-wife. The court quoted this language from Challinor v. Axton, 246 Ky. 76, 54 S. W. 2d 600: "'* * * Clearly, in such a case the owner (which is the wife in this case) by her consent and acquiescence selected her husband as a suitable person to, not only operate her car for her own purpose, but also to guard and protect her personal safety while traveling in her car with him as driver, and since the negligence of a stranger as her agreed chauffeur would be imputed to her, we conclude that the same principles should apply when her selected chauffeur is her husband.'" The language is applicable here.

Lucey v. Allen, 44 R. I. 379, 117 A. 539, was a case where the wife of the driver of the car owned the automobile. The question was whether the negligence of the driver could be imputed to the wife. The court held: "If in this case the negligence of Mr. Prendergast is imputed to his wife, such determination would not be made because of the marital relation, but because she was the owner of the automobile, that it was being operated by the husband for the wife in furtherance of a purpose in which she was an interested party, and because from those circumstances the relation of principal and agent would arise between Mrs. Prendergast and her husband. It appears that at the time of the collision the Prendergasts were returning from a day's outing at Pearl Lake near Franklin, Massachusetts; that for the purpose of carrying out this day of pleasure in which she was interested and took part she had furnished her automobile and being unable to operate it herself she had procured her husband to run it. In accordance with the rule of agency applicable with reference to a so-called 'family automobile,' the owner is undoubtedly chargeable with the negligence of another member of the family who is driving, if the owner is a passenger and it is being used for a purpose in the accomplishment of which the owner is interested. In such circumstances the relation of principal and agent arises between the owner and the member of the family driving the machine."

In Petersen v. Schneider, *supra,* we cited for the rule the sole decision of Rodgers v. Saxton, 305 Pa. 479, 158 A. 166, 80 A. L. R. 280, "and cases cited in the annotation thereto."

The Rodgers case held: "* * * a wife who is riding in her own automobile while it is being driven by her husband is not prima facie chargeable with the husband's negligence in driving the automobile * * *. 'To hold that the facts, as shown here, constituted agency would be carrying the principle of implied agency too

far. If one is riding in a vehicle with another who is his agent or employee, he is responsible for his acts, but to hold that when a husband drives the car of his wife, she being in it, that he is her agent without any proof of how or under what circumstances he is driving it, is to go much further than the law has done or we are willing to do.' "

Here there is proof of how and under what circumstances he was driving it, which proof in this instance was furnished by plaintiff.

I call attention to the cases cited in the annotation to 80 A. L. R., page 286, under the heading "Car operated by member of owner's family." The author of the annotation states: "The fact that one was riding in his automobile while it was being driven by a member of his family will not necessarily render him liable for an injury resulting from its negligent operation. His liability, apart, from statute, generally depends upon whether the car was being driven by his servant or agent, and his presence in the car is evidence of that fact."

I also call attention to the case of Powers v. State, 178 Md. 23, 11 A. 2d 909, wherein the court held: "If the owner of a car either requests or allows another person to drive while he is occupying it, his request of (or) permission will not of itself exclude his right of control. The owner has the right and the duty to prevent, if possible, the driver from operating the machine in a reckless and dangerous manner. If the car is negligently operated, it is presumed that the owner consented to the negligence. Therefore, in the absence of proof that he abandoned the right of control, he is liable for any damage resulting from the negligence of the driver."

The undisputed evidence in this record requires the conclusion under the rule in Petersen v. Schneider, *supra*, that the negligence of the driver of plaintiff's car, if any, was imputed to the plaintiff.

I submit that the decision in the Petersen case puts this court in accord with the dominant rule in this country. I find no reason for wrapping the cloak of immunity around the owner of a car under the circumstances here.

DARYL LONG, APPELLANT, V. F. L. WHALEN, REAL NAME UNKNOWN, APPELLEE.
71 N. W. 2d 496

Filed July 15, 1955. No. 33667.

1. **Trial.** If there is any evidence which will sustain a finding for the litigant having the burden of proof in a cause the trial court may not disregard it and decide the case as a matter of law.
2. **Negligence: Trial.** In deciding the contention that a litigant is barred from recovery by his contributory negligence every material fact which his evidence tends to prove should be considered as established.
3. **Trial.** It is error for the trial court to submit to the jury an issue pleaded by the plaintiff which under the evidence produced in the case affords no basis of recovery by the pleader.
4. **Automobiles.** The duty of a driver of a motor vehicle to sound a horn or give a warning of its approach is not an absolute one but it depends upon the circumstances.
5. **Trial: Appeal and Error.** If it does not appear from the record that an incorrect instruction to the jury did not affect the result of the trial of the case unfavorably to the party affected by it the giving of the instruction must be considered prejudicial error.
6. ———: ———. If an instruction is given which it is claimed does not fully state the law upon the subject to which it relates and the attention of the trial court is directed to the alleged defect by a tendered and requested proposed instruction containing the claimed omission and the requested instruction was refused the party affected may have the alleged error because thereof reviewed in this court.
7. **Automobiles.** It is a part of the law of the road in this state that when two vehicles approach or enter an intersection at approximately the same time, the driver of the vehicle on the left must yield the right-of-way to the vehicle on the right if it is traveling at a lawful rate of speed.

8. ———. Right-of-way in this connection is the right of one vehicle to proceed uninterruptedly in a lawful manner in the direction in which it is moving in preference to another vehicle approaching from a different direction into its path.
9. ———. A vehicle which has entered an intersection and is passing through it at a lawful speed has the right-of-way over a vehicle approaching the intersection from a different direction into its path.
10. ———. One having the right-of-way may not on that account proceed with disregard of the surrounding circumstances. He has the right-of-way over traffic approaching on his left, but he is not thereby relieved from the duty of exercising ordinary care to avoid accidents.
11. ———. The drivers of vehicles approach an intersection at approximately the same time whenever the two vehicles are in such relative position that upon appraisal of all factors it should appear to a man of ordinary prudence approaching from the left that there is danger of collision if he fails to yield the right-of-way.

APPEAL from the district court for Lancaster County: HARRY A. SPENCER, JUDGE. *Reversed and remanded.*

Ginsburg & Ginsburg, for appellant.

Kirkpatrick & Dougherty, for appellee.

Heard before SIMMONS, C. J., CARTER, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ., and FLORY, District Judge.

BOSLAUGH, J.

Appellant sought to recover damages from appellee on the basis that injuries to his person by the collision of an automobile operated by appellant and a motor vehicle driven by appellee were caused by his negligence. Appellant included in his cause of action a claim for property loss because of damage to the automobile he was operating and an amount for medical, hospital, and nursing services assigned to him by his father. The result of the trial in district court was a verdict for appellee. The motion of appellant for another trial was denied and he prosecutes this appeal.

The circumstances of the accident as alleged by ap-

pellant are these: He was driving a Chevrolet coach May 29, 1951, at about 5 p. m. toward the west on a county road south of and in the vicinity of Glenvil. Appellee was about the same time operating his Ford coupé toward the north on a county road which intersected the road on which appellant was traveling. The roads were each graded and graveled. Appellant entered the intersection of the roads and while therein appellee wrongfully and negligently drove his motor vehicle onto and against the left side of the automobile of appellant with great force and violence. The car appellant was driving was practically destroyed. Multiple and serious injuries were inflicted upon appellant. He was compelled to incur large obligations for hospital, medical, and nursing services. He has suffered and will as a result thereof suffer additional disability. Appellant made numerous specifications of negligence against appellee as the proximate cause of the accident and of the injuries to appellant.

Appellee conceded he was operating his motor vehicle at about the time and place described by appellant but he denied all other charges made against him as to negligence or otherwise. He asserted that any injuries or damages sustained by appellant were proximately caused by his reckless and negligent acts which were separately specified. The negligence of appellant was charged to have been more than slight. Appellee says that he had the right-of-way to cross the intersection; that he was there first; that appellant approached at great speed; that appellee waived his right to prior passage through the intersection and brought his car to a dead stop south of the traveled portion of the east-west road; and that appellant drove his car on the south or wrong side of the road onto and against the side of the car of appellee.

The issues were which of the parties had the right-of-way at the intersection and which party was guilty of negligence that proximately caused the accident. Ap-

pellant complains of what he says was prejudicial error in instructions given the jury by the trial court. Appellee asserts that the proximate cause of the accident was the contributory negligence of appellant that was more than slight and hence he was not entitled to recover any amount, and that he was not prejudiced by any error that occurred at the trial. If the premise of appellee is sustained by the record his conclusion is indisputable. If the negligence of plaintiff in comparison with the negligence of defendant is more than slight and is a proximate cause of the accident of which plaintiff complains he may not succeed in the cause. Dickenson v. County of Cheyenne, 146 Neb. 36, 18 N. W. 2d 559; Miller v. Aitkens, *ante* p. 97, 69 N. W. 2d 290.

There was proof tending to establish these matters: The day of the accident was pleasant and clear. It occurred about 5 p. m. when the sun was in the southwest and it was daylight. There had been a rain the night before and while the roads were damp under the surface they were in good condition and were not muddy or slippery. The intersection was in a practically level area, was unobstructed, and could be seen by a traveler approaching it for a distance of about 500 feet to the south and for a distance of about 460 feet to the east. After the appellant came up from the lower ground or valley east of the intersection and was within seeing distance of it he was seen looking to the south and then to the north. His companion in the car at that time noticed an automobile to the south. She estimated it was as far or somewhat farther from the intersection as was the car in which she was riding. She watched the car to the south as it moved toward the intersection. The car driven by appellant was going the faster. The companion of appellant did not have any thought of or anxiety about the imminence of an accident as she watched the car from the south until the one in which she was riding came to and entered the intersection.

The car from the south was owned and operated by appellee and it was then close to the intersection. It hit the car operated by appellant on its left side back of the front side of the door. It was not struck on its front, that part of the car was uninjured. The accident or collision was about in the middle of the intersection. Neither of the cars involved slowed nor stopped before they collided. A witness testified that appellee soon after the accident and near the place thereof said he did not see any car coming. The rate of speed the car appellant operated was estimated at 45 to 55 miles an hour and the speed of the car of appellee was estimated at 20 to 30 miles an hour. The car of appellee was not in the intersection before the other car entered it. The car going west before and at the time of the accident was traveling straight ahead and it did not make any movement indicating it was changing its course. The point of the collision was expressed by the sheriff as right at the main traveled part of the north-south road. He said as near as he could tell the marks he saw at the point of the impact of the cars were where the usual traveled course is of that east-west road. He also explained "that was a graveled road, a country road, and like the other road, pretty near everybody else meeting a car was in the center of the road, both roads are that way." Appellee could have seen the car operated by appellant at any time when it was within a distance of about 460 feet of the intersection.

If there is any evidence which will sustain a finding for the party having the burden of proof in a cause the trial court may not disregard it and direct a verdict against him. Haight v. Nelson, 157 Neb. 341, 59 N. W. 2d 576. In deciding the contention of appellee that appellant was as a matter of law barred from recovery herein because of his contributory negligence every material fact which the evidence of appellant tends to prove should be considered for the purpose of the motion as established. Hoerger v. City State Bank, 151

Neb. 321, 37 N. W. 2d 393; Canaday v. Krueger, 156 Neb. 287, 56 N. W. 2d 123. The record prevents the conclusion, as appellee contends, that the evidence conclusively shows that appellant was as a matter of law guilty of contributory negligence more than slight which was a proximate cause of the accident.

Appellee charged in his answer that any injuries or damages sustained by appellant were caused by his negligence which was more than slight and the sole proximate cause of the accident. A specification of negligence made against him therein was that he "failed to sound any warning or otherwise give notice of his approach and of his intent to usurp the right of way in said intersection, knowing that the defendant (appellee) was" therein. The trial court expressed this in an instruction to the jury by saying that defendant by his answer alleged that the negligent acts of plaintiff (appellant) were the sole and proximate cause of the accident, injuries, and damage sustained by him, and that one of the negligent acts alleged against him was "failing to sound any warning or give notice of his approach." Another part of the charge to the jury advised it "that the burden of proof is upon the defendant to prove every material affirmative allegation in his answer * * * by a preponderance of the evidence" subject to two exceptions, neither of which is important to the discussion or conclusion of this phase of the case. The fact that appellant did not sound the horn on his car or give any other warning of his approach to the intersection was stressed by the examination of each person who testified during the trial that was in a position to have any information on the subject and there were several persons who were so situated. They each answered that there was no warning given or that no signal was heard or seen. The absence of a warning by appellant was emphasized by appellee at the trial as negligence on his part as it is in this court by the statement in the brief that Mrs. Long, the wife of

appellant, "supported this allegation that 'no horn was sounded' Plaintiff (appellant) apparently conceded it." The conclusion is then asserted that this was one of the acts of negligence of the appellant.

The opportunity of each of the parties to see the other approaching the intersection was unobstructed and free from interference for the considerable distances hereinbefore stated. Appellee as he drove north toward it looked east and he said he could see plainly to where the road went over the knoll, and that there was no obstruction whatsoever. The distance which he could see was more than 460 feet. He heard the noise of a car. He saw it plainly when it came upon the higher ground as it traveled toward the intersection. Appellee had all and more information concerning the approach of the car appellant was operating than the sounding of a horn or the giving of any signal could have afforded him. Any signal or warning given by appellant in the circumstances of the record would have been futile and useless. His failure in this respect was not negligence or evidence of negligence. It had no relation to the cause of the accident. It was a wholly unimportant fact. The duty to sound a horn or give a warning during the operation of a motor vehicle is not an absolute one. The duty in this regard depends upon circumstances. In this instance the record establishes beyond the area of argument that there was no such duty on appellant. The charge that the horn was not sounded or a warning given by appellant of his approach to the intersection should have been by the court entirely eliminated from consideration by the jury. Dorn v. Sturges, 157 Neb. 491, 59 N. W. 2d 751. These comments therein are relevant in the present case: "With reference to whether or not the driver of the plaintiff's truck was guilty of negligence in failing to sound his horn or warn the defendant of his presence in approaching the intersection, the following is applicable: The duty to sound a signal warning of the approach of a motor vehicle depends largely

upon the circumstances of the particular case. * * * We believe that under the evidence the driver of the plaintiff's truck could not be found guilty of negligence in failing to sound his horn. Failure to do so had no relation to the cause of the accident, and therefore was no part of the proximate cause thereof."

The jury was permitted to and may have concluded that appellant was more than slightly contributorily negligent and that his negligence in this regard was the proximate cause of the accident because of the instruction concerning the absence of a warning by appellant of his approach to the intersection. The court told the jury that appellee was required to prove all of the affirmative allegations of his answer before he could have a verdict. The allegation that appellant did not sound his horn or give a warning was one of the statements of the answer. It must be assumed that the jury observed the mandate of the instruction. In any event it cannot be ascertained from the record that the jury was not improperly influenced by the instruction or that appellant was not thereby prejudiced. It must therefore be determined that the giving of the instruction referred to above was prejudicial error. Borden v. General Insurance Co., 157 Neb. 98, 59 N. W. 2d 141; Hoffman v. State, *ante* p. 375, 70 N. W. 2d 314.

Appellant requested the trial court to fully advise the jury of the law of the road concerning the right-of-way of vehicles at an intersection of highways and especially the meaning of the language of the statute "When two vehicles approach or enter an intersection at approximately the same time * * *." § 39-751, R. R. S. 1943. A proposed instruction was tendered by appellant that was sufficient to advise the court as to the scope and substance of the desire and request of appellant. The court refused the instruction tendered and failed to include matters contained therein in the charge to the jury. This was an important subject in this case because each party claimed he approached the intersec-

tion where the accident happened first and the evidence was sharply conflicting. The appellant complied with the procedure required to permit him to challenge the correctness of the action of the court in this regard. In re Estate of Hunter, 151 Neb. 704, 39 N. W. 2d 418; Hawkeye Casualty Co. v. Stoker, 154 Neb. 466, 48 N. W. 2d 623.

The jury should have been advised on this phase of the case substantially as follows: That a statute of the state provides that when two vehicles approach or enter an intersection at approximately the same time, the driver of the vehicle on the left shall yield the right-of-way to the vehicle on the right, if it is traveling at a lawful rate of speed.

The statute is intended to avoid collisions between vehicles at intersections and the right-of-way is not to be determined by the single test of which vehicle actually entered the intersection first, if the vehicles approached or entered the intersection at approximately the same time. The driver of a vehicle who does not have the right-of-way as explained herein is not justified in taking close chances and if there is reasonable danger of collision if both vehicles proceed then it is his duty to yield the right-of-way.

A vehicle which has entered an intersection and is crossing it at a lawful speed has the right-of-way over a vehicle approaching the intersection from a different direction into its path.

The driver of a vehicle upon reaching an intersection has the right-of-way over a vehicle approaching on his left, and may ordinarily proceed to cross, and has a legal right to assume that his right-of-way will be respected by the other driver; but if the situation is such as to indicate to the mind of an ordinarily prudent person in his position that to proceed would probably result in a collision, then he must exercise ordinary care and caution to prevent an accident even to the extent of waiving and giving up his right-of-way to cross the intersection first.

A driver of a vehicle on the left is approaching an intersection at approximately the same time as a party to his right when there is such relative proximity of the vehicles to the intersection that, upon appraisal of all the factors in the situation it would appear to a man of ordinary prudence in his place that there is danger of a collision if he fails to yield or forego the right-of-way to cross the intersection. The statute giving right-of-way to a vehicle coming to or entering an intersection from the right over another coming to it at approximately the same time imposes upon the driver from the left the duty of deciding as a man of ordinary prudence whether, under the circumstances, which includes a consideration of the relative distances of the approaching vehicles, their apparent speeds, and the probable conduct of the other driver, his arrival at the intersection will sufficiently precede that of the vehicle crossing his line of travel to warrant the reasonable belief that he can safely cross the intersecting road or highway ahead of it. Thrapp v. Meyers, 114 Neb. 689, 209 N. W. 238, 47 A. L. R. 585; Klement v. Lindell, 139 Neb. 540, 298 N. W. 137; Stark v. Turner, 154 Neb. 268, 47 N. W. 2d 569; Evans v. Messick, 158 Neb. 485, 63 N. W. 2d 491; Annotation, 175 A. L. R. 1013; 5 Am. Jur., Automobiles, § 297, p. 666; 60 C. J. S., Motor Vehicles, § 362, p. 865; 2 Blashfield, Cyclopedia of Automobile Law and Practice (Perm. Ed.), § 993, p. 217; 1 Berry, The Law of Automobiles (7th Ed.), § 3.16.

The judgment should be and it is reversed and the cause is remanded for further proceedings.

REVERSED AND REMANDED.

COUNTY OF SCOTTS BLUFF, STATE OF NEBRASKA, A GOVERNMENTAL SUBDIVISION, APPELLANT, V. PHILIPP HARTWIG ET AL., APPELLEES.

71 N. W. 2d 507

Filed July 15, 1955. No. 33687.

1. Waters. Water which appears upon the surface of the ground in a diffused state with no permanent source of supply or regular course is regarded as surface water.
2. ———. Surface water is a common enemy and the proprietor may by embankment or dike or otherwise defend himself against its encroachments and will not be liable in damages which may result from the deflection and repulsion defended against, provided that the proprietor in making defense on his own land himself exercised ordinary care, and provided he so uses his own property as not to unnecessarily and negligently injure another.
3. ———. The right of the owner, without negligence, to protect his land against surface water is a continuing one and the right is commensurate with the necessity for protection.
4. ———. While one may fight surface water and protect his premises against it by the use of reasonable means, he cannot collect it in a large body and flow it onto the land of a lower proprietor to his injury.
5. ———. Where surface water resulting from rain and snow flows in a well-defined course, whether it be a ditch, swale, or draw in its primitive condition, its flow cannot be arrested or interfered with by a landowner to the injury of neighboring proprietors.
6. Easements. An easement by prescription can be acquired only by an adverse user for 10 years and in cases of this character the prescriptive right will not commence to run until some act or fact exists giving the party against whom the right is claimed a cause of action.
7. Easements: Waters. An easement may be acquired by prescription, or by open, notorious, exclusive, and adverse use for a period of 10 years, for the flow of water in a watercourse or its flood plane. The rule however has no application to surface waters.
8. Waters. What would be illegal in the disposition of surface or other waters in a private individual, is likewise illegal when attempted by the public authorities, unless by agreement, or in the exercise of the power of eminent domain and by the payment of damages, the public authorities have acquired the

right to collect and discharge the water upon the land of another.

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

Holtorf & Hansen and *Byron M. Johnson,* for appellant.

Neighbors & Danielson, Townsend & Youmans, for appellees.

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

WENKE, J.

This action was brought in the district court for Scotts Bluff County. It was brought by the County of Scotts Bluff for the purpose of obtaining a mandatory injunction to compel certain parties it had made defendants therein to remove an earthen dike or embankment they had placed on their lands, which dike or embankment the county alleged obstructed the natural flow of surface waters, and to permanently enjoin these same defendants from in any way interfering with the natural drainage thereof. The basis for the action is the claim that the earthen dike or embankment caused the surface waters to back up and stand on the county's road and thus temporarily prevented its use and caused damage thereto. The trial court entered a decree against the county and denied it the relief asked for. The county thereupon filed a motion for new trial and has appealed from the overruling thereof.

In our consideration of the record the following is applicable: "It is the duty of the court to try the issues de novo and to reach an independent conclusion without being influenced by the findings of the district court except to the extent the evidence is in irreconcilable conflict, and as to that the court may consider the fact that the trial court saw the witnesses, observed their manner of testifying, and accepted one version of the facts rather

than the opposite." Keim v. Downing, 157 Neb. 481, 59 N. W. 2d 602.

The latter part of the foregoing quote has particular application to the evidence submitted relating to the condition existing at the corner involved immediately prior to the building by defendant Philipp Hartwig of a small house in the southeast corner of his farm. This he did in the spring of 1944. We shall hereafter refer thereto as a laborer's house.

The lands involved are the east half of Section 11 and the west half of Section 12, both sections being in Township 22 North, Range 56 West of the 6th P. M., in Scotts Bluff County. Philipp Hartwig is the owner of the northeast quarter of Section 11 and has been since 1927. His two sons, Henry and Conrad, are the owners of the northwest quarter of Section 12 and have been since 1946. They, with their respective wives, were made defendants herein and are the appellees.

The Mitchell Irrigation District was originally made a party to the action. The action was dismissed as to the district. No appeal was taken therefrom. It is, therefore, not a party to this appeal.

The county many years prior to the commencement of this action, but just how long ago is not shown, opened the section-line road between the southwest quarter of Section 12 and the southeast quarter of Section 11 and established and opened a county road between the northeast quarter and southeast quarter of Section 11. In the beginning this road was just a trail between two fences but gradually it has been improved by grading and gravelling until it has become a main county road regularly used as a mail and school bus route. The grading of the road resulted in borrow pits being cut along both sides of the road as it traverses this area.

The Mitchell Irrigation District, many years prior to the commencement of this action, but just how long ago is not shown, built an irrigation lateral in the southwest quarter of Section 12 running in a north-south direc-

tion along the west side thereof and just east of the section-line road. When this lateral reaches the point where the county road turns west the lateral also turns at an angle to the west until it reaches the section line. It then turns to the north and runs in the section line between the northwest quarter of Section 12 and the northeast quarter of Section 11. The west bank of this irrigation lateral is substantially higher than the surrounding areas with one exception, that is, at a point just east of where the county road turns west. At this point the irrigation lateral passes through a cement culvert which runs under a private lane. This lane extends from the turn in the road east onto the northwest quarter of Section 12. At the point of this culvert the irrigation lateral has no banks.

There was also an irrigation lateral built along the entire south side of the northeast quarter of Section 11. Just when the lateral was built is not shown but it apparently has been there for many years. The south part of this quarter slopes to the north and this lateral was and is used for irrigating the southern part thereof.

All the land herein involved slopes gently from the southwest to the northeast. In its natural state, before the building of these irrigation laterals, the moisture falling thereon would flow toward the northeast as diffused surface waters. After these irrigation laterals were built the surface waters, when they reached the banks of these irrigation laterals, turned and flowed either to the north or east, depending upon which lateral turned its flow. This caused the surface waters to collect at the turn in the road and on the northeast corner of the southeast quarter of Section 11. Just how large an area drains into this corner is not shown but apparently it is not very large. However, the water collecting in the corner has always caused the turn in the road to be wet and boggy after almost every rain of any consequence.

When this water collected in this corner it did not,

prior to 1944, reach a sufficient height that any substantial amount ever flowed north onto the northeast quarter of Section 11 and very little flowed east over the culvert and down the lane onto the northwest quarter of Section 12. It is apparent that the reason why it did not flow onto the northeast quarter of Section 11 was because of the irrigation lateral along the south side thereof and also because of the dirt and sand that had collected in the line of the fence running from the east end of the lateral east to the bank of the Mitchell Irrigation District lateral.

In the spring of 1944 Philipp Hartwig built a laborer's house on the southeast corner of his land. In connection with doing so he removed a section of the irrigation lateral and fence along the south line of his farm, just south of the house, and leveled off the ground where the lateral and fence had been. This somewhat lowered the general elevation of this area. Nothing happened, however, until June 1952. Then a heavy rain, augmented by water flowing over the west bank of the Mitchell Irrigation District lateral, caused sufficient water to collect in the corner that it flowed north onto the southeast corner of Philipp Hartwig's land, past the small house he had built there, and north onto the field for some 600 to 700 feet. There it ponded and drowned out about 10 acres of beans. The northeast quarter of Section 11 slopes from the south to the north and from the north to the south with an over-all general slope to the northeast. However, with the irrigation lateral along the east side thereof any water running on the land will collect in a pond along the east side thereof, about equal distance from the north and south line, and stay there until it evaporates or seeps away.

In October 1952, in order to correct this condition, Philipp Hartwig caused an earthen dike or embankment to be built along the south side of his land, just south of the laborer's house, and extended it far enough to the east so as to cover the culvert in the lane running

to the east onto the northwest quarter of Section 12. When another heavy rain came in June 1953 the surface waters therefrom, which were again substantially augmented by water flowing from the Mitchell Irrigation District's lateral, were prevented from running either north or east by this earthen bank. As a result they collected in this corner to a considerable depth and spread out onto the northeast corner of the southeast quarter of Section 11. The water did some damage to the road and for some 36 hours prevented the road from being used for travel. As already stated, it is to remove this dike or earthen embankment, and to permanently prevent it from being rebuilt, that this action was instituted.

Recognizing that the situation involves surface waters appellant suggests this court should overrule all its previous cases relating thereto and adopt the civil law rule as the law in force in this state, citing the fact that in Leaders v. Sarpy County, 134 Neb. 817, 279 N. W. 809, we cited Heier v. Krull, 160 Cal. 441, 117 P. 530, with approval. To fully understand the extent to which the rule announced in Leaders v. Sarpy County, *supra,* has application in this state we call attention to Jorgenson v. Stephens, 143 Neb. 528, 10 N. W. 2d 337, and Snyder v. Platte Valley Public Power & Irr. Dist., 144 Neb. 308, 13 N. W. 2d 160, 160 A. L. R. 1154, wherein its application is discussed. We think the principles applicable to surface waters, and which are here controlling, are not in confusion as appellant suggests. Insofar as here material they are as follows:

"Water which appears upon the surface of the ground in a diffused state with no permanent source of supply or regular course is regarded as surface water." Courter v. Maloley, 152 Neb. 476, 41 N. W. 2d 732.

"Surface water is that which is diffused over the surface of the ground, derived from falling rains or melting snows, and continues to be such until it reaches some well-defined channel in which it is accustomed

to and does flow with other waters, whether derived from the surface or springs, and it then becomes the running water of a stream and ceases to be surface water." Jack v. Teegarden, 151 Neb. 309, 37 N. W. 2d 387. See, also, Snyder v. Platte Valley Public Power & Irr. Dist., *supra;* Cooper v. Sanitary Dist. No. 1, 146 Neb. 412, 19 N. W. 2d 619; Schomberg v. Kuther, 153 Neb. 413, 45 N. W. 2d 129.

"* * * Surface water is a common enemy and the proprietor may by embankment or dike or otherwise defend himself against its encroachments and will not be liable in damages which may result from the deflection and repulsion defended against, provided that the proprietor in making defense on his own land himself exercised ordinary care, and provided he so uses his own property as not to unnecessarily and negligently injure another." Snyder v. Platte Valley Public Power & Irr. Dist., *supra.* See, also, Jorgenson v. Stephens, *supra;* Courter v. Maloley, *supra;* Schomberg v. Kuther, *supra.*

"The right of the owner, without negligence, to protect his land against surface water is a continuing one and the right is commensurate with the necessity for protection." Courter v. Maloley, *supra.*

"Every proprietor may lawfully improve his property by doing what is reasonably necessary for that purpose, and unless guilty of some act of negligence in the manner of its execution, will not be answerable to an adjoining proprietor, although he may thereby cause the surface water to flow on the premises of the latter to his damage; but if, in the execution of such enterprise, he is guilty of negligence, which is the natural and proximate cause of injury to his neighbor, he is accountable therefor." Schomberg v. Kuther, *supra.* See, also, Muhleisen v. Krueger, 120 Neb. 380, 232 N. W. 735; Courter v. Maloley, *supra.*

"While one may fight surface water and protect his premises against it by the use of reasonable means, he

cannot collect it in a large body and flow it onto the land of a lower proprietor to his injury. Todd v. York County, 72 Neb. 207, and cases there cited." Roe v. Howard County, 75 Neb. 448, 106 N. W. 587, 5 L. R. A. N. S. 831. See, also, Schomberg v. Kuther, *supra;* Keim v. Downing, *supra;* Ricenbaw v. Kraus, 157 Neb. 723, 61 N. W. 2d 350; Hengelfelt v. Ehrmann, 141 Neb. 322, 3 N. W. 2d 576.

" 'Surface waters may have such an accustomed flow as to have formed at a certain place a channel or course, cut in the soil by the action of the water, with well-defined banks, and having many of the distinctive attributes of a watercourse; and though there are no exceptions to the general rule except from necessity, this may constitute an exception, and if the flow is stopped by the erection of an embankment across and in the channel, some provision may be necessary for the allowance of the regular flow of the surface waters.' (Town v. Missouri P. Ry. Co., 50 Neb. 768, 70 N. W. 402.) This same doctrine was enunciated in Jacobson v. Van Boening, 48 Neb. 80, and Morrissey v. Chicago, B. & Q. R. Co., 38 Neb. 406." Muhleisen v. Krueger, *supra.*

"Where surface water resulting from rain and snow flows in a well-defined course, whether it be a ditch, swale, or draw in its primitive condition, its flow cannot be arrested or interfered with by a landowner to the injury of neighboring proprietors." Schomberg v. Kuther, *supra.* See, also, Snyder v. Platte Valley Public Power & Irr. Dist., *supra;* Jack v. Teegarden, *supra;* Courter v. Maloley, *supra;* McGill v. Card-Adams Co., 154 Neb. 332, 47 N. W. 2d 912; Ricenbaw v. Kraus, *supra.*

The latter is not the situation here as the surface waters have never flowed in any well-defined course on appellees' lands, either natural or artificial. It is true that it had collected in this corner for many years but there is no evidence that this collecting resulted in dumping it on appellees. In fact the evidence shows

that until 1952 it just collected in the corner and stayed there.

"An easement by prescription can be acquired only by an adverse user for ten years (Omaha & R. V. R. Co. v. Rickards, 38 Neb. 847); and in cases of this character the prescriptive right will not commence to run until some act or fact exists giving the party against whom the right is claimed a cause of action." Roe v. Howard County, *supra*. See, also, Courter v. Maloley, *supra*.

Under the conditions here shown to have existed no cause of action accrued to appellees until 1952. Situations may arise when conditions have so changed that the doctrine of estoppel will apply. See Johnk v. Union P. R. R. Co., 99 Neb. 763, 157 N. W. 918, L. R. A. 1916F 403. That is not the situation here.

In any event, as we said in Courter v. Maloley, *supra*, although "An easement may be acquired by prescription, or by open, notorious, exclusive, and adverse use for a period of ten years, for the flow of water in a watercourse or its flood plane. The rule however has no application to surface waters."

Since the county was, by statute, required to keep its roads open to travel does that fact give it an absolute right to drain surface waters upon lands adjoining a county road? In this regard we have said: "It is well settled that what would be illegal in the disposition of surface or other waters in a private individual, is likewise illegal when attempted by the public authorities, unless by agreement, or in the exercise of the power of eminent domain and by the payment of damages, the public authorities have acquired the right to collect and discharge the water upon the land of another." Roe v. Howard County, *supra*.

"What a private landowner may not do neither may a county nor other public authority do, except in the exercise of eminent domain." Purdy v. County of Madison, 156 Neb. 212, 55 N. W. 2d 617.

That the county has ample authority to relieve itself of this situation is evidenced by statutes relating to this duty. As an example see section 39-218, R. R. S. 1943. We find it must pursue such a course and that the statute provides an adequate remedy for that purpose. In other words, the county cannot take a landowner's property for this purpose without paying the damage he suffers as a result thereof.

We come then to the only question remaining, that is, were appellees negligent in constructing the dike and, if not, did they unnecessarily injure the county road by constructing it? We find nothing to indicate the dike or embankment was negligently constructed nor do we find its construction unnecessary for without it the land of Philipp Hartwig will be seriously and permanently damaged. We find what appellees did was a reasonable exercise of their right to repel these surface waters.

In view of the foregoing we have come to the conclusion that the judgment of the trial court is correct. We therefore affirm its action.

AFFIRMED.

SCHOOL DISTRICT NO. 42 OF HITCHCOCK COUNTY, NEBRASKA, ET AL., APPELLANTS, V. IDA M. MARSHALL, AS COUNTY SUPERINTENDENT OF HITCHCOCK COUNTY, NEBRASKA, APPELLEE.

71 N. W. 2d 549

Filed July 15, 1955. No. 33692.

1. Statutes. In construing a statute to determine the legislative intent a court may consider the history of its passage, the amendments offered, and action taken by the Legislature thereon.
2. Schools and School Districts. The provision in section 79-402, R. S. Supp., 1953, that any plan of reorganization must be submitted to the state committee for school district reorganization and be approved by it before a hearing is had, relates only

to any plan of reorganization proposed by a group of districts under the provisions of sections 79-426.20 and 79-426.21, R. S. Supp., 1953.

APPEAL from the district court for Hitchcock County: VICTOR WESTERMARK, JUDGE. *Reversed and remanded with directions.*

Charles M. Bosley and *Robert C. Bosley,* for appellants.

Jack H. Hendrix, for appellee.

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

SIMMONS, C. J.

This is an action in mandamus. Plaintiffs sought a writ commanding the defendant as county superintendent of schools to fix a date for hearing on petitions to create a new school district from three existing districts, to give notice of the hearing, and for other appropriate relief.

Issues were made and trial was had. The trial court denied the writ and dismissed the cause. Plaintiffs appeal.

We reverse the judgment of the trial court and remand the cause with directions to issue the writ.

The facts are stipulated. All of the electors of School District No. 36, 13 of the 14 electors in School District No. 15, and all of the electors in School District No. 42 in Hitchcock County filed petitions with the defendant county superintendent of schools, petitioning that School Districts No. 36 and No. 15 be attached to School District No. 42. The defendant thereafter submitted the matter to the state committee for the reorganization of school districts. That body did not approve the plan. The defendant then refused to fix a date for a hearing on the petitions. This action followed.

Plaintiffs rely on the provisions of section 79-402, R. S. Supp., 1953, providing: "The county superintendent shall create a new district from other districts, * * *

upon petitions signed by fifty-five per cent of the legal voters of each district affected. * * * Before the county superintendent authorizes any changes as provided in this section, the county superintendent must fix a date for hearing and give all interested parties an opportunity to be heard at such hearing."

In Cacek v. Munson, *ante* p. 187, 69 N. W. 2d 692, we held: "* * * where the record of the proceedings before a county superintendent of schools in a proper hearing upon petitions filed under section 79-402, R. S. Supp., 1953, discloses that 55 per cent or more of the legal voters of each school district affected have filed petitions requesting a change of boundaries, the county superintendent has the jurisdiction and mandatory duty to order the boundary changes requested by such petitions."

This was followed in Olsen v. Grosshans, *ante* p. 543, 71 N. W. 2d 90.

Defendant relies on a provision of the statute not involved in the above two decisions. In 1953, the Legislature amended section 79-402, R. S. Supp., 1951, in part by inserting therein the following: "Any plan of reorganization must be submitted to the state committee for school district reorganization and be approved by it before a hearing is had." Laws 1953, c. 295, § 1, p. 999. This provision, mandatory in form, is relied on by the defendant.

The question then is the controlling effect, if any, of the 1953 provision upon the mandatory duty of the defendant which the plaintiffs invoke.

The key to the answer is found in the use by the Legislature of the phrase "Any plan of reorganization" as the subject of the sentence in the 1953 amendment.

Legislation with reference to the powers of the county superintendent to change the boundaries of school districts is of long standing. The Legislature in 1949 enacted a comprehensive recodification of school laws. Laws 1949, c. 256, p. 689. It enacted the first of the two provisions above quoted relied on by plaintiffs. The

second sentence above quoted, relied on by plaintiffs, was enacted as an amendment in 1951. Laws 1951, c. 276, § 1, p. 928.

Also in 1949, the Legislature enacted an independent act cited as the "Reorganization of School Districts Act." Laws 1949, c. 249, p. 673. This act as amended became sections 79-426.01 to 79-426.19, R. R. S. 1943.

In the above act the Legislature created a state committee for the reorganization of school districts and, in each county, a county committee for the reorganization of school districts. The duty of recommending plans and procedures for the reorganization of school districts was placed on the state committee. The county committee was required to consider and determine whether or not the changes should be attempted. The act likewise provided that the county committee could formulate plans of reorganization of school districts which were to be submitted to the state committee for review. The Legislature then, in substance, in 1949 provided for two ways of initiating plans of reorganization at the same session in which it enacted the first of the two provisions relied on by plaintiffs. The Legislature amended the 1949 Act in 1951 (Laws 1951, c. 278, p. 937) in ways not material here.

When the 1953 Legislature met, there existed in the statutory law the provisions above quoted as to the power and duty of the county superintendent to create new districts from other districts, and the two plans for the reorganization of school districts set up in the reorganization act.

We have held that in construing a statute to determine the legislative intent a court may consider the history of its passage, the amendments offered, and action taken by the Legislature thereon. State ex rel. Taylor v. Hall, 129 Neb. 669, 262 N. W. 835.

Accordingly we go to Legislative Bill 279 introduced in the 1953 Legislature. By its title, in part it was an act to amend section 79-402, R. S. Supp., 1951, "to provide

that the county committee for reorganization of school districts may create a new district from other districts * * *."

This bill in its first section proposed, so far as is material here, to amend section 79-402, R. S. Supp., 1951, as it then existed, by transferring the power of the county superintendent to the county committee for the reorganization of school districts. It is pointed out that "the uniting of one or more established districts" could be accomplished by the reorganization methods. § 79-426.02, R. R. S. 1943. In sections 2 and 3 it was proposed to grant power to "a group of districts" to institute a plan of reorganization, by petition, which was to be sent to the state committee which was required to make a personal check of the plan proposed in conjunction with the county committee.

Legislative Bill 279 as amended became Laws 1953, c. 295, p. 999. Section 1 as enacted is now section 79-402, R. S. Supp., 1953, and sections 2 and 3 became sections 79-426.20 and 79-426.21, R. S. Supp., 1953.

The provision of the title of the bill as introduced, above quoted, was omitted from the title of the act as passed.

The language in section 1 of the bill providing for the transfer of the power of the superintendent to the county committee was eliminated and the language granting power to the county superintendent was re-enacted. The re-enacted section contained the new sentence quoted above upon which defendant relies.

In the same act the Legislature authorized a third method of reorganization of school districts to be initiated by "a group of districts," provided for conjunctive consideration by the state and county committee, and "The proposal, as finally approved or as amended, shall be returned to the county superintendent who shall call an election, * * *."

What then is the scope of the phrase "Any plan of reorganization"? Does it relate to any reorganization,

or to any of the three plans of reorganization, or to any plan of reorganization advanced by "a group of districts" under the 1953 act?

The Supreme Court of Iowa was confronted with a similar problem. There a statute related to "any plan of consolidation" of school districts. The court pointed out that Iowa had an "official plan method" and a "peoples' petition method" of creating new districts. It was held that because the Legislature had enacted a plan of reorganization method and also had made provision for the creation of consolidated districts by petition as an independent procedure, that the statute applied only to every plan initiated under the plan of reorganization act. See Smaha v. Simmons, 245 Iowa 163, 60 N. W. 2d 100. That reasoning is applicable here.

Does the phrase "Any plan of reorganization" relate to the state or county committee method? We decide it does not for the reason that under those procedures the state committee has only advisory powers and there appears no legislative intent to change that power. See §§ 79-426.07 and 79-426.12, R. S. Supp., 1953.

It necessarily follows that it relates to the "a group of districts" plan of reorganization which was set up in the same act where the "Any plan of reorganization" provision was enacted. The provision in section 79-402, R. S. Supp., 1953, here considered fixes a mandatory power in the state committee. The provision in section 79-426.21, R. S. Supp., 1953, fixes a mandatory duty in the county superintendent after the "a group of districts" plan is approved or approved as amended by the state committee acting in conjunction with the county committee. As so construed and applied, the conflict in the considered provisions of section 79-402, R. S. Supp., 1953, does not arise. This is in accord with the reasoning followed in Smaha v. Simmons, *supra,* that the Legislature had in mind the specific subject matter of the law it was enacting.

Accordingly, we hold that the provision in section 79-

402, R. S. Supp., 1953, that "Any plan of reorganization must be submitted to the state committee for school district reorganization and be approved by it before a hearing is had" relates only to any plan of reorganization proposed by "a group of districts" under the provisions of sections 79-426.20 and 79-426.21, R. S. Supp., 1953.

The judgment of the trial court is reversed and the cause remanded with directions to issue the writ prayed for by plaintiffs in accord with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

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Adverse Possession.

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15. The record of a court properly authenticated where a matter originated or was tried imports absolute verity and cannot be contradicted, varied, or changed by oral testimony or any extrinsic evidence. *Segebart v. Gregory* 64

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20. It is error to submit issues upon which there is no evidence to sustain an affirmative finding. *Welstead v. Ryan Construction Co.* 87

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27. The Supreme Court in determining if findings of the district court are sustained by evidence must consider the proof and permissible inferences therefrom most favorably to the successful party. *Otto Gas, Inc. v. Stewart* 200

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29. When the Supreme Court reverses a decree and remands the cause with directions to enter a specific judgment or decree, the mandate is final and conclusive upon all parties as to all matters so directed, and no new defenses can be entertained or heard in opposition thereto. *Jurgensen v. Ainscow* 208

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37. The ruling of the trial court on a question involving misconduct of the jury will not be disturbed in the absence of a showing of an abuse of discretion. *Kohrt v. Hammond* 347

38. Where a juror during a trial acquires information that appears to relate itself to the issues of the case, it will not vitiate the verdict unless the facts gained are of such a character as to enable a reviewing court to say that they influenced the juror in reaching the verdict rendered. *Kohrt v. Hammond* 347

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48. When a question of the sufficiency of the evidence is involved in an error proceeding, the judgment of the lower court or tribunal should be affirmed when all of the evidence with reference thereto is not contained in a bill of exceptions and the transcript fails to disclose any error prejudicial to the party prosecuting the error proceeding. *Olsen v. Grosshans* 543

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52. When a part of a sentence is illegal an appellate court may, if the sentence is divisible, modify it by striking out the illegal part. *Olson v. State* 604

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54. Before an error requires a reversal, it must be prejudicial to the rights of the defendant and, as a result, a substantial miscarriage of justice occurred. *Gates v. State* 722

55. Where there is no evidence upon which to base an instruction given, although correct as a legal proposition, it is ground for reversal if it has a tendency to mislead the jury. *Doleman v. Burandt* 745

56. The Supreme Court on the trial de novo of a case in which the evidence is all in writing will consider and decide it uninfluenced by what was done or concluded in the case before it was presented to it. *Miller v. Miller* 766

57. The giving of an incorrect instruction must be considered prejudicial where there is no showing that it did not affect the result of the trial. *Long v. Whalen* 813

58. If an instruction is given which it is claimed does not fully state the law and the attention of the trial court is directed to the alleged defect by a requested proposed instruction supplying the claimed omission, the party affected may have the alleged error reviewed in the Supreme Court. *Long v. Whalen* 813

Appearances.

The filing of a motion for new trial and to vacate a void judgment is ordinarily a general appearance, but such general appearance does not relate back so as to validate the void proceedings. Its only effect is to confer jurisdiction over the person of defendant from its date. *Board of Trustees of York College v. Cheney* 631

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4. Statutory provision with relation to the allowance of attorney's fees is mandatory. *State ex rel. School Dist. v. Ellis* 400
5. If a husband in an action for divorce fails to satisfy a judgment for alimony in favor of the wife and the wife employs counsel to enforce it, and this is accomplished with or without court proceeding, the court in which the judgment was rendered may require the husband to pay to the wife a reasonable amount as compensation for the services of her counsel. *Miller v. Miller* 766
6. Persons admitted to practice law in this state voluntarily assume certain obligations and duties as officers of the courts. In the performance thereof they must conform to certain standards in relation to clients, to the courts, to the profession, and to the public. *State ex rel. Nebraska State Bar Assn. v. Dunker* 779
7. Generally, a contingent fee contract executed before decree is rendered for payment of attorney's fees in a divorce action is void as against public policy, since it tends to prevent a reconciliation between the parties and to destroy the family relationship. *State ex rel. Nebraska State Bar Assn. v. Dunker* 779
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9. Under ordinary circumstances, an attorney who has contracted with his client as to the amount of his compensation for a specified service will not be allowed to contract for greater compensation for

such service while the service is being rendered. *State ex rel. Nebraska State Bar Assn. v. Dunker* 779

10. A lawyer who, in the pursuit of his profession, executes an agreement which is void as against public policy is guilty of a breach of professional obligation and duty which may justify disciplinary action. *State ex rel. Nebraska State Bar Assn. v. Dunker* 779
11. Generally a lawyer who threatens criminal prosecution to enforce a civil claim for himself or his client thereby breaches his obligation and duty as a lawyer and officer of the court which may justify disciplinary action. *State ex rel. Nebraska State Bar Assn. v. Dunker* 779
12. The purpose of a disbarment proceeding is not so much to punish the lawyer as it is to determine in the public interest whether he should be permitted to practice. *State ex rel. Nebraska State Bar Assn. v. Palmer* 786
13. The grant of a license to practice law is made on the implied understanding that the party receiving such license shall in all things demean himself in a proper manner and abstain from such practices as cannot fail to bring discredit upon himself, the profession, and the courts. *State ex rel. Nebraska State Bar Assn. v. Palmer* 786
14. The oath taken by a lawyer requires him to faithfully discharge his duties; to uphold and obey the Constitution and laws of this state; to observe established standards and codes of professional ethics and honor; to maintain the respect due to courts of justice; and to abstain from all offensive practices which cast reproach on the courts and the bar. *State ex rel. Nebraska State Bar Assn. v. Palmer* 786
15. A lawyer owes his first duty to the court. He assumed his obligation toward it before he ever had a client. He cannot serve two masters, and the one he has undertaken to serve primarily is the court. *State ex rel. Nebraska State Bar Assn. v. Palmer* 786
16. The ethical standards relating to the practice of law in this state are the Canons of Professional Ethics of the American Bar Association and those which may from time to time be approved by the Supreme Court. *State ex rel. Nebraska State Bar Assn. v. Palmer* 786

Automobiles.

1. Testimony that a motor vehicle was traveling at a speed of 45 or 50 miles per hour is only evidence that such vehicle was traveling at the lower rate of speed. *Granger v. Byrne* 10
2. The lawfulness of the speed of a motor vehicle, within the limits fixed by law, is determined by the further test of whether the speed was greater than was reasonable and prudent under the conditions then existing. *Granger v. Byrne* 10
3. A certificate of title to a motor vehicle is generally conclusive evidence of the ownership of the vehicle. *Terry Bros. & Meves v. National Auto Ins. Co.* 110
4. Independent of statute or city ordinance, the operator of a motor vehicle on a highway or city street is under a duty to exercise ordinary care to avoid striking a person on a highway or city street. *Gain v. Drennen* 263
5. A vehicle traveling on a highway at a reasonable and lawful rate of speed is not required to slow down or stop upon the appearance of a vehicle about to enter the highway from a private road until it reasonably appears that its driver is not going to yield the right-of-way. *Kohrt v. Hammond* 347
6. If the driver of an automobile entering a highway from a private road looks for approaching vehicles but fails to see one which is favored over him under the rules of the road, he is guilty of negligence. *Kohrt v. Hammond* 347
7. The duty to look for approaching vehicles implies the duty to see that which is in plain sight. *Kohrt v. Hammond* 347
8. The punishment for the offense of speeding is specifically defined in a separate section and that part of any penalty imposed in excess of the maximum provided and not permitted under any other applicable penalty section is void. *Olson v. State* 604
9. The discretionary power given to the court to revoke a driver's license is limited to the charges of operating a motor vehicle in such a manner as to endanger life, limb, or property, or while under the influence of alcoholic liquor or any drug, brought under appropriate statutes, and does not apply to a simple charge of speeding. *Olson v. State* 604
10. In a guest case, a verdict should not be directed

or a cause of action dismissed, or a judgment entered notwithstanding the verdict, unless the court can definitely determine that the evidence of defendant's negligence, when taken as a whole, fails to reach such degree of negligence that is considered gross. *Rice v. Neisius* 617

11. In order to recover damages for injuries sustained while riding in the host's automobile, a guest must establish by a preponderance of the evidence the gross negligence of the host relied upon, and that such gross negligence so established was the proximate cause of the accident resulting in the damages sought. *Rice v. Neisius* 617

12. What amounts to gross negligence in any given case must depend upon the facts and circumstances. The fact that the operator of the automobile may have been guilty of ordinary negligence is insufficient to warrant a recovery in favor of a guest. *Rice v. Neisius* 617

13. 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 headlights. *Allen v. Kavanaugh* 645

14. A driver of an automobile is legally obligated to keep such a lookout that he can see what is plainly visible before him and he cannot relieve himself of that duty. In conjunction therewith, he must so drive his automobile that when he sees the object he can stop his automobile in time to avoid it. *Allen v. Kavanaugh* 645

15. As a general rule a motorist who drives his 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 headlights is negligent as a matter of law. *Allen v. Kavanaugh* 645

16. When one being in a place of safety sees, or in the exercise of reasonable care for his own safety should see, the approach of a moving vehicle in close proximity, suddenly moves from the place of safety into the path of such vehicle and is struck, his own conduct constitutes contributory negligence more than slight in degree, as a matter of law, and precludes recovery. *Heinis v. Lawrence* 652

17. When two motor vehicles collide in an ordinary city or country intersection and there is no evidence of a substantial difference in the speed of the

vehicles, it is generally self-evident that they approached the intersection at approximately the same time under the rule of right-of-way at intersections. *Gernandt v. Beckwith* 719

18. A motor truck owned by a private person and used to carry mail under contract with the United States Post Office Department is required to pay the registration fee to which commercial trucks are subject under the statutes of Nebraska. *Aulner v. State* 741

19. For overroading of truck in excess of specified carrying capacity, the owner of a motor truck used to carry mail under contract with the United States Post Office Department is subject to the penalty prescribed. *Aulner v. State* 741

20. Where plaintiff's automobile is standing still on the highway when defendant, driving on icy pavement in a blinding snowstorm, first sees it, the only issue of contributory negligence is whether plaintiff should have, under the circumstances, removed his car from the pavement or given warning. *Doleman v. Burandt* 745

21. Where plaintiff's automobile is standing still on highway, instructions imposing duties on plaintiff with respect to operation of automobile are prejudicially erroneous. *Doleman v. Burandt* 745

22. When an automobile is owned jointly and one of the two co-owners entrusts its use to the other, any negligence of the owner driving the automobile is imputed to the other owner in an action brought by the owners as plaintiffs against a third party for property damage to their jointly owned automobile. *Doleman v. Burandt* 745

23. A person is liable for the negligent operation of an automobile by his servant or agent only where such servant or agent, at the time of the accident, was engaged in his employer's or principal's business with his knowledge and direction. *Bartek v. Glasers Provisions Co., Inc.* 794

24. The negligence of a husband while driving an automobile with his wife as a guest may not be imputable to her but she may be responsible for the consequences of her own negligence. *Bartek v. Glasers Provisions Co., Inc.* 794

25. Ordinarily, the guest passenger in an automobile has a right to assume that the driver is a reasonably safe and careful driver; and the duty to warn

him does not arise until some fact or situation out of the usual and ordinary is presented. *Bartek v. Glasers Provisions Co., Inc.* 794

26. Where the owner is a passenger in his own automobile while it is being operated by another, the negligence of the operator is not imputable to the owner, except where the operator is the owner's servant or agent, or where the operator and the owner are engaged in a joint enterprise, or where the owner assumes to direct the operation of the automobile. *Bartek v. Glasers Provisions Co., Inc.* 794

27. To constitute occupants of a motor vehicle joint adventurers there must be not only joint interest in the objects and purposes of the enterprise but also an equal right to direct and control the conduct of each other in the operation of the vehicle. *Bartek v. Glasers Provisions Co., Inc.* 794

28. A person traveling a favored street protected by a traffic signal, of which he has knowledge, may properly assume that oncoming traffic will obey it. *Bartek v. Glasers Provisions Co., Inc.* 794

29. The duty of a driver of a motor vehicle to sound a horn or give a warning of its approach is not an absolute one but depends upon the circumstances. *Long v. Whalen* 813

30. When two vehicles approach or enter an intersection at approximately the same time, the driver of the vehicle on the left must yield the right-of-way to the vehicle on the right if it is traveling at a lawful rate of speed. *Long v. Whalen* 813

31. Right-of-way at an intersection is the right of one vehicle to proceed uninterruptedly in a lawful manner in the direction in which it is moving in preference to another vehicle approaching from a different direction into its path. *Long v. Whalen* 813

32. A vehicle which has entered an intersection and is passing through it at a lawful speed has the right-of-way over a vehicle approaching the intersection from a different direction into its path. *Long v. Whalen* 813

33. One having the right-of-way may not on that account proceed with disregard of the surrounding circumstances. He has the right-of-way over traffic approaching on his left, but he is not thereby relieved from the duty of exercising ordinary care to avoid accidents. *Long v. Whalen* 813

34. The drivers of vehicles approach an intersection at

approximately the same time whenever it should appear to a man of ordinary prudence approaching from the left that there is danger of collision if he fails to yield the right-of-way. *Long v. Whalen* 813

Banks and Banking.

1. Where a check is deposited for collection, the bank of deposit is the agent of the depositor for collection, and each collecting bank to whom it is forwarded becomes the agent of the depositor. *Selig v. Wunderlich Contracting Co.* 215
2. The relation between a depositor and a bank may be dual in character. As to a general deposit a debtor and creditor relationship exists. As to the payment of checks drawn upon it, the relationship is that of principal and agent. *Selig v. Wunderlich Contracting Co.* 215

Bills and Notes.

1. When a married woman signs a note there is no presumption that she intended thereby to fasten a liability upon her separate estate. *Marmet v. Marmet* 366
2. When coverture is pleaded and proved or admitted, the burden is upon the plaintiff to establish that the note, upon which the action is based, was made with reference to, and upon the credit of, her property and with the intent to bind the same. *Marmet v. Marmet* 366

Bridges.

1. It is the duty of a drainage district to build bridge over its ditch where it crosses a highway, and it is the duty of the county thereafter to maintain the bridge. *Henneberg v. County of Burt* 250
2. Failure to make proper provision for the flow of water under a bridge or culvert imposes liability, although such bridge or culvert may be constructed according to approved principles of engineering. The fact that it materially affects the flow is evidence that it was not properly constructed, regardless of the principles upon which it was built. *Henneberg v. County of Burt* 250

Carriers.

In the absence of evidence, the presumption is that goods transported by a carrier arrived at their

destination in the same condition in which they were shipped. *Halsey v. Merchants Motor Frieght, Inc.* 732

Charities.

1. Nonprofit charitable corporations are exempt from tort liability insofar as inmates, participants, or recipients of the charity are concerned. This immunity was adopted as a matter of public policy. If any change is to be made therein it should come from the Legislature. *Muller v. Nebraska Methodist Hospital* 279
2. The fact that patients who are able to pay are required to do so does not deprive a charitable corporation of its eleemosynary character, nor does it permit a recovery for damages on account of the existence of contract relations. *Muller v. Nebraska Methodist Hospital* 279
3. The fact that a charitable institution carries indemnity insurance indemnifying it from liability to a recipient of its bounty does not create liability. *Muller v. Nebraska Methodist Hospital* 279
4. Doctrine of immunity of nonprofit charitable corporation to inmates, participants, or recipients of charity followed. *Cheatham v. Bishop Clarkson Memorial Hospital* 297
   Parks v. Holy Angels Church 299

Children Born Out of Wedlock.

1. A child born out of wedlock claiming to be an heir has the burden of proving (1) that he is illegitimate, (2) that his alleged father was actually his illegitimate father, and (3) that the alleged father recognized the child in accordance with the statute. *Peetz v. Masek Auto Supply Co.* 410
2. A writing to constitute an acknowledgment of paternity of a child born out of wedlock must be one in which the paternity is directly, unequivocally, and unquestionably acknowledged. *Peetz v. Masek Auto Supply Co.* 410
3. Under act prescribing conditions for acknowledgment of paternity of child born out of wedlock, writing involved was insufficient to comply with statute. *Peetz v. Masek Auto Supply Co.* 410

Commerce.

1. Congress, in the choice of means to effect a permis-

sible regulation of commerce, must conform to due process. *Hanson v. Union Pacific R. R. Co.* 669

2. The Fifth Amendment is not a guarantee of untrammeled freedom of action and of contract. In the exercise of its power to regulate commerce, Congress can subject both to restraints not shown to be unreasonable. *Hanson v. Union Pacific R. R. Co.* 669

Compromise and Settlement.

A compromise and settlement must be supported by a consideration, and no consideration exists where it consists of a promise to do that which the promisor was under a previous valid obligation to do. *Selig v. Wunderlich Contracting Co.* 215

Constitutional Law.

1. Constitutional provision providing for remedy by due course of law does not create any new rights but is merely a declaration of a general fundamental principle. It is a primary duty of the courts to safeguard this declaration of right and remedy but, where no right of action is given or remedy exists under either the common law or some statute, this constitutional provision creates none. *Muller v. Nebraska Methodist Hospital* 279

2. An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; and it is, in legal contemplation, as inoperative as though it had never been passed. *Jessen v. Blackard* 557

3. In an action wherein relief is sought pursuant to the terms of a statute which has been declared unconstitutional, the Supreme Court is required to regard the statute as nonexistent and to deny relief whether or not unconstitutionality of the act has been pleaded as a defense. *Jessen v. Blackard* 557

4. Congress, in the choice of means to effect a permissible regulation of commerce, must conform to due process. *Hanson v. Union Pacific R. R. Co.* 669

5. When the question is whether legislative action transcends the limits of due process guaranteed by the Fifth Amendment, decision is guided by the principle that the law shall not be unreasonable, arbitrary, or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained. *Hanson v. Union Pacific R. R. Co.* 669

6. The Fifth Amendment is not a guarantee of untrammeled freedom of action and of contract. In the exercise of its power to regulate commerce, Congress can subject both to restraints not shown to be unreasonable. *Hanson v. Union Pacific R. R. Co.* 669

7. Class legislation discriminating against some and favoring others is prohibited. But, classification based upon substantial distinction, with a proper relation to the objects classified and the purposes sought to be achieved if it does operate alike on all members of the class, is not special, discriminatory, or class legislation. *Hanson v. Union Pacific R. R. Co.* 669

8. The freedom of association, the freedom to join or not to join in association with others for whatever purposes such association is lawfully organized, is a freedom guaranteed by the First Amendment. *Hanson v. Union Pacific R. R. Co.* 669

Continuances.

When a party learns that an important witness is absent but nevertheless proceeds with the trial and takes the chance of a verdict without seeking a continuance he is not entitled to a new trial upon the ground of accident or surprise. *Granger v. Byrne* 10

Contracts.

1. Where a party bound by an executory contract repudiates his obligation before the time for performance, the promisee has an option to treat the contract as ended so far as further performance is concerned, and to maintain an action at once for the damages occasioned by such anticipatory breach. *Selig v. Wunderlich Contracting Co.* 215

2. At any time before breach the parties to an executory agreement may change its terms by subsequent agreement without a new consideration. *Selig v. Wunderlich Contracting Co.* 215

3. A modification of an agreement made after a breach thereof must be supported by a new consideration. *Selig v. Wunderlich Contracting Co.* 215

4. Neither the promise to do nor the actual doing of that which the promisor by law or subsisting contract is bound to do is a sufficient consideration

to support an agreement in his favor. *Selig v. Wunderlich Contracting Co.* 215

5. Where there has been a breach of a contract by one party resulting in loss to the other, it is the duty of such other to take all reasonable steps to reduce the amount of his damages. *Selig v. Wunderlich Contracting Co.* 215
6. One who fails to mitigate his damages cannot recover from the party breaking the contract the damages which would have been avoided had he performed his duty in that respect. *Selig v. Wunderlich Contracting Co.* 215
7. When an agreement is oral and evidence as to the intention of the parties is conflicting, the question of the intention of the parties is for determination by the jury. *Hampton v. Struve* 305
8. Usage or custom cannot take the place of a contract where none has been made by the parties and cannot create a contract or liability where none otherwise exists. *Peterson v. State Automobile Ins. Assn.* 420
9. Rule and limitations stated on effect of custom or usage to aid in construction of written contract. *Peterson v. State Automobile Ins. Assn.* 420
10. Every contract is made with reference to, and subject to, existing law, and every law affecting such contract is read into and becomes a part thereof. *County of Johnson v. Weber* 432

Corporations.

1. A stockholder, before he can proceed in his own name but in behalf of the corporation for the redress of wrongs done to it, must establish as a condition precedent that he has exhausted all available means to obtain relief through the corporation itself, unless the circumstances excuse him from so doing. *Kowalski v. Nebraska-Iowa Packing Co.* 609
2. Facts showing that a stockholder has complied with this condition must be set forth in unmistakable terms in his bill. *Kowalski v. Nebraska-Iowa Packing Co.* 609
3. A stockholder must make an earnest and sincere and not a feigned or simulated effort to induce the managing officers of the corporation to take remedial action in its name. *Kowalski v. Nebraska-Iowa Packing Co.* 609

4. Unless there is adequate reason to the contrary, a stockholder must make an honest attempt to convince the other stockholders that action ought to be instituted. *Kowalski v. Nebraska-Iowa Packing Co.* 609
5. It is only from actual necessity, in order to prevent a failure of justice, that a suit in equity for the benefit of the corporation can be maintained by a stockholder. *Kowalski v. Nebraska-Iowa Packing Co.* 609

Counties.

1. Counties have the right to reconstruct highways and in so doing to provide for the flow of water as it was wont to flow in the course of nature. *Clare v. County of Lancaster* 622
2. In the absence of negligence there is no liability on the part of a county in providing for the flow across a reconstructed highway of water naturally falling upon upper land which in the course of nature would have flowed across the highway onto lower land. *Clare v. County of Lancaster* 622

Courts

1. The doctrine of stare decisis is grounded on public policy. It should be adhered to unless the reasons therefor have ceased to exist, are clearly erroneous, or are manifestly wrong and mischievous, or unless more harm than good will result from doing so. *Muller v. Nebraska Methodist Hospital* 279
2. Constitutional provision providing for remedy by due course of law does not create any new rights but is merely a declaration of a general fundamental principle. It is a primary duty of the courts to safeguard this declaration of right and remedy but, where no right of action is given or remedy exists under either the common law or some statute, this constitutional provision creates none. *Muller v. Nebraska Methodist Hospital* 279
3. The facts necessary to confer jurisdiction must affirmatively appear upon the face of the record in proceedings before courts or tribunals of inferior or limited jurisdiction. *Olsen v. Grosshans* 543

Criminal Law.

1. Where a defendant in a criminal action has vol-

untarily paid a fine imposed upon him, he waives his right of appeal. *Abbott v. State* 275
2. Ordinarily, a judgment in a criminal action can be satisfied only by carrying into effect the sentence imposed by the trial court. *Dixon v. Hann* 316
3. Extrajudicial admissions or a voluntary confession are insufficient to prove that a crime has been committed, but either or both are competent evidence of the fact and may, with corroborative evidence of facts and circumstances, establish the corpus delicti. *Hoffman v. State* 375
4. The credibility of witnesses and the weight of their testimony are for the jury to determine in a criminal case. The conclusion of the jury will not be disturbed unless it is clearly wrong. *Hoffman v. State* 375
5. The giving of an incorrect instruction in a criminal case must be considered prejudicial error where lack of prejudice is not shown. *Hoffman v. State* 375
6. A plea of not guilty puts in issue all the material allegations of the information and all matters of defense which have sufficient support in the evidence to be submitted to the jury. It is the duty of the trial court to instruct as to the law applicable to all of such matters whether requested to do so or not. *Washington v. State* 385
7. A party may not complain of misconduct of counsel if, with knowledge thereof, he does not ask for a mistrial, but consents to take the chance of a favorable verdict. *Beads v. State* 538
8. Where no objection is made or exceptions taken to remarks of the trial judge made during the course of the trial, a complaint with respect thereto cannot be reviewed on appeal. *Beads v. State* 538
9. A photograph proved to be a true representation of the person, place, or thing which it purports to represent is proper evidence of anything of which it is competent and relevant for a witness to give a verbal description. *Beads v. State* 538
10. When a part of a sentence is illegal an appellate court may, if the sentence is divisible, modify it by striking out the illegal part. *Olson v. State* 604
11. The district court may not properly direct a verdict of not guilty unless the evidence is so lacking in probative force that the court may say as a matter of law that it is insufficient to support a finding of guilt. *Hertz v. State* 640

12. It is not the province of the district court to resolve conflicts in evidence in a criminal action or to pass upon the credibility of witnesses. *Hertz v. State* 640
13. In a criminal action evidence of other similar acts to be admissible must amount to proof of other similar criminal offenses. *Hertz v. State* 640
14. Evidence of other similar acts are admissible in a criminal prosecution for the purpose only of showing motive, criminal intent, or guilty knowledge. *Hertz v. State* 640
15. Where a prisoner is released on an illegal or void order of the court he may be retaken and compelled to serve out the sentence, even though the time in which the original sentence should have been served has expired. *Chapman v. Hayward* 664
16. Where one sets in motion the proceedings by which he secures an illegal or void release from custody, he becomes an escapee in contemplation of the law as of the date he secures such order. *Chapman v. Hayward* 664
17. Venue is a jurisdictional fact in this state. The Constitution and statutes give the defendant in a criminal prosecution the right to be tried by an impartial jury in the county where the alleged offense was committed. *Gates v. State* 722
18. The venue of an offense may be proven like any other fact in a criminal case. If from evidence the only rational conclusion which can be drawn is that the crime was committed in the county alleged, the proof is sufficient. *Gates v. State* 722
19. In a criminal case, a new trial may be granted for newly discovered evidence which is competent, material, and credible, which might have changed the result of the trial and which the exercise of due diligence could not have discovered and produced at the trial. *Gates v. State* 722

Crops.

1. A lessee of a life tenant has a right to enter the premises after termination of the lease to harvest any crop planted during the life of the lessor, and to remove any personal property thereon belonging to him. *Statler v. Watson* 1
2. A cropper is a hired hand who farms land and is paid for his labor with a share of the crops he produces and harvests. A cropper does not have

exclusive possession of the land and has no estate in the crop until he is assigned his share thereof by the owner of the land. *Hampton v. Struve* 305

3. Whether a particular instrument is a lease of land or a cropping agreement is resolved by the rule of construction and the distinction between a cropper and a tenant. *Hampton v. Struve* 305

4. Whether the relation of parties to a contract is that of landlord and tenant or landowner and cropper depends upon the intention of the parties as determined from the entire contract. *Hampton v. Struve* 305

Customs and Usages.

1. The existence and extent of a duty to use due care cannot be supplied by proof of mere usage or custom. *Peterson v. State Automobile Ins. Assn.* 420

2. Generally, the mere custom of insurance companies to give notice of approaching dates for the payment of premiums does not bind them contractually to continue to do so. A mere custom to renew will not of itself bind an insurance company in the absence of a contract to do so. *Peterson v. State Automobile Ins. Assn.* 420

3. Usage or custom cannot take the place of a contract where none has been made by the parties and cannot create a contract or liability where none otherwise exists. *Peterson v. State Automobile Ins. Assn.* 420

4. A custom or usage, in order to be regarded as entering into an insurance contract, must be clearly distinguished from mere acts of courtesy or accommodation and must be binding upon both insured and insurer. *Peterson v. State Automobile Ins. Assn.* 420

5. Rule and limitations stated on effect of custom or usage to aid in construction of written contract. *Peterson v. State Automobile Ins. Assn.* 420

Damages.

1. When the amount of the damages allowed by a jury is clearly inadequate under the evidence it is error for the trial court to refuse to set the verdict aside. *Schumacher v. Lang* 43

2. If the jury finds the defendant in a personal injury action is not chargeable with negligence, an

error relating to the subject of damages is harmless. *Segebart v. Gregory* 64

3. Damages for permanent injuries cannot be based upon mere speculation, probability, or uncertainty, but must be based upon competent evidence that permanent damages, clearly shown, are reasonably certain as a proximate result of the injury. *Welstead v. Ryan Construction Co.* 87

4. It is error to submit the question of future damages to the jury where such an instruction has no support in the evidence. *Selig v. Wunderlich Contracting Co.* 215

5. Where there has been a breach of a contract by one party resulting in loss to the other, it is the duty of such other to take all reasonable steps to reduce the amount of his damages. *Selig v. Wunderlich Contracting Co.* 215

6. One who fails to mitigate his damages cannot recover from the party breaking the contract the damages which would have been avoided had he performed his duty in that respect. *Selig v. Wunderlich Contracting Co.* 215

7. The measure of damages for failure to deliver goods purchased is the loss directly and naturally resulting, in the ordinary course of events, from the seller's breach of contract. *Selig v. Wunderlich Contracting Co.* 215

8. Loss of profits is a proper element of damage when established with reasonable certainty. *Selig v. Wunderlich Contracting Co.* 215

9. The remedies of rescission and damages are inconsistent; the former proceeding upon disaffirmance and the latter upon affirmance of the contract. *Russo v. Williams* 564

Depositions.

The taking of a deposition before trial by a representative of deceased, at which time he examined or cross-examined the witness, is not a waiver of disqualification, and appropriate objections thereto may still be raised at the trial. *O'Neal v. First Trust Co.* 469

Descent and Distribution.

An expectant heir cannot merely on the basis of his expectancy maintain an action during the life of

his ancestor to cancel a transfer made by his ancestor. *Dafoe v. Dafoe* 145

Divorce.

1. Application of doctrine of condonation to acts of cruelty stated. *Cowan v. Cowan* 74
2. Rule stated governing the award of custody of minor children in a divorce action. *Cowan v. Cowan* 74
3. The amount of alimony to be granted a wife is not to be determined alone from the property possessed by the husband. Many other factors enter into the determination such as the husband's age, health, earning capacity, future prospects, and social standing. *Cowan v. Cowan* 74
4. Unjustifiable conduct may constitute extreme cruelty even though no physical or personal violence may be inflicted. *Smith v. Smith* 120
5. A decree of divorce from the bonds of matrimony should only be granted when the evidence brings the case within the definition of the statute providing for such relief. *Smith v. Smith* 120
6. Corroborative evidence is required of the acts or conduct asserted as grounds for a divorce. *Smith v. Smith* 120
7. A rule by which to measure the exact amount or degree of corroboration required in a divorce case has not been formulated. The sufficiency or insufficiency of corroboration must be determined upon the facts and circumstances of each case. *Sewell v. Sewell* 173
8. Condonation is forgiveness for the past upon condition that the wrong will not be repeated. *Sewell v. Sewell* 173
9. Condonation is complete if there is a voluntary resumption of marital relations after violation of marital duty. *Sewell v. Sewell* 173
10. The absence of a plea of condonation does not bar its consideration and application by the court if the proof affords a proper basis for it. *Sewell v. Sewell* 173
11. Where the determination of the issues in a divorce action depends upon the reliability of the witnesses, the conclusion of the trial court will be carefully regarded by the Supreme Court. *Sewell v. Sewell* 173
12. The court may allow attorney's fees to a wife in a divorce action where cross petition of husband for a divorce is denied. *Sewell v. Sewell* 173

13. Where a husband seeks a divorce on the ground of adultery, the voluntary testimony of an alleged paramour that he had intimate relations with a wife should be received with caution and carefully scrutinized. *Sewell v. Sewell* 173
14. The power to set aside or modify a decree of divorce within six months as prescribed by statute is not absolute but must be exercised within a sound legal discretion. *Kasai v. Kasai* 588
15. Where a default has been regularly entered in an action for divorce it is largely within the discretion of the trial court to say whether or not the defendant will be permitted to come in afterwards and make his defense and, unless an abuse of discretion be made to appear, the Supreme Court will not interfere. *Kasai v. Kasai* 588
16. In an action for divorce, the court may in its discretion require the husband to pay an amount necessary to enable the wife to carry on or defend the suit during its pendency. *Miller v. Miller* 766
17. A divorce case is pending with reference to allowance of attorney's fees until all matters involved therein or incidental thereto are determined and satisfied. *Miller v. Miller* 766
18. If a husband in an action for divorce fails to satisfy a judgment for alimony in favor of the wife and the wife employs counsel to enforce it, and this is accomplished with or without court proceeding, the court in which the judgment was rendered may require the husband to pay to the wife a reasonable amount as compensation for the services of her counsel. *Miller v. Miller* 766
19. Generally, a contingent fee contract executed before decree is rendered for payment of attorney's fees in a divorce action is void as against public policy, since it tends to prevent a reconciliation between the parties and to destroy the family relationship. *State ex rel. Nebraska State Bar Assn. v. Dunker* 779

Drains.

1. It is the duty of a drainage district to build a bridge over its ditch where it crosses a highway, and it is the duty of the county thereafter to maintain the bridge. *Henneberg v. County of Burt* 250
2. It is the duty of a person who places a structure or facility in a drainway to provide sufficient passage for all water which may be reasonably expected

to be transported thereto by the drainway. *Henneberg v. County of Burt* 250

3. Failure to make proper provision for the flow of water under a bridge or culvert imposes liability, although such bridge or culvert may be constructed according to approved principles of engineering. The fact that it materially affects the flow is evidence that it was not properly constructed, regardless of the principles upon which it was built. *Henneberg v. County of Burt* 250
4. If an obstruction placed in a drainway will be a continuing injury to the land of another, the owner may on proper showing have a mandatory injunction for the removal of the obstruction and a restoration of the conditions existing before the advent of it. *Henneberg v. County of Burt* 250
5. Legislature imposed duty on drainage districts to maintain and keep in repair drainage system constructed under drainage statute. *County of Johnson v. Weber* 432
6. Statute was mandatory imposing duty for the care and preservation of drainage ditches. *County of Johnson v. Weber* 432
7. Landowners having paid assessments for the construction and maintenance of a drainage system on the basis of benefits have the right to be protected in the enjoyment of those benefits. *County of Johnson v. Weber* 432

Easements.

1. Where a claimant has shown use of land for a period of time sufficient to acquire an easement by adverse user, the use will be presumed to be under a claim of right. The owner of the servient estate has the burden of rebutting the prescription by showing the use to be permissive. *Hopkins v. Hill* 29
2. Acquiescence on the part of the owner which is necessary to acquisition of a prescriptive easement means passive assent or submission, quiescence, or consent by silence. *Hopkins v. Hill* 29
3. If the use of an easement has been open, adverse, notorious, peaceable, and uninterrupted, the owner of the servient tenement is charged with knowledge of such use, and acquiescence in it is implied. *Hopkins v. Hill* 29
4. The extent and nature of an easement is deter-

mined from the use actually made of the property during the running of the prescriptive period. *Hopkins v. Hill* 29

5. The term "exclusive use" does not mean that no one has used the roadway except the claimant of the easement. It simply means that his right to do so does not depend upon a similar right in others. *Hopkins v. Hill* 29
6. A grant in gross is never presumed when it can fairly be construed as appurtenant to some other estate. *County of Johnson v. Weber* 432
7. Whether an easement is appurtenant or in gross is to be determined mainly by the nature of the right and the intention of the parties creating it. Requisites of an easement appurtenant to the land stated. *County of Johnson v. Weber* 432
8. Subject to stated exceptions, one who succeeds to the possession of a dominant tenement thereby succeeds to the privileges of use of the servient tenement authorized by the easement. *County of Johnson v. Weber* 432
9. If the grant of an easement or reservation is specific in its terms, it is decisive of the limits of the easement. *County of Johnson v. Weber* 432
10. An easement by prescription can be acquired only by an adverse user for 10 years. The prescriptive right will not commence to run until some act or fact exists giving the party against whom the right is claimed a cause of action. *County of Scotts Bluff v. Hartwig* 823
11. An easement may be acquired by prescription for the flow of water in a watercourse or its flood plane. The rule however has no application to surface waters. *County of Scotts Bluff v. Hartwig* 823

Election of Remedies.

1. A party who has been induced to enter into a contract by fraud has, upon its discovery, an election of remedies. He may either affirm the contract and sue for damages or rescind it and be reinstated to the position he was in before it was consummated. *Russo v. Williams* 564
2. An election of remedies is not made, if, in fact, the remedy sought does not exist. *Russo v. Williams* 564

Equity.

1. Laches, in its legal significance, is not mere delay.

It must be shown in addition to delay that substantial injury has resulted therefrom. *Richards v. McBride* 57

2. One who contends that there are defects in the election by which a schoolhouse site is designated may be barred by laches if he waits until the school district has expended substantial sums in good faith and the rights of third persons have intervened in reliance on the validity of the election. *Richards v. McBride* 57
3. Where there is no evidence of acquiescence, estoppel, or undue delay on the part of the person questioning the validity of an election to fix a schoolhouse site, equity will not entertain the defense of laches or estoppel in a suit to test the validity of such election. *Richards v. McBride* 57
4. Whether laches exists in a particular case depends upon its own peculiar circumstances and is addressed to the sound discretion of the court. *Russo v. Williams* 564

Escape.

1. Where a prisoner is released on an illegal or void order of the court he may be retaken and compelled to serve out the sentence, even though the time in which the original sentence should have been served has expired. *Chapman v. Hayward* 664
2. Where one sets in motion the proceedings by which he secures an illegal or void release from custody, he becomes an escapee in contemplation of the law as of the date he secures such order. *Chapman v. Hayward* 664

Estates.

1. A remainderman does not have the right of possession of real estate during the existence of a life tenancy therein. *Statler v. Watson* 1
2. The contract of a life tenant purporting to include the entire property affected by his life estate extends to and is effective as to all his interest in the property. *Statler v. Watson* 1
3. A tenant in remainder may sell, convey, encumber, or contract in reference to his interest in the real estate during the continuance of a life estate therein. *Statler v. Watson* 1
4. If the interest of a lessor in real estate is only a life tenancy, his death during the term of a lease

between him and his lessee terminates the lease. If the lessee thereafter remains in possession of the property he becomes a tenant by sufferance. *Statler v. Watson* 1

5. Where life tenant also owns an undivided part of the remainder in fee, a lease made by the life tenant as lessor is not terminated by his death as to the fee interest. *Statler v. Watson* 1

Estoppel.

1. Where one of two innocent persons must suffer by the acts of a third, he whose conduct, act, or omission enabled such third person to occasion the loss must sustain it if the other party acted in good faith, without knowledge of the facts, and altered his position to his detriment. *Terry Bros. & Meves v. National Auto Ins. Co.* 110
2. The doctrine of estoppel applies when one by his words or conduct causes another to believe in the existence of a certain state of facts and to act upon that belief or to alter his previous condition. *Frank v. Russell* 354

Evidence.

1. Life tables of expectancy may be properly received in evidence only when there is competent evidence that the claimed injuries are permanent. *Welstead v. Ryan Construction Co.* 87
2. A declaration to be competent evidence as part of the res gestae must have been made at such a time and under such circumstances as to raise a presumption that it was the unpremeditated and spontaneous explanation of the matter about which made. *Gain v. Drennen* 263
3. It is permissible to admit in evidence an unsigned written instrument made by a third party at the solicitation, direction, and with the assent of the parties to the case, and to permit it to be considered by the jury if there is evidence which tends to show that the instrument contains terms of an oral contract which is an issue in or the subject of the suit. *Hampton v. Struve* 305
4. A valid provision in a contract, expressly and unequivocally binding separate estate of a married woman, is conclusive proof of such intention, and cannot be contradicted by parol evidence. *Marmet v. Marmet* 366

5. In cases where a note does not contain a clause to the effect that the wife intends to bind her separate estate, parol evidence is admissible to show the intent of the parties. *Marmet v. Marmet* 366
6. A photograph of the victim of a homicide which tends to throw light upon or illustrates a controverted issue may properly be received in evidence where a proper foundation has been laid for its admission. *Washington v. State* 385
7. A photograph proved to be a true representation of the person, place, or thing which it purports to represent is proper evidence of anything of which it is competent and relevant for a witness to give a verbal description. *Beads v. State* 538
8. In a criminal action evidence of other similar acts to be admissible must amount to proof of other similar criminal offenses. *Hertz v. State* 640
9. Evidence of other similar acts are admissible in a criminal prosecution for the purpose only of showing motive, criminal intent, or guilty knowledge. *Hertz v. State* 640
10. Circumstantial evidence cannot be said to be sufficient to sustain a verdict or to require submission of a case to a jury depending solely thereon for support, unless the circumstances proved are of such a nature and so related to each other that the conclusion reached is the only one that can fairly and reasonably be drawn therefrom. *Halsey v. Merchants Motor Freight, Inc.* 732

Executors and Administrators.

1. In the conduct of proceedings for the sale of real estate for the payment of debts of a deceased person, the principal duty of a district court is to conserve the estate. *Hill v. Swanson* 520
2. By statute, the proceeds of any real estate sold for the payment of debts are deemed assets in the hands of the executor or administrator. *Hill v. Swanson* 520

Extradition.

1. In habeas corpus proceeding, filing of complaint in demanding state is prima facie evidence that prisoner was there charged with crime. *Gorgen v. Tomjack* 457
2. In an extradition proceeding where a prisoner demands his freedom on the ground that the complaint against him does not charge a crime under

the statutes of the demanding state, he must produce statute to maintain his position. *Gorgen v. Tomjack* 457

3. In order to be a fugitive from justice, it is not necessary that person shall have left the demanding state for the purpose of avoiding prosecution, but that, having committed an act charged to be a crime under the laws of that state, he has left that jurisdiction and is found in another state. *Gorgen v. Tomjack* 457
4. The issuance of a warrant of extradition creates a presumption that the prisoner detained under it is a fugitive from justice. *Gorgen v. Tomjack* 457
5. In habeas corpus, probable cause to believe one guilty who is held under extradition as a fugitive from justice from another state is a matter exclusively for the courts of the demanding state. *Gorgen v. Tomjack* 457
6. In extradition proceeding, evidence that the charge was made on improper motives and that the person detained was not guilty of the crime charged will not justify his release from custody under a writ of habeas corpus. *Gorgen v. Tomjack* 457
7. In extradition proceedings, it is not proper to hear evidence upon, or inquire into, the motives or purposes of the prosecution, or into the motives of the Governor of the demanding state. *Gorgen v. Tomjack* 457
8. To be a fugitive from justice under the Uniform Criminal Extradition Act, it is necessary that the person charged must have been actually present in the demanding state at the time of the commission of the crime, or, having been there, has committed some overt act in furtherance of the crime subsequently consummated and has departed to another jurisdiction. *Chapman v. Hayward* 664

Fires.

It is sufficient if all the facts and circumstances in evidence fairly warrant the conclusion that a fire did not originate from some other cause. The origin of a fire has generally been held sufficiently established by inferences drawn from circumstantial evidence. *Behrens v. Gottula* 103

Fixtures.

The installation of condensation lines as a necessary

part of air conditioning units is not work requiring a plumbing permit under city ordinance. *McNeil v. City of Omaha* 201

Fraud.

1. When a person obtains the legal title to real estate by means of fraud or misrepresentation, actual or constructive, the law constructs a trust in favor of the party upon whom the fraud or imposition has been practiced. A court of equity will enforce such a trust for the benefit of the grantor or those claiming under him. *Musil v. Beranek* 269
2. The existence of an intent to defraud at the time a promise was made may be inferred from the failure to comply with the promise, and the promisor may be presumed to have intended, when he made the promise, to do what he finally did do with respect thereto. *Musil v. Beranek* 269
3. A party who has been induced to enter into a contract by fraud has, upon its discovery, an election of remedies. He may either affirm the contract and sue for damages or rescind it and be reinstated to the position he was in before it was consummated. *Russo v. Williams* 564
4. Requirements of pleadings and proof necessary to maintain an action for rescission because of false representations stated. *Russo v. Williams* 564
5. Fraud is never presumed, but must be established by the party alleging it by clear and satisfactory evidence. *Russo v. Williams* 564
6. In an action in which relief is sought on account of fraud, the burden of alleging and proving the existence of all the elements thereof is upon the party seeking such relief. *Russo v. Williams* 564
7. If a party, without knowing whether his statements are true or not, makes an assertion as to any material matter upon which the other party has relied, the party defrauded will, in a proper case, be entitled to relief. *Russo v. Williams* 564
8. A purchaser of real estate has a right to believe and rely upon representations made to him by his vendor as to the character, quality, and location of the property, when the facts concerning which the representations are made are unknown to the vendee. *Russo v. Williams* 564
9. To maintain an action for fraudulent representations it is not only necessary to establish the tell-

ing of the untruth, knowing it to be such or that it was told without knowledge of the facts, but also to prove that the plaintiff had a right to rely upon it, did so rely, altered his condition because thereof, and suffered damages thereby. *Russo v. Williams* 564

10. A person is justified in relying upon a representation made to him where the representation is a positive statement of fact and where an investigation would be required to discover the truth. *Russo v. Williams* 564

11. The mere fact that one party makes an independent investigation or examination does not necessarily preclude reliance on representations of other party. *Russo v. Williams* 564

12. The right of one party to a contract to rescind is barred by failure for an unreasonable time after knowledge of the facts giving rise to such right to declare a rescission and disclaim the benefits of the contract. *Russo v. Williams* 564

13. If one party has been induced to make a contract by reason of any material misrepresentation on the part of the other party, specific performance will be denied, whether the misrepresentation was willful and intended, or made innocently with an honest belief in its truth. *Russo v. Williams* 564

14. Specific performance of a contract is not generally demandable or awarded as a matter of absolute legal right but is directed to and governed by the sound legal discretion of the court, dependent upon the facts and circumstances of each particular case. It will not be granted where enforcement would be unjust. *Russo v. Williams* 564

Frauds, Statute of.

1. An agreement to pay a debt of another antecedently contracted without a consideration to the promisor therefor is within the statute of frauds. *Otto Gas, Inc. v. Stewart* 200

2. A consideration to support a promise, not in writing, to pay the debt of another must operate to the advantage of the promisor and place him under a pecuniary obligation to the promisee independent of the original debt, which obligation is to be discharged by the payment of the debt. *Otto Gas, Inc. v. Stewart* 200

3. The burden is on the litigant to prove by the greater weight of the evidence facts alleged by

him to take an oral contract without the operation of the statute of frauds. *Otto Gas, Inc. v. Stewart* 200

4. Trusts arising by implication or by operation of law are excepted from the operation of the statute of frauds. Resulting and constructive trusts therefore fall within the exception. *Musil v. Beranek* 269

5. Where one is claiming the estate of a deceased person under an alleged oral contract, the evidence of such contract and the terms of it must be clear, satisfactory, and unequivocal. *O'Neal v. First Trust Co.* 469

6. An oral contract claiming the estate of a deceased person is void on its face as within the statute of frauds, because not in writing. Even though proved by clear and satisfactory evidence, it is not enforceable unless there has been such performance as the law requires. *O'Neal v. First Trust Co.* 469

7. The thing done constituting performance must be such as is referable solely to the contract sought to be enforced so that nonperformance by the other party would amount to fraud upon him. *O'Neal v. First Trust Co.* 469

8. Burden of proof stated as to enforcement of oral contract to leave part of estate by will. *O'Neal v. First Trust Co.* 469

9. Evidence of declarations of a deceased person, concerning a parol contract to leave part of estate by will, does not amount to direct proof of the facts claimed to have been admitted by those declarations. Such evidence, when not supported by other evidence, is generally entitled to but little weight. *O'Neal v. First Trust Co.* 469

10. Each case seeking specific performance of oral contract is to be determined from the facts, circumstances, and conditions as presented therein. *O'Neal v. First Trust Co.* 469

Habeas Corpus.

1. It is the duty of the court on presentation of a petition for a writ of habeas corpus to examine it and if it fails to state a cause of action to enter an order denying a writ. *Dixon v. Hann* 316

2. In habeas corpus proceeding, filing of complaint in demanding state is prima facie evidence that

prisoner was there charged with crime. *Gorgen v. Tomjack* 457
3. In habeas corpus, probable cause to believe one guilty who is held under extradition as a fugitive from justice from another state is a matter exclusively for the courts of the demanding state. *Gorgen v. Tomjack* 457
4. In extradition proceeding, evidence that the charge was made on improper motives and that the person detained was not guilty of the crime charged will not justify his release from custody under a writ of habeas corpus. *Gorgen v. Tomjack* 457
5. In extradition proceeding, it is not proper to hear evidence upon, or inquire into, the motives or purposes of the prosecution, or into the motives of the Governor of the demanding state. *Gorgen v. Tomjack* 457

Highways.

1. The county board has general supervision over the roads of the county except to the extent that the state has undertaken the construction and maintenance of any highway therein. *Henneberg v. County of Burt* 250
2. Roads established by law and roads opened by a county board of any county and traveled for more than 10 years are public roads. *Henneberg v. County of Burt* 250
3. A person traveling a favored street protected by a traffic signal, of which he has knowledge, may properly assume that oncoming traffic will obey it. *Bartek v. Glasers Provisions Co., Inc.* 794

Homicide.

1. Where the evidence does not establish a higher grade of homicide than manslaughter, it may be prejudicial error to submit to the jury the issue of murder in the second degree. *Washington v. State* 385
2. It is the duty of the trial court to instruct the jury on such degrees of homicide as find support in the evidence. *Washington v. State* 385
3. A photograph of the victim of a homicide which tends to throw light upon or illustrate a controverted issue may properly be received in evidence where a proper foundation has been laid for its admission. *Washington v. State* 385

Husband and Wife.

1. At common law the husband and wife are treated as one person, that is, the legal existence of the wife is suspended during marriage, and she becomes incapable of making a valid contract to bind either herself or her estate. *Marmet v. Marmet* 366
2. The common-law disability of a married woman is still in force in this state, except as it has been abrogated by statute. *Marmet v. Marmet* 366
3. Under statute, a married woman is but partially emancipated from her common-law disability to contract. *Marmet v. Marmet* 366
4. The statute has removed the common-law disability of a married woman to bind her separate property, where her contract is made with intent on her part to bind it. *Marmet v. Marmet* 366
5. When a married woman signs a note there is no presumption that she intended thereby to fasten a liability upon her separate estate. *Marmet v. Marmet* 366
6. A valid provision in a contract, expressly and unequivocally binding separate estate of a married woman, is conclusive proof of such intention, and cannot be contradicted by parol evidence. *Marmet v. Marmet* 366
7. In cases where a note does not contain a clause to the effect that the wife intends to bind her separate estate, parol evidence is admissible to show the intent of the parties. *Marmet v. Marmet* 366
8. When coverture is pleaded and proved or admitted, the burden is upon the plaintiff to establish that the note, upon which the action is based, was made with reference to, and upon the credit of, her property and with the intent to bind the same. *Marmet v. Marmet* 366

Injunctions.

1. A litigant who asks an injunction must establish by proof the controverted facts necessary to entitle him to relief. An injunction will not be granted unless the right is clear, the damage is irreparable, and the remedy at law is inadequate to prevent a failure of justice. *Shepardson v. Chicago, B. & Q. R. R. Co* 127
2. In a case where redress is sought for continuing damage injunction is the proper remedy. *Reed v. Jacobson* 245

3. If an obstruction placed in a drainway will be a continuing injury to the land of another, the owner may on proper showing have a mandatory injunction for the removal of the obstruction and a restoration of the conditions existing before the advent of it. *Henneberg v. County of Burt* 250
4. The levy, assessment, and collection of taxes which are demonstrably void for want of jurisdiction or authority to impose the same may be enjoined. *Offutt Housing Co. v. County of Sarpy* 320
5. If the nature of a threatened trespass on real estate is such that it will, if accomplished, prevent a substantial enjoyment of property or the possession thereof, the remedy of injunction is appropriate to forestall the wrongful act. *Peterson v. Vak* 450

Insane Persons.

Requirements for maintenance of suit by a next friend stated. *Dafoe v. Dafoe* 145

Insurance.

1. The fact that a charitable institution carries indemnity insurance indemnifying it from liability to a recipient of its bounty does not create liability. *Muller v. Nebraska Methodist Hospital* 279
2. Generally, the mere custom of insurance companies to give notice of approaching dates for the payment of premiums does not bind them contractually to continue to do so. A mere custom to renew will not of itself bind an insurance company in the absence of a contract to do so. *Peterson v. State Automobile Ins. Assn.* 420
3. A custom or usage, in order to be regarded as entering into an insurance contract, must be clearly distinguished from mere acts of courtesy or accommodation and must be binding upon both insured and insurer. *Peterson v. State Automobile Ins. Assn.* 420
4. Considerations received for annuity contracts by life insurance companies licensed to do business in this state are taxable. *Bankers Life Ins. Co. v. Laughlin* 480

Intoxicating Liquors.

1. If intoxication of a person is an issue in litigation, evidence of the alcoholic content of a specimen of

body fluid determined by a chemical analysis, and expert opinion evidence as to intoxication based thereon, are admissible. *Hoffman v. State* 375
2. Legislative act providing for body fluid test for intoxication is in derogation of the common law and must be strictly interpreted and applied as limited by the terms of the act. *Hoffman v. State* 375
3. Instruction on body fluid test for intoxication is required only in a prosecution for operating a motor vehicle while under the influence of intoxicating liquor. *Hoffman v. State* 375

Judges.
1. A judge performing a judicial function is absolutely privileged to publish false and defamatory matter in the performance of such function if the publication has some relation to the matter before him. *Reller v. Ankeny* 47
2. Extent of privilege of judge in connection with publication of defamatory matter stated. *Reller v. Ankeny* 47

Judgments.
1. In order to obtain a summary judgment the movant must show, first, that there is no genuine issue as to any material fact in the case, and second, that he is entitled to a judgment as a matter of law. *Miller v. Aitken* 97
2. In considering a motion for summary judgment, the court should consider the evidence in the light most favorable to the party against whom it is directed. *Miller v. Aitken* 97
3. Summary judgment is effective and serves a separate useful purpose only when it can be used to pierce the allegations of the pleadings and show conclusively that the controlling facts are otherwise than as alleged. *Miller v. Aitken* 97
4. A ruling on the question of discontinuance of a railroad station agency at any given time does not amount to an adjudication for the future. It is only a judgment on the condition presented by the application and relates only to the time and conditions presented. *Chicago, B. & Q. R. R. Co. v. Keifer* 168
5. An attack on a judgment is collateral if it has an independent purpose and contemplates some relief

other than the overturning of the judgment. *Cacek v. Munson* 187

6. Where the record discloses that the county superintendent of schools has jurisdiction to enter an order changing the boundaries of school districts, such order may not, unless fraud is alleged, be collaterally attacked, but may be reviewed by proceedings in error which provide an adequate remedy. *Cacek v. Munson* 187
7. When the Supreme Court reverses a decree and remands the cause with directions to enter a specific judgment or decree, the mandate is final and conclusive upon all parties as to all matters so directed, and no new defenses can be entertained or heard in opposition thereto. *Jurgensen v. Ainscow* 208
8. Rights of the parties which may have accrued since the rendition of the original judgment, not in issue in the action in which it was rendered, are not adjudicated therein, but the trial court has no power to reopen the proceeding to settle such rights. *Jurgensen v. Ainscow* 208
9. If, since the original judgment, something has occurred which would render it inequitable to enforce the judgment of the Supreme Court, resort must be had to some form of original proceeding by which appropriate relief can be secured. It cannot be done by way of defense to the entry of the judgment the Supreme Court has directed. *Jurgensen v. Ainscow* 208
10. The state's immunity from suit in its own courts without its consent is unaffected by declaratory judgment statutes, but such an action may be maintained under statutes which permit actions against the state. *Offutt Housing Co. v. County of Sarpy* 320
11. If the evidence given at the original trial is not contained in the record under review, the court cannot determine whether the judgment rendered on such trial was the result of false testimony. *Kasai v. Kasai* 588
12. The district court is without power to set aside its decree after the term at which it was rendered in the absence of a showing of a statutory or equitable ground therefor. *Kanouff v. Norton* 593
13. A consent decree is usually treated as an agreement between the parties. It is accorded greater force than an ordinary judgment and ordinarily will not

be modified over objection of one of the parties. *Kanouff v. Norton* 593

14. A judgment is void unless a reasonable method of notification is employed and a reasonable opportunity to be heard is afforded to persons affected. *Board of Trustees of York College v. Cheney* 631

15. Where a proper method of notification is not employed, a judgment is void and not merely subject to reversal. The rendition of such a judgment is a denial of due process of law. *Board of Trustees of York College v. Cheney* 631

16. Even though the court has jurisdiction over a defendant and even though he is given notice of the action, a judgment against him is void if he was denied all opportunity to be heard. *Board of Trustees of York College v. Cheney* 631

17. A proceeding for revivor of a judgment is not the commencement of an action but is a continuation of the suit in which the judgment was rendered. An order of revivor continues the vitality of the original judgment with all its incidents from the time of its rendition. *Miller v. Miller* 766

Juries.

1. An affidavit of a juror as to what items the jury allowed or disallowed in computing the amount due, or what the jury believed it had a right to do under the instructions, is incompetent. *Schumacher v. Lang* 43

2. To vitiate a verdict, an unauthorized inspection of the scene of an accident must be shown to have related to a matter in dispute and to have been of such a nature as to have influenced the jury in arriving at a verdict. *Kohrt v. Hammond* 347

3. Where a juror during a trial acquires information that appears to relate itself to the issues of the case, it will not vitiate the verdict unless the facts gained are of such a character as to enable a reviewing court to say that they influenced the juror in reaching the verdict rendered. *Kohrt v. Hammond* 347

4. Affidavits of jurors may not be considered to impeach a verdict where the facts sought to be shown are such as inhere in the verdict. *Kohrt v. Hammond* 347

Labor Relations.

1. The objective of the Railway Labor Act is the amicable adjustment of disputes and in that way to avoid strikes with their harmful effect upon public interests. *Hanson v. Union Pacific R. R. Co.* 669
2. The purpose of the Eleventh subsection of section 152 of 45 U. S. C. A., the Railway Labor Act, is to permit a railway and a union to agree to a union shop notwithstanding any statute or law, state or federal, that forbids such agreements. *Hanson v. Union Pacific R. R. Co.* 669

Landlord and Tenant.

1. If the interest of a lessor in real estate is only a life tenancy, his death during the term of a lease between him and his lessee terminates the lease. If the lessee thereafter remains in possession of the property he becomes a tenant by sufferance. *Statler v. Watson* 1
2. Where life tenant also owns an undivided part of the remainder in fee, a lease made by the life tenant as lessor is not terminated by his death as to the fee interest. *Statler v. Watson* 1
3. A lessee of a life tenant has a right to enter the premises after termination of the lease to harvest any crop planted during the life of the lessor, and to remove any personal property thereon belonging to him. *Statler v. Watson* 1
4. A lease of land is a hiring or renting of it for a certain time upon a named consideration. *Hampton v. Struve* 305
5. A tenant of land rents it and pays for the use of it with money or a part of the crop or the equivalent thereof.. *Hampton v. Struve* 305
6. Whether a particular instrument is a lease of land or a cropping agreement is resolved by the rule of construction and the distinction between a cropper and a tenant. *Hampton v. Struve* 305
7. Whether the relation of parties to a contract is that of landlord and tenant or landowner and cropper depends upon the intention of the parties as determined from the entire contract. *Hampton v. Struve* 305
8. A lessee of real estate may by virtue of statute maintain an action to quiet title to his leasehold. *Peterson v. Vak* 450
9. A tenant is entitled to the exclusive possession and

use of the demised premises in the absence of reservations and restrictions in his lease and he may even maintain trespass against his landlord. *Peterson v. Vak* 450

10. A tenant holding over after the invalidation of a lease of school lands becomes a tenant at sufferance. *Jessen v. Blackard* 557

11. A tenant at sufferance on school lands is the owner of crops planted on such lands during the continuance of the tenancy. *Jessen v. Blackard* 557

Libel and Slander.

1. Where a petition alleges that certain statements published by defendant concerning plaintiff were false and maliciously made, a demurrer thereto admits the falsity of the statements and that they were motivated by malice. *Reller v. Ankeny* 47

2. An action for libel must be commenced within 1 year of the publication of the defamatory matter. *Reller v. Ankeny* 47

3. A judge performing a judicial function is absolutely privileged to publish false and defamatory matter in the performance of such function if the publication has some relation to the matter before him. *Reller v. Ankeny* 47

4. Extent of privilege of judge in connection with publication of defamatory matter stated. *Reller v. Ankeny* 47

Limitations of Actions.

An action for libel must be commenced within 1 year of the publication of the defamatory matter. *Reller v. Ankeny* 47

Master and Servant.

1. Where the inference is clear that there is, or is not, a master and servant relationship, the determination is made by the court; otherwise the jury determines the question. *Peetz v. Masek Auto Supply Co.* 410

2. The right of control determines whether the relationship of master and servant or that of an independent contractor exists. Whether or not the right of control exists is ordinarily a question of fact for the jury. *Peetz v. Masek Auto Supply Co.* 410

3. Whether an act was or was not such as to be within the scope of the employment is, ordinarily, one of

fact for the determination of the jury under all the surrounding facts and circumstances. *Peetz v. Masek Auto Supply Co.* 410

4. The relation of master and servant does not render the master liable for the torts of the servant, unless connected with his duties as such servant or within the scope of his employment. *Crane v. Whitcomb* 527

5. Employers are liable for the consequences, not of danger, but of negligence. The unbending test of negligence in methods, machinery, and appliances is the ordinary usage of the business. *Halsey v. Merchants Motor Freight, Inc.* 732

Municipal Corporations.

1. The installation of condensation lines as a necessary part of air conditioning units is not work requiring a plumbing permit under city ordinance. *McNeil v. City of Omaha* 201

2. A prosecution for an act in violation of a city ordinance, which act is not a violation of statute, is a civil action for the recovery of a penalty. In such case the burden is on the prosecution to prove the charge by a preponderance of the evidence. *State v. Renensland* 206

3. In an action to recover a penalty for violation of a city ordinance where a jury is waived, the matter of weighing the evidence to determine whether or not the prosecution has sustained the burden of proving its case by a preponderance of the evidence is one for the trial judge and his finding will not be disturbed unless it is clearly wrong. *State v. Renensland* 206

4. Rule for waiving requirements of zoning ordinance stated. *Frank v. Russell* 354

5. Conditions requiring denial of waiver of zoning requirements stated. *Frank v. Russell* 354

6. In reviewing the action of a board of adjustment granting a variation from the provisions of a zoning ordinance, the decision of the board will not be disturbed unless it is found to be illegal, or from the standpoint of fact it is not supported by evidence, or is arbitrary and unreasonable, or is clearly wrong. *Frank v. Russell* 354

7. The obligation of a public power district to make payments in lieu of taxes was not changed by statutory amendment. *State ex rel. School Dist. v. Ellis* 400

8. Under amendment to statute, payments by public power districts in lieu of taxes became payable in the proportion that the levies of the separate subdivisions bore to the total amount all of them received before the amendment. *State ex rel. School Dist. v. Ellis* 400
9. Municipal corporations are political subdivisions of the state. The powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the state. *County of Johnson v. Weber* 432
Lang v. Sanitary District 754
10. Powers of municipal corporations stated. *Lang v. Sanitary District* 754
11. Statutes which authorize the issuance of bonds by minor political subdivisions of the state are subjects for strict construction when an interpretation is necessary. Where the meaning and intent is doubtful, the doubt should be resolved in favor of the public or taxpayers. *Lang v. Sanitary District* 754

Negligence.

1. When the evidence with relation to negligence is conflicting or such that minds may reasonably reach different conclusions with regard to its existence, the issue should be submitted to the jury. *Granger v. Byrne* 10
Welstead v. Ryan Construction Co. 87
2. If the jury finds the defendant in a personal injury action is not chargeable with negligence, an error relating to the subject of damages is harmless. *Segebart v. Gregory* 64
3. Rule stated as to burden of proof and manner of instructing jury where conduct of others not parties to the suit is claimed to be the sole proximate cause of accident. *Welstead v. Ryan Construction Co.* 87
4. When separate and independent acts of negligence by different persons combine to produce a single injury, each participant is liable for the resulting damages. *Welstead v. Ryan Construction Co.* 87
5. In a negligence action where the undisputed facts conclusively establish as a matter of law that plaintiff was guilty of contributory negligence more than slight when compared with the negligence of the defendant, a motion for summary judgment for

the defendant may properly be sustained. *Miller v. Aitken* 97

6. Where a petition charges specific grounds of negligence as a basis for recovery, and also contains a general allegation of negligence on the part of defendant in causing the damage, and where no motion for a more specific statement is filed, it is competent under the general allegation of negligence to offer evidence of any fact which contributed to the injury. *Behrens v. Gottula* 103
7. It is sufficient if all the facts and circumstances in evidence fairly warrant the conclusion that a fire did not originate from some other cause. The origin of a fire has generally been held sufficiently established by inferences drawn from circumstantial evidence. *Behrens v. Gottula* 103
8. It is error to submit the issue of contributory negligence to a jury if such issue finds no support in the evidence. *Gain v. Drennen* 263
9. To neglect and to omit are not synonymous terms. There may be an omission to perform an act or condition which is altogether involuntary and inevitable; but neglect to perform must be either voluntary or inadvertent. To neglect is to omit by carelessness or design, not from necessity. *Sullivan v. Omaha & C. B. St. Ry. Co.* 342
10. Essential elements of cause of action for negligence stated. *Peterson v. State Automobile Ins. Assn.* 420
11. The existence and extent of a duty to use due care cannot be supplied by proof of mere usage or custom. *Peterson v. State Automobile Ins. Assn.* 420
12. Mere inaction does not constitute negligence in the absence of a duty to act. Even though a duty has been undertaken, if such undertaking was purely gratuitous, negligence cannot be predicated on abandonment of or failure to perform such duty. *Peterson v. State Automobile Ins. Assn.* 420
13. Liability of proprietor of a place of business for torts of third persons stated. *Crane v. Whitcomb* 527
14. Gross negligence within the meaning of the motor vehicle guest statute means great and excessive negligence or negligence in a very high degree. It indicates the absence of slight care in the performance of a duty. *Rice v. Neisius* 617
15. When the evidence is resolved most favorably towards the existence of gross negligence, the ques-

tion of whether or not it supports a finding of gross negligence is one of law. *Rice v. Neisius* 617
16. 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 headlights. *Allen v. Kavanaugh* 645
17. A driver of an automobile is legally obligated to keep such a lookout that he can see what is plainly visible before him and he cannot relieve himself of that duty. In conjunction therewith, he must so drive his automobile that when he sees the object he can stop his automobile in time to avoid it. *Allen v. Kavanaugh* 645
18. As a general rule a motorist who drives his 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 headlights is negligent as a matter of law. *Allen v. Kavanaugh* 645
19. Where the evidence shows beyond reasonable dispute that a plaintiff's negligence was more than slight as compared with a defendant's negligence it is the duty of the court to determine the question as a matter of law and direct a verdict in favor of the defendant. *Allen v. Kavanaugh* 645
20. When one being in a place of safety sees, or in the exercise of reasonable care for his own safety should see, the approach of a moving vehicle in close proximity, suddenly moves from the place of safety into the path of such vehicle and is struck, his own conduct constitutes contributory negligence more than slight in degree, as a matter of law, and precludes recovery. *Heinis v. Lawrence* 652
21. Employers are liable for the consequences, not of danger, but of negligence. The unbending test of negligence in methods, machinery, and appliances is the ordinary usage of the business. *Halsey v. Merchants Motor Freight, Inc.* 732
22. Negligence is ordinarily a question of fact which may be proved by circumstantial evidence and established physical facts. If such facts and circumstances, and the inferences that may be drawn therefrom, indicate with reasonable certainty the existence of the negligent act complained of, it is sufficient to sustain a verdict by the jury. *Halsey v. Merchants Motor Freight, Inc.* 732
23. Negligence is never presumed, and cannot be in-

ferred from the mere fact that an accident happened. *Halsey v. Merchants Motor Freight, Inc.* 732

24. Where plaintiff's automobile is standing still on the highway when defendant, driving on icy pavement in a blinding snowstorm, first sees it, the only issue of contributory negligence is whether plaintiff should have, under the circumstances, removed his car from the pavement or given warning. *Doleman v. Burandt* 745

25. Where plaintiff's automobile is standing still on highway, instructions imposing duties on plaintiff with respect to operation of automobile are prejudicially erroneous. *Doleman v. Burandt* 745

26. When an automobile is owned jointly and one of the two co-owners entrusts its use to the other, any negligence of the owner driving the automobile is imputed to the other owner in an action brought by the owners as plaintiffs against a third party for property damage to their jointly owned automobile. *Doleman v. Burandt* 745

27. Where two persons unite in the joint prosecution of a common purpose so that each has authority, express or implied, to act for the other in respect to the control of the means to accomplish the common purpose, the negligence of one will be imputed to the other. *Bartek v. Glasers Provisions Co., Inc.* 794

28. Where contributory negligence is pleaded as a defense, but there is no evidence to support such defense, it is error to submit such issue to the jury. *Bartek v. Glasers Provisions Co., Inc.* 794

29. In deciding that a litigant is barred from recovery by his contributory negligence every material fact which his evidence tends to prove should be considered as established. *Long v. Whalen* 813

New Trial.

1. The basis of a motion for new trial may be stated in the language of the statute without other particularity. *Powell v. Van Donselaar* 21

2. The words unavoidably prevented in the statute specifying grounds for new trial signify something that was beyond the ability of the person affected to have avoided. An event or a result is unavoidable which human prudence, foresight, and sagacity cannot prevent. *Powell v. Van Donselaar* 21

3. A motion for a new trial not timely filed does not

enlarge the time within which a notice of appeal must be filed after the rendition of judgment. *Powell v. Van Donselaar* 21
4. Procedure on appeal where trial court has sustained motion for new trial stated. *Gain v. Drennen* 263
5. In a criminal case, a new trial may be granted for newly discovered evidence which is competent, material, and credible, which might have changed the result of the trial and which the exercise of due diligence could not have discovered and produced at the trial. *Gates v. State* 722

Officers.

1. Statutory provision with relation to the allowance of attorney's fees has application to actions upon the bonds of public officials. *State ex rel. School Dist. v. Ellis* 400
2. Statutory provision with relation to the allowance of attorney's fees is mandatory. *State ex rel. School Dist. v. Ellis* 400
3. Practical construction of statute by an executive officer charged with its enforcement is given considerable weight by the courts. *Bankers Life Ins. Co. v. Laughlin* 480
4. The Legislature is presumed to know the construction of its statutes by the executive departments of the state. *Bankers Life Ins. Co. v. Laughlin* 480

Parties.

1. The real party in interest is the party entitled to the avails of the suit. *Dafoe v. Dafoe* 145
2. A party plaintiff not only must have a legal existence and a legal capacity to sue, but also must have a remedial interest which the law of the forum can recognize and enforce. *Dafoe v. Dafoe* 145
3. Requirements for maintenance of suit by a next friend stated. *Dafoe v. Dafoe* 145

Partition.

1. As between partition in kind or sale of land for division, the courts favor partition in kind, since it does not disturb the existing form of inheritance or compel a person to sell his property against his will. *Cary v. Armbrust* 392
2. A sale in partition cannot properly be decreed merely to advance the interests of one of the owners, but before ordering a sale, the court must

judicially ascertain that the interests of all will be promoted thereby. *Cary v. Armbrust* 392
3. In a partition action the plaintiff is not entitled to have fees taxed for his attorney if the action is adversary. *Cary v. Armbrust* 392
4. Rule with respect to attorney's fees applies to the proceedings after decree of partition as well as to those leading up to decree. *Cary v. Armbrust* 392

Penalties.

1. A prosecution for an act in violation of a city ordinance, which act is not a violation of statute, is a civil action for the recovery of a penalty. In such case the burden is on the prosecution to prove the charge by a preponderance of the evidence. *State v. Renensland* 206
2. In an action to recover a penalty for violation of a city ordinance where a jury is waived, the matter of weighing the evidence to determine whether or not the prosecution has sustained the burden of proving its case by a preponderance of the evidence is one for the trial judge and his finding will not be disturbed unless it is clearly wrong. *State v. Renensland* 206

Pleading.

1. 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 the civil code. *Reller v. Ankeny* 47
2. Where a petition alleges that certain statements published by defendant concerning plaintiff were false and maliciously made, a demurrer thereto admits the falsity of the statements and that they were motivated by malice. *Reller v. Ankeny* 47
3. An exhibit incorporated in a pleading is a part of it for all purposes in the case and it may be considered in deciding if the pleading states a cause of action or a defense. *Reller v. Ankeny* 47
4. The rule is inflexible that allegations and proof must agree. *Shepardson v. Chicago, B. & Q. R. R. Co.* 127
5. When, without timely and proper objection a motion to dismiss is treated by the parties as the equivalent of a general demurrer, it will be so treated on appeal to the Supreme Court. *Cacek v. Munson* 187
6. A general demurrer admits allegations of fact well

pleaded, but does not admit the pleader's conclusions of law or fact. *Cacek v. Munson* 187

7. In passing on a demurrer, the court will consider an exhibit attached to a petition and made a part thereof, if the allegations stated therein either aid the petition in stating a cause of action or charge facts going to avoid liability on the part of the defendant. *Cacek v. Munson* 187

8. Essential elements of cause of action for negligence stated. *Peterson v. State Automobile Ins. Assn.* 420

9. An admission in an answer does not extend beyond the intendment of the admission as disclosed by its context. *O'Neal v. First Trust Co.* 469

10. A motion for judgment on the pleadings, like a demurrer, admits the truth of all well-pleaded facts in the pleading of the opposing party, together with all reasonable inferences to be drawn therefrom. The party moving for judgment on the pleadings necessarily admits, for the purpose of the motion, the untruth of his own allegations insofar as they have been controverted. *Board of Trustees of York College v. Cheney* 631

11. A judgment on the pleadings is allowable not for lack of proof but for lack of an issue; hence, it is proper where the pleadings entitle the party to recover without proof, as where they disclose all the facts, or where the pleadings present no issue of fact but only a question of law. *Board of Trustees of York College v. Cheney* 631

12. A party may at any time invoke the language of the pleading of his adversary on which the case is tried on a particular issue as rendering certain facts indisputable; and in so doing he is neither required nor permitted to offer the pleading in evidence. *Wright v. Lincoln City Lines, Inc.* 714

13. An admission made in a pleading on which the trial is had is more than an ordinary admission. It is a judicial admission and constitutes a waiver of all controversy so far as the adverse party desires to take advantage of it, and is therefore a limitation of the issues. *Wright v. Lincoln City Lines, Inc.* 714

Public Lands.

1. The meaning of the words "public lands" varies in different statutes enacted for different purposes.

The words should be given such meaning as comports with the intention of the Legislature in their use. *Offutt Housing Co. v. County of Sarpy* 320

2. The term "leased public lands" as used in the taxation statute means "lands belonging to the public, which have been leased as authorized by law." *Offutt Housing Co. v. County of Sarpy* 320
3. A tenant holding over after the invalidation of a lease of school lands becomes a tenant at sufferance. *Jessen v. Blackard* 557
4. A tenant at sufferance on school lands is the owner of crops planted on such lands during the continuance of the tenancy. *Jessen v. Blackard* 557

Public Service Commissions.

1. When an application is made for additional service or to discontinue an existing service of a common carrier, the question to be determined is the public need or lack of need therefor. The carrier is not required to maintain standby station agency service not comprehensively used by the public, or to be used only when other established carriers fail to meet the need. *Chicago, B. & Q. R. R. Co. v. Keifer* 168
2. It is the duty of a carrier to seek, and of regulatory agencies to permit, the elimination of those services and facilities that are no longer needed or used by the public to any substantial extent. *Chicago, B. & Q. R. R. Co. v. Keifer* 168
3. A ruling on the question of discontinuance of a railroad station agency at any given time does not amount to an adjudication for the future. It is only a judgment on the condition presented by the application and relates only to the time and conditions presented. *Chicago, B. & Q. R. R. Co. v. Keifer* 168
4. On appeal from an order of the State Railway Commission, while acting within its jurisdiction, the question for determination is the sufficiency of the evidence to prove that the order is not unreasonable or arbitrary. *Chicago, B. & Q. R. R. Co. v. Keifer* 168
5. Courts are without authority to interfere with the findings and orders of the State Railway Commission except where it exceeds its jurisdiction or acts arbitrarily. *Dalton v. Kinney* 516

Quieting Title.

A lessee of real estate may by virtue of statute maintain an action to quiet title to his leasehold. *Peterson v. Vak* 450

Railroads.

1. A carrier is not required to make expenditure of earnings from a particular community in the community where earned in excess of the requirements of reasonable service. *Chicago, B. & Q. R. R. Co. v. Keifer* 168
2. The services and facilities to be furnished by a railroad company at any station need only be just, reasonable, and adequate to the requirements of the station, and should in a measure be commensurate with the patronage and receipts from that portion of the public to whom such service is rendered. *Chicago, B. & Q. R. R. Co. v. Keifer* 168
3. When an application is made for additional service or to discontinue an existing service of a common carrier, the question to be determined is the public need or lack of need therefor. The carrier is not required to maintain standby station agency service not comprehensively used by the public, or to be used only when other established carriers fail to meet the need. *Chicago, B. & Q. R. R. Co. v. Keifer* 168
4. It is the duty of a carrier to seek, and of regulatory agencies to permit, the elimination of those services and facilities that are no longer needed or used by the public to any substantial extent. *Chicago, B. & Q. R. R. Co. v. Keifer* 168
5. Ordinarily a carrier by rail is not obligated to furnish substantially door-to-door delivery of commodities which are shipped over its lines. *Chicago, B. & Q. R. R. Co. v. Keifer* 168

Rescission.

1. Requirements of pleading and proof necessary to maintain an action for rescission because of false representations stated. *Russo v. Williams* 564
2. The right of one party to a contract to rescind is barred by failure for an unreasonable time after knowledge of the facts giving rise to such right to declare a rescission and disclaim the benefits of the contract. *Russo v. Williams* 564
3. The remedies of rescission and damages are incon-

sistent; the former proceeding upon disaffirmance and the latter upon affirmance of the contract. *Russo v. Williams* 564
4. If a contract is actually rescinded, it becomes non-existent. *Russo v. Williams* 564

Sales.
1. An innocent purchaser is one who buys property for a present valuable consideration without knowledge sufficient to charge him in law with notice of any infirmity in the title of the seller. *Terry Bros. & Meves v. National Auto Ins. Co.* 110
2. The measure of damages for failure to deliver goods purchased is the loss directly and naturally resulting, in the ordinary course of events, from the seller's breach of contract. *Selig v. Wunderlich Contracting Co.* 215
3. As a general rule where the seller of goods sends them by railroad to a purchaser, title passes to the purchaser on arrival at the designated point of delivery to the purchaser. *Joyce Wholesale Co. v. Northside L. & M., Inc.* 703
4. The general rule with respect to title to goods passing on arrival at designated point of delivery does not apply if a contrary intent appears. *Joyce Wholesale Co. v. Northside L. & M., Inc.* 703
5. As a general rule a sale is incomplete without delivery. *Joyce Wholesale Co. v. Northside L. & M., Inc.* 703

Schools and School Districts.
1. One who was actually present at an annual meeting of a rural school district and entitled to vote on the designation of a schoolhouse site but who did not vote must be counted as present in order to compute the requisite majority on that matter. *Richards v. McBride* 57
2. One who contends that there are defects in the election by which a schoolhouse site is designated may be barred by laches if he waits until the school district has expended substantial sums in good faith and the rights of third persons have intervened in reliance on the validity of the election. *Richards v. McBride* 57
3. Where there is no evidence of acquiescence, estoppel, or undue delay on the part of the person questioning the validity of an election to fix a schoolhouse

site, equity will not entertain the defense of laches or estoppel in a suit to test the validity of such election. *Richards v. McBride* 57

4. When petitions are filed requesting a change of boundaries of school districts, it is the duty of the county superintendent of schools to give proper notice of and hold a hearing thereon, and at or after such hearing to factually determine the sufficiency of the petition. *Cacek v. Munson* 187

5. Where the record of proceedings discloses that 55 percent or more of the legal voters of each school district affected have signed and filed petitions requesting a change of boundaries, the county superintendent of schools has the jurisdiction and mandatory duty to order the boundary changes requested by such petitions. *Cacek v. Munson* 187

6. Where the record discloses that the county superintendent of schools has jurisdiction to enter an order changing the boundaries of school districts, such order may not, unless fraud is alleged, be collaterally attacked, but may be reviewed by proceedings in error which provide an adequate remedy. *Cacek v. Munson* 187

7. When proper petitions are filed requesting creation of a new district from other districts or a change of boundaries of school districts across county lines, it is the duty of county superintendents to give proper notice of and hold a hearing, and at or after such hearing to factually determine whether or not such districts have lawfully petitioned the same. *Olsen v. Grosshans* 543

8. When the record discloses that the districts involved have severally signed and filed proper petitions requesting creation of a new district from other districts or a change of boundaries thereof, county superintendents have jurisdiction and the mandatory duty to order the changes requested by such petitions, which order may be reviewed by petition in error. *Olsen v. Grosshans* 543

9. Unless the petitions of the several districts affected concur in substantially the identical action requested, the county superintendent or superintendents are without jurisdiction or authority to act on petitions to create a new school district or make a change in boundaries. *Olsen v. Grosshans* 543

10. The requirement in amendatory act, that any plan of reorganization must be submitted to the state

committee for school district reorganization and be approved by it before a hearing is had, relates only to any plan of reorganization proposed by a group of districts. *School District No. 42 v. Marshall* 832

Specific Performance.

1. Where one is claiming the estate of a deceased person under an alleged oral contract, the evidence of such contract and the terms of it must be clear, satisfactory, and unequivocal. *O'Neal v. First Trust Co.* 469
2. An oral contract claiming the estate of a deceased person is void on its face as within the statute of frauds, because not in writing. Even though proved by clear and satisfactory evidence, it is not enforceable unless there has been such performance as the law requires. *O'Neal v. First Trust Co.* 469
3. The thing done constituting performance must be such as is referable solely to the contract sought to be enforced so that nonperformance by the other party would amount to fraud upon him. *O'Neal v. First Trust Co.* 469
4. Burden of proof stated as to enforcement of oral contract to leave part of estate by will. *O'Neal v. First Trust Co.* 469
5. Evidence of declarations of a deceased person, concerning a parol contract to leave part of estate by will, does not amount to direct proof of the facts claimed to have been admitted by those declarations. Such evidence, when not supported by other evidence, is generally entitled to but little weight. *O'Neal v. First Trust Co.* 469
6. Each case seeking specific performance of oral contract is to be determined from the facts, circumstances, and conditions as presented therein. *O'Neal v. First Trust Co.* 469
7. If one party has been induced to make a contract by reason of any material misrepresentation on the part of the other party, specific performance will be denied, whether the misrepresentation was willful and intended, or made innocently with an honest belief in its truth. *Russo v. Williams* 564
8. Specific performance of a contract is not generally demandable or awarded as a matter of absolute legal right but is directed to and governed by the sound legal discretion of the court, dependent upon

the facts and circumstances of each particular case. It will not be granted where enforcement would be unjust. *Russo v. Williams* 564

States.

The state's immunity from suit in its own courts without its consent is unaffected by declaratory judgment statutes, but such an action may be maintained under statutes which permit actions against the state. *Offutt Housing Co. v. County of Sarpy* 320

Statutes.

1. The civil code 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. *Reller v. Ankeny* 47
2. Legislative act providing for body fluid test for intoxication is in derogation of the common law and must be strictly interpreted and applied as limited by the terms of the act. *Hoffman v. State* 375
3. Instruction on body fluid test for intoxication is required only in a prosecution for operating a motor vehicle while under the influence of intoxicating liquor. *Hoffman v. State* 375
4. Legislature imposed duty on drainage districts to maintain and keep in repair drainage system constructed under drainage statute. *County of Johnson v. Weber* 432
5. Statute was mandatory imposing duty for the care and preservation of drainage ditches. *County of Johnson v. Weber* 432
6. Every contract is made with reference to, and subject to, existing law, and every law affecting such contract is read into and becomes a part thereof. *County of Johnson v. Weber* 432
7. In construing a statute, effect must be given, if possible, to every word, clause, and sentence, so that no part of its provisions will be inoperative, superfluous, void, or insignificant. *Ewert Implement Co. v. Board of Equalization* 445
8. Practical construction of statute by an executive officer charged with its enforcement is given considerable weight by the courts. *Bankers Life Ins. Co. v. Laughlin* 480
9. The Legislature is presumed to know the construction of its statutes by the executive depart-

ments of the state. *Bankers Life Ins. Co. v. Laughlin* 480

10. A mutual canal company is a creature of statute and possesses only those powers expressly or impliedly granted to it by such statute. *Thirty Mile Canal Co. v. Carskadon* 496

11. Where the Legislature has prescribed how assessments may be levied and collected by a mutual canal company, the method is exclusive and such company is without authority to prescribe other methods in its articles of incorporation and by-laws. *Thirty Mile Canal Co. v. Carskadon* 496

12. An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; and it is, in legal contemplation, as inoperative as though it had never been passed. *Jessen v. Blackard* 557

13. In an action wherein relief is sought pursuant to the terms of a statute which has been declared unconstitutional, the Supreme Court is required to regard the statute as nonexistent and to deny relief whether or not unconstitutionality of the act has been pleaded as a defense. *Jessen v. Blackard* 557

14. Penal statutes are inelastic, must be strictly construed, and may not be extended by implication. *Olson v. State* 604

15. In construing statutes, the legislative intention is to be determined from a general consideration of the whole act with reference to the subject matter to which it applies and the particular topic under which the language in question is found. The intent so deduced from the whole will prevail over that of a particular part considered separately. *Lang v. Sanitary District* 754

16. The fundamental principle of statutory construction is to ascertain the intent of the Legislature and to discover that intent from the language of the act itself. It is not the court's duty nor within its province to read a meaning into a statute that is not warranted by legislative language. *Lang v. Sanitary District* 754

17. In enacting a statute, the Legislature must be presumed to have had in mind all previous legislation. In the construction of a statute, courts must consider the preexisting law together with any other laws relating to the same subject, which, although

enacted at different times, are in pari materia therewith. *Lang v. Sanitary District* 754

18. When the Legislature subsequently enacts legislation making related preexisting laws applicable thereto, it will be presumed that it did so with full knowledge of such preexisting legislation and the judicial decisions of the Supreme Court construing and applying it. *Lang v. Sanitary District* 754

19. Statutes which authorize the issuance of bonds by minor political subdivisions of the state are subjects for strict construction when an interpretation is necessary. Where the meaning and intent is doubtful, the doubt should be resolved in favor of the public or taxpayers. *Lang v. Sanitary District* 754

20. In construing a statute to determine the legislative intent a court may consider the history of its passage, the amendments offered, and action taken by the Legislature thereon. *School District No. 42 v. Marshall* 832

Subrogation.

The doctrine of subrogation is not available to one who pays his own primary obligations. *Marmet v. Marmet* 366

Taxation.

1. The levy, assessment, and collection of taxes which are demonstrably void for want of jurisdiction or authority to impose the same may be enjoined. *Offutt Housing Co. v. County of Sarpy* 320

2. The Congress of the United States has re-ceded to the state the power and authority to tax a lessee's interest in a housing project located on real property owned by the government of the United States which has been leased by it to private industry. *Offutt Housing Co. v. County of Sarpy* 320

3. The term "leased public lands" as used in the taxation statute means "lands belonging to the public, which have been leased as authorized by law." *Offutt Housing Co. v. County of Sarpy* 320

4. The words "owner of such improvements" as used in the taxation statute include "any lessee who has the dominion or control thereover for his own use and profit during the useful life thereof." *Offutt Housing Co. v. County of Sarpy* 320

5. The obligation of a public power district to make payments in lieu of taxes was not changed by

statutory amendment. *State ex rel. School Dist. v. Ellis* 400
6. Under amendment to statute, payments by public power districts in lieu of taxes became payable in the proportion that the levies of the separate subdivisions bore to the total amount all of them received before the amendment. *State ex rel. School Dist. v. Ellis* 400
7. The Legislature has the power to take funds raised for one governmental subdivision and give them to another governmental subdivision if it is done for the benefit of the public in the taxing district. *State ex rel. School Dist. v. Ellis* 400
8. The Legislature is without power to transfer funds raised for the benefit of one district or subdivision to another district or subdivision. *State ex rel. School Dist. v. Ellis* 400
9. The power of the Legislature with regard to the transfer of funds received in lieu of taxes is the same as it has with regard to funds raised by taxation. *State ex rel. School Dist. v. Ellis* 400
10. A county board of equalization is authorized to meet in special session at any time after the close of its regular annual session for the purpose of equalizing assessments of omitted and undervalued property. *Ewert Implement Co. v. Board of Equalization* 445
11. Prior holding of Supreme Court as to termination date of authority of county board of equalization has been changed by amendment of statute. *Ewert Implement Co. v. Board of Equalization* 445
12. All nonexempt property in Nebraska is subject to taxation and for that purpose must be valued at its actual value, which means its value in the market in the ordinary course of trade. *Ahern v. Board of Equalization* 709
13. Ordinarily the valuation by the assessor is presumed to be correct. However if the assessor does not make a personal inspection of the property, but accepts valuations thereof fixed by a professional appraiser, the presumption does not obtain, and in such case the burden is upon the protesting party to prove that the assessment is excessive. *Ahern v. Board of Equalization* 709
14. The presumption obtains that a board of equalization has faithfully performed its official duties, and that in making an assessment it acted upon suffi-

cient competent evidence to justify its action. *Ahern v. Board of Equalization* 709

15. The presumption that a board of equalization in making an assessment acted upon sufficient competent evidence to justify its action disappears when there is competent evidence on appeal to the contrary. From that point on the reasonableness of the valuation fixed by the board becomes one of fact based upon evidence, unaided by presumption, with the burden of showing such value to be unreasonable resting upon the party complaining. *Ahern v. Board of Equalization* 709

Tenancy in Common.

A right of possession of the common property by each cotenant is an essential characteristic of a tenancy in common. *Statler v. Watson* 1

Torts.

Where the independent tortious acts of two or more persons combine to produce an injury indivisible in its nature, any one or more of such tortfeasors may be held liable for the entire damage on the theory that his or their acts are considered in law as a cause of the injury. *Wright v. Lincoln City Lines, Inc.* 714

Trespass.

1. A tenant is entitled to the exclusive possession and use of the demised premises in the absence of reservations and restrictions in his lease and he may even maintain trespass against his landlord. *Peterson v. Vak* 450

2. If the nature of a threatened trespass on real estate is such that it will, if accomplished, prevent a substantial enjoyment of property or the possession thereof, the remedy of injunction is appropriate to forestall the wrongful act. *Peterson v. Vak* 450

Trial.

1. When the evidence with relation to negligence is conflicting or such that minds may reasonably reach different conclusions with regard to its existence, the issue should be submitted to the jury. *Granger v. Byrne* 10
Welstead v. Ryan Construction Co. 87

2. In determining the sufficiency of evidence to sustain a verdict it must be considered most favorably to the successful party, any controverted fact must be resolved in his favor, and he must have the benefit of inferences reasonably deducible from it. *Granger v. Byrne* 10
Welstead v. Ryan Construction Co. 87
3. The verdict of a jury, based on conflicting evidence, will not be disturbed unless clearly wrong. *Granger v. Byrne* 10
Welstead v. Ryan Construction Co. 87
4. One may not complain of alleged misconduct of adverse counsel if, with knowledge of such alleged misconduct, he does not ask for a mistrial but consents to take the chance of a favorable verdict. *Granger v. Byrne* 10
5. Instructions are to be considered together, and if as a whole they fairly state the law applicable to the evidence when so construed, error cannot be predicated on the giving thereof. *Granger v. Byrne* 10
6. An affidavit used on the hearing of an issue of fact must be offered in evidence in the trial court and preserved in and presented by a bill of exceptions to be available for consideration in the Supreme Court. *Powell v. Van Donselaar* 21
7. An affidavit of a juror as to what items the jury allowed or disallowed in computing the amount due, or what the jury believed it had a right to do under the instructions, is incompetent. *Schumacher v. Lang* 43
8. It is not error to refuse to give a requested instruction containing abstract principles of law where no effort is made therein to apply the rule to the particular evidence and issues of the case to which it is claimed it is applicable. *Segebart v. Gregory* 64
9. It is not error to fail to instruct relative to the purchasing power of money. It is not a proper subject for an instruction. *Segebart v. Gregory* 64
10. Error cannot be predicated upon the giving of an instruction substantially similar to one requested by the party seeking to reverse the judgment. *Segebart v. Gregory* 64
11. In the framing of an instruction, it is not necessary that a trial court follow the exact language used by the Supreme Court in stating a rule of law. *Segebart v. Gregory* 64

12. A party is not permitted to proceed with a trial without objection and, if unfavorable, contend that a mistrial should have been declared, when he did not ask for the same at the time. *Segebart v. Gregory* 64
13. The trial court has the duty to instruct the jury on issues presented by the pleadings and evidence, whether requested to do so or not, and a failure so to do constitutes prejudicial error. *Welstead v. Ryan Construction Co.* 87
14. It is error to submit issues upon which there is no evidence to sustain an affirmative finding. *Welstead v. Ryan Construction Co.* 87
15. Rule stated as to burden of proof and manner of instructing jury where conduct of others not parties to the suit is claimed to be the sole proximate cause of accident. *Welstead v. Ryan Construction Co.* 87
16. In order to obtain a summary judgment the movant must show, first, that there is no genuine issue as to any material fact in the case, and second, that he is entitled to a judgment as a matter of law. *Miller v. Aitken* 97
17. In considering a motion for summary judgment, the court should consider the evidence in the light most favorable to the party against whom it is directed. *Miller v. Aitken* 97
18. Summary judgment is effective and serves a separate useful purpose only when it can be used to pierce the allegations of the pleadings and show conclusively that the controlling facts are otherwise than as alleged. *Miller v. Aitken* 97
19. In a negligence action where the undisputed facts conclusively establish that as a matter of law plaintiff was guilty of contributory negligence more than slight when compared with the negligence of the defendant, a motion for summary judgment for the defendant may properly be sustained. *Miller v. Aitken* 97
20. Rule for consideration of motion for directed verdict stated. *Behrens v. Gottula* 103
Crane v. Whitcomb 527
21. Where a petition charges specific grounds of negligence as a basis for recovery, and also contains a general allegation of negligence on the part of the defendant in causing the damage, and where no motion for a more specific statement is filed,

it is competent under the general allegation of negligence to offer evidence of any fact which contributed to the injury. *Behrens v. Gottula* 103

22. In a jury case where different minds may draw different conclusions or inferences from the adduced evidence, or where there is a conflict in the evidence, the matter at issue must be submitted to the jury. *Behrens v. Gottula* 103

23. In a law action findings of fact made by the court have the same force and effect as the verdict of a jury, and if there is competent evidence to support them, such findings will not be disturbed on appeal. *Terry Bros. & Meves v. National Auto Ins. Co.* 110

24. It is the duty of the trial court to instruct fully upon the theory of a party to an action if the theory finds support in the evidence. *Gain v. Drennen* 263

25. When an agreement is oral and evidence as to the intention of the parties is conflicting, the question of the intention of the parties is for determination by the jury. *Hampton v. Struve* 305

26. An instruction, which correctly advises the jury that plaintiff must prove all the material elements of his case by a preponderance of the evidence and that if it fails to so establish any one of them the verdict should be for the defendant, is not erroneous in that it fails to inform the jury as to what its verdict should be if the evidence was evenly balanced. *Kohrt v. Hammond* 347

27. The ruling of the trial court on a question involving misconduct of the jury will not be disturbed in the absence of a showing of an abuse of discretion. *Kohrt v. Hammond* 347

28. To vitiate a verdict, an unauthorized inspection of the scene of an accident must be shown to have related to a matter in dispute and to have been of such a nature as to have influenced the jury in arriving at a verdict. *Kohrt v. Hammond* 347

29. Affidavits of jurors may not be considered to impeach a verdict where the facts sought to be shown are such as inhere in the verdict. *Kohrt v. Hammond* 347

30. If intoxication of a person is an issue in litigation, evidence of the alcoholic content of a specimen of body fluid determined by a chemical analysis, and expert opinion evidence as to intoxication based thereon, are admissible. *Hoffman v. State* 375

31. It is the duty of the trial court to instruct the jury on such degrees of homicide as find support in the evidence. *Washington v. State* 385
32. When the object of the cross-examination is to collaterally ascertain the accuracy or credibility of a witness, some latitude should be permitted. The scope of such latitude is ordinarily subject to the discretion of the trial judge and, unless abused, its exercise is not reversible error. *Washington v. State* 385
33. A plea of not guilty puts in issue all the material allegations of the information and all matters of defense which have sufficient support in the evidence to be submitted to the jury. It is the duty of the trial court to instruct as to the law applicable to all of such matters whether requested to do so or not. *Washington v. State* 385
34. A trial court is not required to instruct in the exact language of a requested instruction. If the point is covered by an instruction couched in proper terms it meets all the requirements of the law. *Washington v. State* 385
35. Where the inference is clear that there is, or is not, a master and servant relationship, the determination is made by the court; otherwise the jury determines the question. *Peetz v. Masek Auto Supply Co.* 410
36. The right of control determines whether the relationship of master and servant or that of an independent contractor exists. Whether or not the right of control exists is ordinarily a question of fact for the jury. *Peetz v. Masek Auto Supply Co.* 410
37. Whether an act was or was not such as to be within the scope of the employment is, ordinarily, one of fact for the determination of the jury under all the surrounding facts and circumstances. *Peetz v. Masek Auto Supply Co.* 410
38. When the evidence viewed in the light most favorable to plaintiff fails to establish actionable negligence, it is the duty of the trial court to direct a verdict for defendant or render a judgment notwithstanding the verdict if motions therefor are timely and appropriately made. *Crane v. Whitcomb* 527
39. A party may not complain of misconduct of counsel if, with knowledge thereof, he does not ask for a

mistrial, but consents to take the chance of a favorable verdict. *Beads v. State* 538
40. Where no objection is made or exceptions taken to remarks of the trial judge made during the course of the trial, a complaint with respect thereto cannot be reviewed on appeal. *Beads v. State* 538
41. When the facts pertaining to the relationship of the persons involved are in dispute, or more than one inference can be drawn therefrom, the question is for the jury. *Barnes v. Davitt* 595
42. Findings of a court in a law action in which a jury is waived have the effect of the verdict of a jury, and judgment thereon will not be disturbed unless clearly wrong. *Barnes v. Davitt* 595
43. A motion for judgment on the pleadings, like a demurrer, admits the truth of all well-pleaded facts in the pleadings of the opposing party, together with all reasonable inferences to be drawn therefrom. The party moving for judgment on the pleadings necessarily admits, for the purpose of the motion, the untruth of his own allegations insofar as they have been controverted. *Board of Trustees of York College v. Cheney* 631
44. A judgment on the pleadings is allowable not for lack of proof but for lack of an issue; hence, it is proper where the pleadings entitle the party to recover without proof, as where they disclose all the facts, or where the pleadings present no issue of fact but only a question of law. *Board of Trustees of York College v. Cheney* 631
45. The district court may not properly direct a verdict of not guilty unless the evidence is so lacking in probative force that the court may say as a matter of law that it is insufficient to support a finding of guilt. *Hertz v. State* 640
46. It is not the province of the district court to resolve conflicts in evidence in a criminal action or to pass upon the credibility of witnesses. *Hertz v. State* 640
47. Where the evidence shows beyond reasonable dispute that a plaintiff's negligence was more than slight as compared with a defendant's negligence it is the duty of the court to determine the question as a matter of law and direct a verdict in favor of the defendant. *Allen v. Kavanaugh* 645
48. In a case where a motion has been made at the close of all of the evidence for a directed verdict,

which motion should have been sustained but was overruled and the case was submitted to a jury which returned a verdict contrary to the motion, and a motion for judgment notwithstanding the verdict is duly filed, it is the duty of the court to sustain the motion and render judgment in accordance with the motion for a directed verdict. *Allen v. Kavanaugh* 645

49 It is the duty of the trial court, without request, to submit to and properly instruct the jury upon all the material issues presented by the pleadings and the evidence. *Wright v. Lincoln City Lines, Inc.* 714

50. A litigant is entitled to have the jury instructed as to his theory of the case as shown by the pleadings and evidence, and a failure to do so is prejudicial error. *Wright v. Lincoln City Lines, Inc.* 714

51. It is prejudicial error to instruct a jury that all material allegations of an answer must be established by evidence where material allegations thereof have been alleged in the petition and admitted in the answer. A party is entitled to have the jury told that material facts have been admitted by the pleadings and that the necessity of further proof of such admitted facts is not necessary or permitted. *Wright v. Lincoln City Lines, Inc.* 714

52. Negligence is ordinarily a question of fact which may be proved by circumstantial evidence and established physical facts. If such facts and circumstances, and the inferences that may be drawn therefrom, indicate with reasonable certainty the existence of the negligent act complained of, it is sufficient to sustain a verdict by the jury. *Halsey v. Merchants Motor Freight, Inc.* 732

53. Circumstantial evidence cannot be said to be sufficient to sustain a verdict or to require submission of a case to a jury depending solely thereon for support, unless the circumstances proved are of such a nature and so related to each other that the conclusion reached is the only one that can fairly and reasonably be drawn therefrom. *Halsey v. Merchants Motor Freight, Inc.* 732

54. Rule stated of effect of motion for judgment notwithstanding the verdict. *Halsey v. Merchants Motor Freight, Inc.* 732

55. It is the duty of the trial court to determine the issues upon which there is competent evidence and submit them to the jury. The submission of issues

upon which the evidence is insufficient to sustain an affirmative finding is prejudicial. *Doleman v. Burandt* 745

56. Where contributory negligence is pleaded as a defense, but there is no evidence to support such defense, it is error to submit such issue to the jury. *Bartek v. Glasers Provisions Co., Inc.* 794

57. If there is any evidence which will sustain a finding for the litigant having the burden of proof, the trial court may not disregard it and decide the case as a matter of law. *Long v. Whalen* 813

58. In deciding that a litigant is barred from recovery by his contributory negligence every material fact which his evidence tends to prove should be considered as established. *Long v. Whalen* 813

59. It is error for the trial court to submit to the jury an issue pleaded which under the evidence produced in the case affords no basis of recovery by the pleader. *Long v. Whalen* 813

60. The giving of an incorrect instruction must be considered prejudicial where there is no showing that it did not affect the result of the trial. *Long v. Whalen* 813

61. If an instruction is given which it is claimed does not fully state the law and the attention of the trial court is directed to the alleged defect by a requested proposed instruction supplying the claimed omission, the party affected may have the alleged error reviewed in the Supreme Court. *Long v. Whalen* 813

Trusts.

1. The burden of proof is upon one seeking to establish the existence of a constructive trust to do so by evidence which is clear, satisfactory, and convincing in character. *Musil v. Beranek* 269

2. Trusts arising by implication or by operation of law are excepted from the operation of the statute of frauds. Resulting and constructive trusts therefore fall within the exception. *Musil v. Beranek* 269

3. When a person obtains the legal title to real estate by means of fraud or misrepresentation, actual or constructive, the law constructs a trust in favor of the party upon whom the fraud or imposition has been practiced. A court of equity will enforce such a trust for the benefit of the

grantor or those claiming under him. *Musil v. Beranek* 269

United States.

1. A motor truck owned by a private person and used to carry mail under contract with the United States Post Office Department is required to pay the registration fee to which commercial trucks are subject under the statutes of Nebraska. *Aulner v. State* 741
2. For overloading of truck in excess of specified carrying capacity, the owner of a motor truck used to carry mail under contract with the United States Post Office Department is subject to the penalty prescribed. *Aulner v. State* 741

Vendor and Purchaser.

A purchaser of real estate has a right to believe and rely upon representations made to him by his vendor as to the character, quality, and location of the property, when the facts concerning which the representations are made are unknown to the vendee. *Russo v. Williams* 564

Waters.

1. A riprarian owner may construct necessary structures to maintain his bank of the stream in its orginal place and condition, or to restore it to that condition and to bring the stream back to its normal course when it has encroached upon his land. If he does no more, other riparian owners cannot recover damages for the injury his action causes them. *Shepardson v. Chicago, B. & Q. R. R. Co.* 127
2. As defined by statute, a watercourse is any depression or draw 2 feet below the surrounding lands and having a continuous outlet to a stream of water, river, or brook. *Reed v. Jacobson* 245
3. To constitute a watercourse the size of the stream is not material. However, it must be a stream in fact as distinguished from mere surface drainage occasioned by freshets or other extraordinary causes, but the flow of water need not be continuous. *Reed v. Jacobson* 245
4. A mutual canal company is a creature of statute and possesses only those powers expressly or impliedly granted to it by such statute. *Thirty Mile Canal Co. v. Carskadon* 496

5. Where the Legislature has prescribed how assessments may be levied and collected by a mutual canal company, the method is exclusive and such company is without authority to prescribe other methods in its articles of incorporation and by-laws. *Thirty Mile Canal Co. v. Carskadon* 496
6. Water flowing in a well-defined watercourse may not be diverted and cast upon the land of another where it would not go according to natural drainage. *Bahm v. Raikes* 503
7. Overflow waters flowing in the natural flood channel of a running stream are a part of the stream and are governed by the running water rule. *Bahm v. Raikes* 503
8. Surface water is such as is carried off by surface drainage that is independent of a watercourse. *Bahm v. Raikes* 503
9. The flood plane of a live stream is the adjacent land overflowed in times of high water from which floodwaters return to the channel of the stream at lower points. The plane is regarded as part of the channel and the water flowing in the channel or its flood plane is floodwater. *Bahm v. Raikes* 503
10. The flood plane is a part of the channel of the stream. No obstruction can legally be erected in or along it the effect of which is to divert or interfere with the flow of water in the natural course of drainage. *Bahm v. Raikes* 503
11. The owners of lands bordering upon either the normal or flood channels of a natural watercourse are entitled to have its water, whether within its banks or in its flood channel, run as it is wont to run according to natural drainage, and no one has the lawful right by diversions or obstructions to interfere with its accustomed flow to the damage of another. *Bahm v. Raikes* 503
12. Counties have the right to reconstruct highways and in so doing to provide for the flow of water as it was wont to flow in the course of nature. *Clare v. County of Lancaster* 622
13. In the absence of negligence there is no liability on the part of a county in providing for the flow across a reconstructed highway of water naturally falling upon upper land which in the course of nature would have flowed across the highway onto lower land. *Clare v. County of Lancaster* 622
14. Water which appears upon the surface of the

ground in a diffused state with no permanent source of supply or regular course is regarded as surface water. *County of Scotts Bluff v. Hartwig* 823

15. Surface water is a common enemy. The proprietor may defend himself against its encroachments and will not be liable in damages which may result from the deflection and repulsion defended against, provided in making defense on his own land he exercised ordinary care, and provided he so uses his own property as not to unnecessarily and negligently injure another. *County of Scotts Bluff v. Hartwig* 823

16. The right of the owner, without negligence, to protect his land against surface water is a continuing one and the right is commensurate with the necessity for protection. *County of Scotts Bluff v. Hartwig* 823

17. While one may fight surface water and protect his premises against it by the use of reasonable means, he cannot collect it in a large body and flow it onto the land of a lower proprietor to his injury. *County of Scotts Bluff v. Hartwig* 823

18. Where surface water resulting from rain and snow flows in a well-defined course, whether it be a ditch, swale, or draw in its primitive condition, its flow cannot be arrested or interfered with by a landowner to the injury of neighboring proprietors. *County of Scotts Bluff v. Hartwig* 823

19. An easement may be acquired by prescription for the flow of water in a watercourse or its flood plane. The rule however has no application to surface waters. *County of Scotts Bluff v. Hartwig* 823

20. What would be illegal in the disposition of surface or other waters by a private individual is likewise illegal when attempted by the public authorities, unless by agreement, or in the exercise of the power of eminent domain and by the payment of damages, the public authorities have acquired the right to collect and discharge the water upon the land of another. *County of Scotts Bluff v. Hartwig* 823

Witnesses.

1. Where a husband seeks a divorce on the ground of adultery, the voluntary testimony of an alleged paramour that he had intimate relations with a wife should be received with caution and carefully scrutinized. *Sewell v. Sewell* 173

2. The reception of evidence collateral to any issue in the case intended to affect the credibility of a witness is usually within the discretion of the trial court, and the ruling concerning it is not reason for reversal of the judgment in the absence of an abuse of discretion. *Hampton v. Struve* 305
3. The credibility of witnesses and the weight of their testimony are for the jury to determine in a criminal case. The conclusion of the jury will not be disturbed unless it is clearly wrong. *Hoffman v. State* 375
4. The taking of a deposition before trial by a representative of deceased, at which time he examined or cross-examined the witness, is not a waiver of disqualification, and appropriate objections thereto may still be raised at the trial. *O'Neal v. First Trust Co.* 469
5. Before a witness, not a party to the suit, can be impeached by proof that he has made statements contradicting or differing from the testimony given by him upon the stand, a foundation must be laid by interrogating the witness himself as to whether he has ever made such statements. *Bartek v. Glasers Provisions Co., Inc.* 794
6. Manner of laying foundation for impeachment of witness stated. *Bartek v. Glasers Provisions Co., Inc.* 794

Workmen's Compensation.

1. A compensable injury within the Workmen's Compensation Act is one caused by an accident arising out of and in the course of the employment. *Murray v. National Gypsum Co.* 463
2. An accident within the Workmen's Compensation Act is an unexpected and unforeseen event happening suddenly and violently and producing at the time objective symptoms of injury. *Murray v. National Gypsum Co.* 463
3. An employee claiming the benefit of the Workmen's Compensation Act must, to succeed, show by the greater weight of the evidence all the essential elements of an accident as that word is defined in the act. *Murray v. National Gypsum Co.* 463
4. An award of compensation under the Workmen's Compensation Act may not be based on possibilities, probabilities, or speculative evidence. *Murray v. National Gypsum Co.* 463

5. A mere exertion, which is not greater than that ordinarily incident to the employment, cannot of itself constitute an accident within the meaning of the Workmen's Compensation Act. *Murray v. National Gypsum Co.* 463
6. An appeal to the Supreme Court in a workmen's compensation case is considered and determined de novo. *Murray v. National Gypsum Co.* 463
7. Where the amount of an award in a workmen's compensation case is payable periodically for 6 months or more, a party may make application for increase on account of decrease in capacity since the award was rendered, due to the injury. *Peek v. Ayers Auto Supply* 658
8. It is the function of the Supreme Court in a workmen's compensation case to consider it de novo on the record. *Peek v. Ayers Auto Supply* 658