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REPORTS OF CASES

DECIDED BETWEEN
JUNE 21, 1952 AND MAY 8, 1953

IN THE

Supreme Court of Nebraska

JANUARY TERM 1952, SEPTEMBER TERM 1952,
AND
JANUARY TERM 1953

VOLUME CLVI

WALTER D. JAMES
OFFICIAL REPORTER

GANT PUBLISHING COMPANY
LINCOLN, NEBRASKA
1953

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For the benefit of the State of Nebraska

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CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1952

JOHN F. GATCHELL, DOING BUSINESS AS GATCHELL ELECTRIC & HARDWARE CO., APPELLEE AND CROSS-APPELLANT, V. ALVINA HENDERSON ET AL., APPELLANTS AND CROSS-APPELLEES, IMPLEADED WITH HARRY Z. WEST, APPELLEE.

54 N. W. 2d 227

Filed June 27, 1952. No. 33161.

1. **Appeal and Error.** Issues not presented in the trial court may not be raised for the first time in the Supreme Court.
2. ———. Actions in equity, on appeal to this court, are triable de novo, subject, however, to the rule that when credible evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite.
3. **Equity.** Equity will devise a remedy to meet emergencies, and will adjust the property and financial interests of litigants whenever it can do so without prejudice to the legal or equitable rights of any person.
4. ———. Where the court dealing in equity has money or property under its jurisdiction, it has the power to appropriately direct its application in order to carry out justice.
5. **Mechanics' Liens.** A subcontractor must file a sworn statement of the amount due him from the contractor within sixty days from the date of the last material furnished to or labor performed for the contractor in order to perfect a mechanic's lien under the provisions of section 52-102, R. S. 1943.
6. ———. Where more than sixty days intervene between two items of a lien account, there is a presumption that all items

following the hiatus were furnished under a separate contract, and the time for filing a mechanic's lien cannot be extended by tacking one contract to another.

7. ———. A subcontractor cannot extend the time for filing a mechanic's lien by substituting proper labor or material for defective labor or material previously furnished and charged to the contractor.

8. **Contracts.** In the absence of an otherwise binding agreement, express or implied, there is no privity of contract between a subcontractor and the owner.

9. **Mechanics' Liens: Contracts.** Where a mechanic's lien is invalid and there is no privity of contract between a subcontractor and the owner, such owner has a right as against the contractor to offset damages for breach of contract against any sum of money in his hands due and owing on his building contract with the contractor.

APPEAL from the district court for Douglas County: JACKSON B. CHASE, JUDGE. *Affirmed in part, and in part reversed and remanded with directions.*

Morgan & Carnazzo, for appellants.

Spier, Ellick & Spire, for appellee.

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

CHAPPELL, J.

Plaintiff, a subcontractor, brought this action against defendants Alvina Henderson and Carl M. Henderson, owners of Lots 65 and 66, Wyman Heights, an addition to the city of Omaha, and also against defendant Harry Z. West, the contractor who constructed a house thereon for them, seeking to recover a judgment against defendants and to foreclose a mechanic's lien for the reasonable value of electrical wiring, installations, and fixtures furnished the contractor by plaintiff, and to obtain general equitable relief.

Insofar as important here, the owners defended upon the ground that all contracts for material furnished or labor performed by plaintiff were wholly with their contractor and that plaintiff's purported mechanic's lien

was invalid and unenforceable because not filed "within sixty days from the performing of such labor or furnishing such material," the time required by section 52-102, R. S. 1943. The owners also timely filed a cross-petition against the codefendant contractor seeking to recover $260 as damages for alleged breach of contract by him. In that connection they alleged and testified that they had in their hands $322.19, the final balance still due and owing the contractor, and asked the trial court to make disposition thereof. They prayed that such damages aforesaid should be proportionately offset against such sum, and for general equitable relief.

Defendant contractor, although initially served with summons, defaulted both upon plaintiff's petition and defendant owners' answer and cross-petition. Further, defendant owners' right or manner of proceeding by cross-petition was never tested or raised in any manner by anyone in the trial court, either before or after decree was entered, but was raised by plaintiff for the first time in this court on appeal.

In that connection, there are two rules which preclude a decision thereon in this court. First: "An issue not presented in the trial court may not be raised for the first time in the Supreme Court." Freeman v. City of Neligh, 155 Neb. 651, 53 N. W. 2d 67. Second, as stated in 30 C. J. S., Equity, § 387, p. 804: "An irregularity in a cross bill or in proceeding by cross bill, or as to the time at which a cross bill is filed, is waived by permitting the case to progress to hearing or decree without objection."

A hearing was had whereat evidence was adduced upon the issues presented by plaintiff's petition and defendant owners' answer and cross-petition, and the trial court rendered a judgment which denied foreclosure of plaintiff's alleged mechanic's lien but awarded a judgment against defendant contractor in favor of the plaintiff for $563.95, the reasonable value of labor and material furnished to him by plaintiff, and awarded

defendant owners a judgment against the codefendant contractor for $260 damages, as prayed in their cross-petition.

However, the judgment denied defendant owners the right to set-off such damages against the amount of $322.19 then admittedly owing by them to defendant contractor, but instead, upon a basis of purported equity and justice, ordered said sum forthwith paid to the clerk of the district court, all to be proportionately applied upon plaintiff's judgment against defendant contractor, and taxed all costs equally between plaintiff and such contractor.

True, as argued by plaintiff, no summons was issued on the cross-petition against the codefendant, but none was necessary since the pleadings herein were timely filed and decree was not taken until long after time to plead thereto had elapsed.

As stated in Farmers Mutual Ins. Co. v. Gumaer, 109 Neb. 832, 192 N. W. 941: "In Cockle Separator Mfg. Co. v. Clark, 23 Neb. 702, it was held that, when a defendant filed his answer against his codefendant in the nature of a cross-petition, although no summons need be issued thereon, yet the co-defendant is entitled to the same time to plead thereto as though the defendant filing the answer was plaintiff and the codefendant sole defendant, and that a decree taken before the time to plead was erroneous." By analogy, of course, a decree taken after the time to plead has elapsed, as in the case at bar, would not be erroneous.

Defendant owners timely filed a motion for new trial, assigning substantially that such part of the judgment relating to offset as appears in the last paragraph thereof aforesaid, was not sustained by the evidence but was contrary thereto and contrary to law. Such motion was overruled and they appealed, making like assignment here which we conclude should be sustained. On the other hand, plaintiff also timely filed a motion for new trial, assigning substantially that the judgment con-

cluding that plaintiff was not entitled to foreclosure of a mechanic's lien was not sustained by the evidence and contrary to law. Such motion was overruled and plaintiff cross-appealed, making like assignment of error. We conclude that such assignment should not be sustained.

We turn first to plaintiff's cross-appeal to discuss and determine whether or not the trial court erred in concluding that plaintiff was not entitled to foreclosure of his mechanic's lien, because if the lien were valid then distribution of $322.19 in defendant owners' hands would concededly be immaterial to plaintiff. In doing so, we observe the rule that: "Actions in equity, on appeal to this court, are triable de novo, subject, however, to the rule that when credible 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." Wiskocil v. Kliment, 155 Neb. 103, 50 N. W. 2d 786.

In that regard, the sole question which we are required to decide is whether or not the mechanic's lien of plaintiff concededly filed January 5, 1950, was filed within the time required by section 52-102, R. S. 1943. In other words, was it filed "within sixty days from the performing of such labor or furnishing such material * * * including * * * electrical apparatus and lighting fixtures * * *." We conclude that it was not.

The respective agreements between plaintiff and the contractor and between the contractor and defendant owners do not require particular discussion. The mechanic's lien here involved recites that: "the first item furnished and delivered was September —, 1949, and the date of the last item was December 9, 1949." As a matter of fact, both dates were concededly erroneous. Plaintiff admits that the first item was furnished on December 10, 1948, the next December 30, 1948, then March

4, 1949, then March 9, 1949, then August 31, 1949, then September 9, 1949, when the house was purportedly completed, on which date the switches, receptacles, and fixtures were installed by plaintiff in order to complete the job. On that date plaintiff rendered a statement or invoice dated "9/8/49" to "Harry Z. West" the contractor, showing the balance due complete for job $563.95. Such sum was the exact amount subsequently claimed due in his purported mechanic's lien. Also, before the owners moved into the house on September 14, 1949, plaintiff told them that the contractor owed him $563.95. Concededly plaintiff made no charge for any item furnished after September 9, 1949, but claimed that on November 19, 1949, his employee son finished the doorbell wiring and checked to see that everything was completed. That is the date on which plaintiff claimed that the last item was furnished. In that connection the evidence is conflicting, but there are signposts appearing therein from which the truth can be reasonably ascertained.

To support the son's evidence that he connected up the wiring on the doorbell on that date, a page of his daily shop timebook was received in evidence. The last entry on November 19, 1949, reads: "9403 No. 30 st. 1½" hours. The address is that of the property here involved. However, the son did not testify directly when the particular entry was made by him, but only inferred that it was made after work on that date. He testified that on that date he left a job at 4519 North 30th Street, which is not recorded on the time sheet as one worked on that date, and drove to 9403 North 30th Street, connected the wiring on the doorbell, and drove back to 4519 North 30th Street again, all of which time was included in the one and one-half hours allegedly spent in performing the last item. Concededly, Alvina Henderson called plaintiff's store, telling someone that the doorbell would not ring, and the son "went out there to repair it." Also, concededly he might have said to

her upon arrival: " 'I am sorry, the only thing that I neglected to do was to connect these wires.' " However, he claimed that it occurred on November 19, 1949.

On the other hand, defendant Alvina Henderson testified that the house was completed and they moved into it on September 14, 1949. They then tested the doorbell and noticed that it did not ring, so they called plaintiff, whereupon the very next day, Thursday, September 15, 1949, plaintiff's son came out and connected it. At that time he said: "I forgot to connect the bell." Thereupon he unscrewed and connected it, which took him only 10 or 15 minutes. The bell then rang as it should, and that was the last time plaintiff or his employees ever came to the house or did any work there. Her husband, Carl M. Henderson, corroborated such testimony, saying that they also called the contractor, telling him that the bell did not ring. A woman who stayed with the Hendersons and moved in with them on September 15, 1949, testified that the doorbell did not ring at first but it was fixed right away; she could not remember the exact day; and that it then rang all right. All of such evidence appears to be entirely logical and credible.

In rebuttal plaintiff's son testified that he was not at the property involved on September 15, 1949, but worked nine hours, one hour overtime, elsewhere on that date. To support such contention another page of the time record book was received in evidence, which read: "9-15-49 Martin Apt. 9" hours. However, the date "9-14-49" has clearly been changed to "9-15-49" and the figure "9" representing the hours worked, has been written over another indistinguishable number. The son's apprentice testified that he also kept a record of time spent in connection with his work for plaintiff with the son from September 9, 1949, and subsequently, and such record was received in evidence to support a claim that they worked at the Martin Apartment nine hours on September 15, 1949. It read: "9/15/49 Martin

Apt. 9 hr." However, the figure "15" has been written over another indistinguishable number and above it appears "9-14-49 Martin Apt. 7½ hrs." The figure "14" however has been written over another indistinguishable number. All such evidence lacks credence.

In the light of the foregoing evidence we conclude that the last item was furnished in any event not later than September 15, 1949, more than 60 days prior to January 5, 1950, and that plaintiff was therefore not entitled to a mechanic's lien.

Concededly, a subcontractor must file "a sworn statement of the amount due him from said contractor" within 60 days from the date of the last material furnished to or labor performed for the contractor in order to perfect a mechanic's lien under the provisions of section 52-102, R. S. 1943. Disbrow & Co. v. Peterson, 136 Neb. 719, 287 N. W. 220. Plaintiff did not do so in this case.

Assuming for the purpose of argument only that plaintiff simply delayed connecting the doorbell from September 9, 1949, until November 19, 1949, we arrive at the same result. Clearly more than 60 days elapsed between September 9, 1949, when the work was supposed to have been finally completed and a bill in full was finally rendered by plaintiff to the contractor, and November 19, 1949, date of the purported last item. The risk of all payments made to the contractor was upon the owners until such 60-day period had expired, after which they could have paid the contractor in safety. The purpose of the statute is to protect the diligent subcontractor if he acts within the specified 60-day period. The rule is that when more than 60 days intervene between two items of a lien account, there is a presumption that all items following the hiatus were furnished under a separate contract, and the time for filing a mechanic's lien cannot be extended by tacking one contract to another. Disbrow & Co. v. Peterson, *supra*.

The facts and circumstances in Disbrow & Co. v. Peter-

son, *supra,* were comparable with those at bar. In that opinion it was said: "It is obvious that the statute does not contemplate a lien under the circumstances here shown. 'If the time which is restricted by the statute can be thus indefinitely extended by acts of this kind, the 60-day limitation fixed by the legislature in which to file this class of liens can and will be utterly and completely defeated, so that in every case where a right to file a lien has ever existed, the title to the property may for an indefinite period remain in an unsettled and not ascertainable condition, with reference to the character and extent of the mechanic's liens which may be claimed against such property.' Gem State Lumber Co. v. Witty, 37 Idaho 489, 217 Pac. 1027.

" 'After a contract is substantially completed there must be no unnecessary or unreasonable delay under all the circumstances in fully completing the work, and the time for filing a lien cannot be extended by a delay for a considerable time to do a small piece of work necessary to full completion.' 40 C. J. 198, and cases there cited."

See, also, Davidson v. Shields, 129 Neb. 877, 263 N. W. 490, a comparable case in which the contractor himself sought foreclosure of a mechanic's lien against the owner. In that opinion it was said: "The testimony of plaintiff's witnesses is that these valves might have been properly installed in January. The failure to install them at that time was the equivalent to the installation of defective material.

"It is the rule that a contractor cannot extend the time for filing a mechanic's lien by substituting proper material for defective material, previously furnished and charged to the owner. Ashford v. Iowa & Minnesota Lumber Co., 81 Neb. 561; Cady Lumber Co. v. Reed, 90 Neb. 293." Such rule also applies to a subcontractor as indicated in the two cases last cited in Davidson v. Shields, *supra.* Logically the rule is also that he cannot extend the time for filing a mechanic's lien by sub-

stituting proper labor or material for defective labor or material previously furnished and charged to the contractor. We conclude that the judgment of the trial court denying foreclosure of the mechanic's lien of plaintiff should be and hereby is affirmed.

We turn then to defendant owners' contentions. It will be observed that plaintiff's judgment against the contractor to whom plaintiff furnished labor and material by contract between them is not questioned. However, the judgment awarded the owners against the contractor upon their cross-petition for breach of contract should have been for $240 damages, since clearly only such amount was established by the evidence. § 25-842, R. R. S. 1943; State ex rel. Sorensen v. State Bank of Omaha, 128 Neb. 705, 260 N. W. 195. In that connection also there was no finding, and under the record before us there could have been none, concluding that the owners were personally liable to plaintiff in any manner. In other words, in the absence of an agreement express or implied otherwise binding them, which concededly there was not, there was no privity of contract between plaintiff subcontractor and the defendant owners. Frost v. Falgetter, 52 Neb. 692, 73 N. W. 12; Rosebud Lumber and Coal Co. v. Holms, 155 Neb. 459, 52 N. W. 2d 313. The effect of the judgment was nevertheless to conclude that plaintiff had no valid timely filed mechanic's lien or right to a personal judgment against the owners, but that he should have a lien upon $322.19, the balance of money concededly owing by the owners to the contractor, despite the fact that they could then have paid any part or all of it to the contractor with safety and that the contractor was concededly then indebted to such owners in the sum of $240 for breach of contract.

In at least two cases this court has concluded that an owner ordinarily has a right to offset damages for breach of contract against any sum of money due on his building contract with the contractor. McLeod v. Genius, 31 Neb. 1, 47 N. W. 473; Lincoln Stone & Supply Co. v.

Ludwig, 94 Neb. 722, 144 N. W. 782. To refuse to apply such a rule in this case was erroneous. To hold otherwise would require the innocent owners, who were guilty of no wrong whatever, to pay plaintiff $322.19 when there was no liability to him therefor or for any other amount, and, in addition, to sacrifice their lawful right to recoup or offset $240 against the amount in their hands concededly owing the contractor. Such order was neither justice nor equity.

This court, following Tarnow v. Carmichael, 82 Neb. 1, 116 N. W. 1031, has concluded that: " 'Equity will devise a remedy to meet emergencies, and will adjust the property interests of litigants whenever it can do so without prejudice to the legal or equitable rights of any person.' " Penn Mutual Life Ins. Co. v. Katz, 139 Neb. 501, 297 N. W. 899.

Also, as stated by this court in In re Estate of Williams, 148 Neb. 208, 26 N. W. 2d 847, after citing Nelson v. Janssen, 144 Neb. 811, 14 N. W. 2d 662: "Where, as here, a court dealing in equity has the property under its jurisdiction, it has the power to direct its application in order to carry out justice."

Under the situation presented in this case by the pleadings and evidence, the mechanic's lien of plaintiff was invalid and there was no privity of contract between plaintiff and defendant owners. Therefore, the trial court should have entered a judgment permitting and ordering defendant owners to offset their damages of $240 against $322.19, concededly the balance in their hands owing the contractor, and ordering the balance, $82.19, applied on plaintiff's judgment against the contractor. It is not assigned in either brief here that the trial court erroneously taxed costs in that court, and such order taxing costs there equally between plaintiff and defendant contractor will not be disturbed.

For the reasons heretofore stated, the judgment of the trial court should be and hereby is affirmed in part, and in part reversed and remanded with directions to

enter a judgment in conformity with this opinion. All costs in this court are taxed to plaintiff.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

EVELYN ILLIAN, APPELLANT, V. MARK MCMANAMAN, APPELLEE.

54 N. W. 2d 244

Filed June 27, 1952. No. 33164.

1. **Statutes.** When a statute has been adopted from another state, ordinarily the construction given prior to its adoption by the courts of that state will be followed in this state, in the absence of any indication of a contrary intention on the part of the Legislature.
2. **Trial: Judgments.** The summary judgment act, sections 25-1330 to 25-1336, R. S. Supp., 1951, authorizes summary judgment only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, and that no genuine issue remains for trial. The purpose of the statute is not to cut litigants off from their right of trial by jury if they really have issues to try.
3. ———: ———. The issue to be tried on a motion for summary judgment is whether or not there is a genuine issue as to any material fact, and not how that issue should be determined. In considering such a motion as in a motion for a directed verdict, the court should take that view of the evidence most favorable to the party against whom it is directed, giving to that party the benefit of all favorable inferences that may reasonably be drawn from the evidence. If, when so viewed, reasonable men might reach different conclusions, the motion should be denied and the case tried on its merits.
4. ———: ———. In cases which turn on the credibility of witnesses the summary judgment act does not permit a trial by affidavits if either party objects.
5. **Depositions.** An extrajudicial admission appearing in the deposition of a party taken before trial is not ordinarily final and conclusive upon him, but it may be competent and admissible as evidence in contradiction and impeachment of his present claim and his other evidence given at the trial, to be given such weight as the trier of fact deems it entitled.

6. **Trial: Judgments.** A motion for summary judgment is not a substitute for a motion for a directed verdict or for error proceedings taken after full trial.

APPEAL from the district court for Sarpy County: ERNEST J. KROGER, JUDGE. *Reversed and remanded.*

Warren C. Schrempp and *David S. Lathrop,* for appellant.

Mecham, Stoehr, Moore, Mecham & Hills, for appellee.

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

SIMMONS, C. J.

This is an action for damages under the guest statute arising as a result of an automobile accident. The trial court sustained a motion for summary judgment and dismissed the petition. Plaintiff appeals. We reverse the judgment of the trial court and remand.

Plaintiff alleged in her petition that on June 23, 1951, at 1:30 a. m., she was a passenger and guest in defendant's automobile; and that defendant drove his car into a ditch and a bank resulting in personal injuries to her. She alleged defendant's gross negligence in the following particulars: (a) Operating at an excessive rate of speed to wit 50 miles per hour; (b) in failing to observe that the highway turned and continuing in a straight course at a high rate of speed; (c) in driving his automobile at a high rate of speed into a ditch and bank; (d) in operating his automobile while under the influence of intoxicating liquor; and (e) in failing to stop or turn in time to avoid the accident. She alleged her injuries and damages.

Defendant answered, denied generally, denied negligence, and alleged his due care; alleged that plaintiff assumed the risk of sustaining said alleged injuries; and alleged plaintiff's contributory negligence as the proximate cause. For reply plaintiff denied every allegation of new matter in the answer.

After the answer was filed, defendant took plaintiff's deposition subject to a stipulation that any and all objections could be made at the time of trial with the same force and effect as if made at the time of the taking of the deposition; that the shorthand notes could be transcribed outside of the presence of the witness; and waived the signature of the witness and notice of the filing of the deposition.

Plaintiff testified as follows in the deposition, and many of the responses were in answer to leading questions. She is a single woman, 20 years of age, a stenographer, and had know defendant since early childhood. She was living in Omaha. Plaintiff knew that defendant drank "quite a bit." She had drunk with him socially; she had ridden with him in a car before and thought he drove rather recklessly when he had been drinking; that she was always afraid to ride with him, but he gave her to understand he did it to scare her; and on occasion she had asked him not to drive so fast, but he persisted and she had quit asking him. On the night in question, defendant asked her to go to Bellevue to get his car, where it had been repaired; and she agreed on condition there was to be no drinking and that she would be home early. The defendant and two friends came in the car of one of them for her at 9:30 p. m. They started for Bellevue, south of Omaha. They stopped at a beer tavern in Omaha where the three men went in at 10 p. m. Plaintiff remained outside in the car. Defendant and the others came out at different times, she could smell beer on them, she knew that defendant had been drinking, but did not know how much. The party left that tavern at 11:30 p. m., and started for Bellevue. They brought two "six packs" of beer from the tavern. The defendant and one of the men each drank two or three cans on the way to Bellevue. Plaintiff refused to drink and the men got insulting by asking her to do so.

At Bellevue they located defendant's car, and then

went to a bar where defendant and one of the men were from 12 midnight to 1 a. m. One of the men was asleep in the car, "passed out." Plaintiff could see in the bar but did not know what the two were drinking. They came out at 1 a. m. Plaintiff could "tell that they had been drinking quite a bit. They were loud and still insulting. 104 Q In other words, from the time they were at that bar in Omaha up to that time, about all they did was merely continue what, very obviously, was some good, heavy drinking; is that right? A Yes."

The four then drove to where defendant's car was and defendant went in to see the mechanic, taking "some beer" in with him. He remained there 15 or 20 minutes. The defendant came out and the two other men left in the car that had been used up to that time. Plaintiff and defendant started for Omaha in his car. He had no beer with him. They did not get on the highway to Omaha, but drove around for some time making several turns and finally got on a straight, level, two-lane highway, apparently seeking the highway to Omaha. The distance of this journey is not shown, except that one part of it was a mile or more.

Defendant was driving on this highway at about 50 miles per hour, and they came to a dead end where a turn was necessary. Apparently defendant did not see it, plaintiff did just before the accident and when she realized that defendant did not, she called it to his attention—but too late and the accident followed.

Plaintiff answered "That's right" in answer to a question that from 10 p. m. until seeing the mechanic "he had been drinking beer just most of the time. 116 Q All three of them obviously had had more to drink than you felt they should have had; is that right? A Than they should have had." As of the time of the accident, she was asked: "160 Q Did he obviously appear to be under the influence, then, at that time? A Yes. * * * 164 Q You would say, then, that the reason he should have been going 35 was because of his drinking or be-

cause of the condition of the road at that place? A Both."

After the accident, police came, asked defendant what he had been drinking, checked his car, and asked what he had done with the bottle. Defendant went to spend the night with relatives in Bellevue and plaintiff was taken to Omaha.

Defendant filed the deposition. He then moved for judgment for the reason that the pleadings and deposition show that plaintiff was guilty of more than slight contributory negligence as a matter of law and assumed the risk of the injury.

Plaintiff filed an affidavit reciting that when she entered defendant's automobile, his acts, conduct, and speech were not such as to indicate to a reasonably prudent person that he was under the influence of intoxicants to such an extent as would affect his driving ability; that she did not then realize that he was under such influence sufficient to make it dangerous for her to ride with him as a passenger; that the first time she realized it was just before the accident happened, when she realized he had not seen the turn in the road; and that answers to questions 104, 116, and 164 (hereinbefore quoted) were statements of her present conclusions taking into consideration what had happened and did not reflect her state of mind at the points of time during the evening in question. The matter was argued to the court and taken under submission. Plaintiff was given leave to file additional affidavits.

Plaintiff then filed a second affidavit reciting that defendant had promised her on the night in question that he would not get intoxicated, and that she relied thereon; that in her deposition when she stated she knew defendant was a reckless driver when drinking, she meant that he was reckless if he drank to an extent that made him drunk; that she knew he had been drinking beer but also that he was not drunk; that during the ride from Omaha to Bellevue neither in speech, action, or conduct did he indicate that he was under the influence

of liquor; that the reason she said the men had been insulting was that she resented being asked to drink after she had declined to do so; that after defendant's visit to the tavern in Bellevue neither his speech, action, or conduct indicated that he was affected by the beer "which he presumably had consumed"; that he transacted his business with the mechanic in a satisfactory manner; that she had no indication he was under the influence of intoxicating liquor prior to the accident; that she is a minor, has had no experience to any extent with intoxicants, and does not claim to be able to judge degrees of intoxication in others; that after the accident, defendant was interviewed by officers and that no charges were filed against him; that her conclusion that defendant was drunk at the time of the accident was based on the fact that he failed to observe the turn in the road; that her answer to question 160 (hereinbefore quoted) was a conclusion based on the fact that he failed to see the turn in the road; that the only drinking by defendant that she observed was a total amount of two or three cans of beer; and that she assumed he had had beer in the tavern but relied upon his promise not to become drunk.

The trial court, on consideration of the pleadings, the deposition, and the motion, sustained the motion and dismissed the petition.

Plaintiff appeals.

Our summary judgment law is sections 25-1330 to 25-1336, R. S. Supp., 1951.

The provision important here is the following from section 25-1332, R. S. Supp., 1951: "The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

Our act is a substantial copy of Rule 56, Federal Rules of Civil Procedure, Title 28 U. S. C. A., p. 153. The

language above quoted is found in Rule 56 (c).

The rule is: "When a statute has been adopted from another state, ordinarily the construction given prior to its adoption by the courts of that state will be followed in this state, in the absence of any indication of a contrary intention on the part of the Legislature." Nebraska Mid-State Reclamation Dist. v. Hall County, 152 Neb. 410, 41 N. W. 2d 397.

The Supreme Court of the United States in Sartor v. Arkansas Natural Gas Corp., 321 U. S. 620, 64 S. Ct. 724, 88 L. Ed. 967, held: "The Court of Appeals below heretofore has correctly noted that Rule 56 authorizes summary judgment only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, that no genuine issue remains for trial, and that the purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try."

In Ramsouer v. Midland Valley R. R. Co., 135 F. 2d 101, the court held: "* * * the issue to be tried on a motion for summary judgment is whether or not there is a genuine issue as to any material fact, and not how that issue should be determined. In considering such a motion as in a motion for a directed verdict, the court should take that view of the evidence most favorable to the party against whom it is directed, giving to that party the benefit of all favorable inferences that may reasonably be drawn from the evidence. If, when so viewed, reasonable men might reach different conclusions, the motion should be denied and the case tried on its merits."

In Arnstein v. Porter, 154 F. 2d 464, a motion for summary judgment was made based in part on a deposition of plaintiff taken by the defendant. The court held that "* * * as credibility is unavoidably involved, a genuine issue of material fact presents itself. With credibility a vital factor, plaintiff is entitled to a trial where the jury can observe the witnesses while testifying. * * * where as here, credibility, including that of the

defendant, is crucial, summary judgment becomes improper and a trial indispensable. * * * We do not believe that, in a case in which the decision must turn on the reliability of witnesses, the Supreme Court, by authorizing summary judgments, intended to permit a 'trial by affidavits' if either party objects." See, also, Colby v. Klune, 178 F. 2d 872; Batson v. Nichols, 258 Wis. 356, 46 N. W. 2d 192; Luria Steel & Trading Corp. v. Ford, 9 F. R. D. 479.

In Ford v. Luria Steel & Trading Corp., 192 F. 2d 880 (decided since our statute was enacted) it was held: "It has become settled law that a genuine issue as to a material fact cannot be tried and determined upon affidavits, and that it must conclusively be shown that there is no such issue in the case and that the moving party is entitled to judgment as a matter of law, before a summary judgment can lawfully be entered."

Plaintiff contends that there was presented a substantial issue of fact as to whether she knew that defendant was intoxicated when she began the trip from Bellevue to Omaha. Defendant contends that plaintiff cannot create a genuine issue of material fact so as to create a question for the jury by testifying first to one set of facts and subsequently to a directly contradictory set of facts in the same action and that the trial court correctly concluded that plaintiff could not recover because of contributory negligence and assumption of risk.

Defendant relies on Rahfeldt v. Swanson, 155 Neb. 482, 52 N. W. 2d 261, and the holding that "* * * courts are not required to permit a litigant to play fast and loose with the processes of the court by insisting at different times under oath on the truth of each of two or more contradictory versions according to the necessities of the particular occasion presenting itself." An examination of the cases there relied upon show a different factual situation than that present here. The situation here is governed by our decision in Kipf v. Bitner, 150

Neb. 155, 33 N. W. 2d 518, wherein we held: "An extrajudicial admission appearing in the deposition of a party taken before trial is not ordinarily final and conclusive upon him, but it may be competent and admissible as evidence in contradiction and impeachment of his present claim and his other evidence given at the trial, to be given such weight as the trier of fact deems it entitled."

From defendant's view point, the statements in plaintiff's deposition and her affidavits present a question of credibility, and involve an issue of fact which cannot be determined on a resisted motion for summary judgment.

Defendant argues here that the questions of negligence and assumption of risk frequently are jury questions, but that under the circumstances that exist in this case it becomes a question of law for the court. He offers, to sustain this contention, decisions of ours and other jurisdictions where on motion for a directed verdict or after trial it has been determined as a matter of law that recovery cannot be had. Implicit in this contention is the proposition that there was an issue of fact to be tried and determined. Obviously a motion for summary judgment is not a substitute for a motion for a directed verdict or for error proceedings taken after full trial.

As stated by the above authorities the issue to be determined on a motion for summary judgment is whether there is a genuine issue as to any material fact, and not how that issue should be determined. Here there were genuine issues of material fact to be tried as to credibility, contributory negligence, and assumption of risk. When that situation exists a summary judgment is not authorized. How that issue should be determined upon a trial is not before us and not decided.

Defendant relies upon R. I. Recreation Center, Inc. v. Aetna Casualty & Surety Co., 177 F. 2d 603, 12 A. L. R. 2d 230, where on motion for summary judgment the court reviewed the facts and concluded that under the circumstances, should the evidence be submitted to the

jury, the trial court would have no alternative but to direct a verdict for the defendant and granted a summary judgment. In that case, after issues were made, the defendant took the depositions of plaintiff's manager and general manager and on the basis of the pleadings and depositions moved for a summary judgment. The plaintiff then filed a cross-motion for summary judgment on the same basis. The Court of Appeals on that situation took the "statements made in the depositions at face value" as "conceded evidentiary facts" which left "no genuine issue of material fact for trial * * *." Obviously that case is not controlling here.

The trial court erred in sustaining the motion for a summary judgment. The judgment is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

WENKE, J., participating on briefs.

IN RE ESTATE OF IRVING H. LANYON, DECEASED. THE FIRST TRUST COMPANY OF YORK, YORK, NEBRASKA, EXECUTOR, ET AL., APPELLANTS, V. RONALD KENNETH LANYON ET AL., APPELLEES.

54 N. W. 2d 262

Filed June 27, 1952. No. 33165.

1. **Wills.** The evidence of all the attesting witnesses to a will who are available is indispensable to the proving of a will when such will is contested.
2. ———. The fate of a will does not depend entirely upon the testimony of the attesting witnesses thereto.
3. ———. In addition to all available attesting witnesses the proponent in a will contest may properly call general witnesses to prove the lawful execution of the will and the mental capacity of the testator to make the same, and all the evidence thus adduced will be considered in determining the issues presented.

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

P. A. Tomek, John G. Tomek, William Tomek, Kirk-

patrick & Dougherty, and *Stewart & Stewart,* for appellants.

Herman G. Wellensiek, and *Riddell & Grosshans,* for appellees.

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

CARTER, J.

This is a contest of the will and codicil thereto of Irving H. Lanyon, deceased. The jury returned a verdict sustaining the will and finding against the validity of the codicil. The executor and J. W. O'Neal, a legatee, appeal.

The testator, Irving H. Lanyon, died on August 23, 1949, leaving him surviving as his only heirs-at-law two nephews, Ronald Kenneth Lanyon and Willard James Lanyon, the contestants herein. Testator had never married and had accumulated an estate of the alleged value of $70,000 at the time of his death. On February 19, 1948, the testator made the will here involved. On June 14, 1949, he executed the codicil which the jury found in the present case that he did not have testamentary capacity to make. The will nominated The First Trust Company of York as executor.

The contestants asserted the want of mental capacity on the part of Irving H. Lanyon to make the will and the codicil. They have not appealed from the finding of the jury and the judgment entered thereon. In fact, they ask to have the judgment affirmed. The appellants have appealed from the finding and judgment that the codicil was not valid because of the want of mental capacity on the part of the testator to make it. Consequently the only question before this court is the correctness of the proceedings in the district court regarding the codicil.

The codicil was executed by the testator on June 14, 1949. It was witnessed by Evelyn Coufal, Esther Rambo,

and W. L. Kirkpatrick. The latter two were called as witnesses and testified for the proponents. Evelyn Coufal was not called as a witness nor was it shown that she was not available for any reason. The contestants contend that proponents failed to make a prima facie case by failing to call Evelyn Coufal as a witness and that the trial court erred in failing to sustain their motion for a directed verdict at the close of proponents' evidence. Contestants have preserved this claimed error by cross-appeal.

The appellees rely upon the case of In re Estate of Coons, 154 Neb. 690, 48 N. W. 2d 778. In that case we announced the rule to be as follows: "The rule is that a proponent is required to present all attesting witnesses if their testimony is available, otherwise a prima facie case is not made." The appellants argue that this means the minimum number of witnesses required by statute to execute a valid will is all that is required to be called. Such is not the rule nor the holding in the Coons case.

In Gillis v. Gillis, 96 Ga. 1, 23 S. E. 107, 30 L. R. A. 143, 51 Am. S. R. 121, cited as the supporting authority in the Coons case, it is held that all the attesting witnesses to a will, who are available, are indispensable to the proving of a will that is contested. While it is true in this state that only two attesting witnesses to a will or codicil are required, the testator not only selects the witnesses but he may select the number over and above two that he desires to testify to the proper execution of the will and his mental competency to make the same. They are, in effect, the witnesses that he wants called. Helm v. Sheeks, 116 Miss. 726, 77 S. 820. He may anticipate the unavailability of one or more of the witnesses at the time of the probate of the will, or he may have other personal reasons for wanting the attesting witnesses designated by him to be called to testify with respect to his last will. While the fate of the will does not depend entirely upon their testimony, they are in-

dispensable to the making of a prima facie case when the will is contested and their failure to testify is not explained. The requirements of the statute as to the number of attesting witnesses in no manner affects the operation of this rule.

In Abbott v. Abbott, 41 Mich. 540, 2 N. W. 810, the court aptly stated the rule applicable when a will is contested in this state in the following language: "But we know of no rule of law which makes the probate of a will depend upon the recollection or even the veracity of a subscribing witness. The law, for wise and obvious reasons, requires such instruments to be executed and attested with such precautions as will usually guard against fraud. But if the forgetfulness or falsehood of a subscribing witness can invalidate a will, it would be easy in many cases to use such artifices or corruption as would render the best will nugatory. * * * But in all contested will cases the case is open for general witnesses, and when the testimony is all in, each witness is credited according to the impression he leaves of candor and intelligence, and not according to his being or not being an attesting witness." See, also, In re Williams' Estate, 50 Mont. 142, 145 P. 957; Elwell v. Universalist General Convention, 76 Tex. 514, 13 S. W. 552; Will of Johnson, 175 Wis. 1, 183 N. W. 888.

We conclude therefore that proponents failed to make a prima facie case within the meaning of the foregoing rule. The motion of contestants at the close of proponents' evidence in chief should have been sustained by the trial court. The contestants being entitled to a directed verdict at that stage of the proceedings, no error thereafter appearing in the record was prejudicial to the rights of the proponents. The verdict of the jury and the judgment entered thereon in favor of the contestants determining that the codicil is invalid is affirmed.

AFFIRMED.

LARRY MEDLEY, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.
54 N. W. 2d 233

Filed June 27, 1952. No. 33177.

1. **Rape.** In a prosecution for rape, it is not essential to a conviction that the prosecutrix should be corroborated by the testimony of other witnesses as to the particular act constituting the offense. It is sufficient if she be corroborated as to material facts and circumstances which tend to support her testimony, and from which, together with her testimony as to the principal fact, the inference of guilt may be drawn.
2. ———. Whether or not prosecutrix resisted advances of defendant to the extent of her ability is a question of fact, and where her testimony, if believed, would indicate that she had so resisted, a verdict based on such testimony will not be set aside.
3. **Venue: Criminal Law.** A motion for a change of venue in a criminal case is addressed to the sound discretion of the trial court, and its ruling thereon will not be disturbed unless an abuse of such discretion is disclosed.
4. ———: ———. The venue of an offense may be proved 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.
5. **Juries.** It is the duty of counsel in interrogating a juror to elicit such information as he desires before the juror is qualified. Where the issue is raised on motion for new trial that further interrogation of the juror on a certain subject might have avoided prejudice to the substantial rights of the defendant, held, prejudicial error was not committed by the trial court in considering any further interrogation by counsel to have been waived.

ERROR to the district court for Buffalo County: ELDRIDGE G. REED, JUDGE. *Affirmed.*

Leon A. Sprague, for defendant in error.

Clarence S. Beck, Attorney General, and *Charles Thone,* for defendant in error.

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

MESSMORE, J.

A jury found the plaintiff in error, hereafter called defendant, guilty of rape. He was 17 years old at the time of the alleged offense; the prosecutrix was then 18 years old and without mental or physical disability. Defendant's motion for new trial was overruled and the trial court sentenced him to a term of four years in the penitentiary, from which he prosecuted error to this court.

The defendant's assignments of error will be taken up in the order in which they are presented.

The defendant contends that the evidence as to resistance by the prosecutrix and corroboration thereof was not sufficient to sustain a verdict of guilty, and the court erred in not sustaining the defendant's motion for a directed verdict.

It appears from the record that the prosecuting witness is a single woman 18 years of age, employed by a telephone company, and residing in an apartment with a roommate employed by the same company. She is 5 feet 3 inches in height and 110 pounds in weight. On November 4, 1951, she met Robert Steele, 15 years of age, and Gale Shields, 16 years of age, at a skating rink in Kearney. She had been acquainted with Shields for a year and a half or two years and on one occasion went on a date with him. She talked to Shields. He and some other boys had been hunting and he asked her if she wanted to go with him after a rabbit. She told him she would tell him later. Shortly after 10 p. m., Shields returned and again asked her about going after a rabbit. She agreed, and left the rink with Shields. They went to a car driven by the defendant, which was a two-door Chevrolet. She and the three boys got into the car and proceeded to the telephone office to enable her to inform her roommate as to what she proposed to do, and that she would return shortly after 11 o'clock. They drove to the Shields home where he got the rabbit and put it in the car. They then decided to get some coffee. One of the boys suggested that they go to

the Mystery Oil Station. Upon arriving there they found the station closed. They decided then to go to Gibbon, and were unable to procure coffee there. They then went east of Gibbon to a bus station which was also closed. They started back to Kearney, and when they arrived two or three miles west of Gibbon the defendant turned off the highway to the north, proceeding in that direction two or three miles, then turned west and soon parked the car in a driveway. The boys started to tell dirty stories and then filthy stories. The prosecutrix did not patricipate in the story telling. Eventually one of the boys said: "Either you give peacefully or we're going to take it." At first she did not realize what they were talking about, and one of the boys again repeated the statement. She replied that she was "not going to give a thing." The boys then endeavored to persuade her. She argued with them and finally persuaded the defendant and Steele to leave the car. She remained in the car with Shields and felt that she might have some influence over him because she knew him. She told him such an act was sacred and holy, and asked him if he did not believe so. He reiterated the statement that she would "give peacefully or they were going to take." The defendant and Steele returned to the car and the defendant got into the back seat. The boys in the back seat each took hold of one of her arms. Steele reached over the front seat and endeavored to unbutton her sweater. The prosecutrix was then struggling and fighting; and trying to kick Steele away. During this time she bit one of his fingers. Momentarily the struggle ceased and a match was lit to ascertain how badly he was injured. Steele then got into the back seat. During the struggle the boys pulled her hair, twisted their legs around her legs so that she could not kick, and proceeded forcibly to remove her clothing. This struggle lasted for about 30 minutes when, the prosecutrix testified, she became exhausted. The defendant and Steele held her legs while Shields tried to have inter-

course with her, but failed to accomplish the act. The defendant then attempted to have intercourse with her and she fought until she "kind of blacked out." She testified that when she came to her senses she was screaming and pushing the defendant "for all I was worth" until she was so weakened she could not fight any more, then the defendant did have intercourse with her.

There is evidence on cross-examination to the effect that she removed her coat and it was folded carefully and put in the front seat so that it would not become soiled, and that her clothes were also placed in the front seat; that two cars passed in close proximity to where they were parked, but this is in dispute; that it was cold and the windows were closed; that the boys ceased struggling with her to permit her to get some chewing gum out of her purse, roll down the window, and throw the wrapper outside; and that she did not scream. This was explained as being to no avail because there was no one to hear but she did cry.

There is also testimony of a physician who examined prosecutrix to the effect that he saw no evidence of trauma, bruises or abrasions, or tearing; that the prosecutrix was normal; and that there was no hysteria. There is also testimony to the effect that her clothes were not torn or soiled.

There is testimony that the defendant told the chief of police that "We rassled with her about fifteen minutes" and she acted like she was "played out." Also, that she could not have helped herself, and that she pushed the defendant off. The same type of statements were made by the defendant to the sheriff.

The boys returned the prosecutrix to her home at 2 a. m. Her roommate testified that she was hysterical and sobbing. Prosecutrix told her that she had been raped. The roommate reported the matter to the police later the same morning.

In a case of this kind, the degree of force required is relative, depending upon the particular circumstances,

but in any such case it must be sufficient to subject and put the dissenting woman within the power of the man, and thus enable him to have carnal knowledge of her, notwithstanding good-faith resistance on her part. In that connection, whether carnal knowledge was forcible and against her will or with her consent, is ordinarily indicated by resistance or lack of it by the woman. While the degree of resistance required is also relative, depending upon the particular circumstances, the general rule is that a mentally competent woman must in good faith resist to the utmost with the most vehement exercise of every physical means or faculty naturally within her power to prevent carnal knowledge, and she must persist in such resistance as long as she has the power to do so until the offense is consummated. See, Cascio v. State, 147 Neb. 1075, 25 N. W. 2d 897; Prokop v. State, 148 Neb. 582, 28 N. W. 2d 200, 172 A. L. R. 916.

"In a prosecution for rape, it is not essential to a conviction that the prosecutrix should be corroborated by the testimony of other witnesses as to the particular act constituting the offense. It is sufficient if she be corroborated as to material facts and circumstances which tend to support her testimony, and from which, together with her testimony as to the principal fact, the inference of guilt may be drawn." Fager v. State, 22 Neb. 332, 35 N. W. 195. See, also, Prokop v. State, *supra;* Hughes v. State, 154 Neb. 86, 46 N. W. 2d 904.

Whether or not the prosecutrix resisted advances of the defendant to the extent of her ability under the circumstances presented by the evidence is a question of fact, and where her testimony, if believed, would indicate that she had so resisted, a verdict based on such testimony will not be set aside. See Starnes v. State, 148 Neb. 888, 29 N. W. 2d 795.

We conclude that the jury was justified in returning a verdict of guilty as charged, and the defendant's assignment of error cannot be sustained.

The defendant contends the trial court erred in over-

ruling his motion for a change of venue. The basis alleged for change of venue is that in the principal newspaper of Kearney, Buffalo County, which has a wide circulation, several articles were published with reference to the arrest of the three boys and the crime charged against them; an article was published with reference to the preliminary hearing at which the evidence of the prosecutrix was related to some extent and most of the persons present consisted of high school students and friends of the boys involved; and a letter was written by an unknown person criticizing the newspaper for the manner in which it handled its publication on the subject. Also as a basis for a change of venue was a statement by a local radio announcer to the effect that fathers of girls should arm themselves with guns. Just what this broadcast in its entirety disclosed is not in the record.

Section 29-1301, R. R. S. 1943, provides that all criminal cases shall be tried in the county where the offense was committed unless it shall appear to the court by affidavits that a fair and impartial trial cannot be had therein; in which case the court may direct the person accused to be tried in some adjoining county.

In this case no affidavits were presented and no showing was made otherwise that a fair and impartial trial could not be had. There is no showing that an effort to get such affidavits or make such a showing was made.

The rule is that a motion for a change of venue in a criminal case is addressed to the sound discretion of the trial court, and its ruling thereon will not be disturbed unless an abuse of such discretion is disclosed. See Sundahl v. State, 154 Neb. 550, 48 N. W. 2d 689.

The motion for change of venue was properly denied.

The defendant contends the trial court erred in overruling defendant's motion to dismiss the case for the reason that the State had failed to prove venue.

The defendant argues that the only evidence establish-

ing venue is that of statements of an accomplice made in the absence of the defendant. We have heretofore set forth the evidence with reference to where the defendant drove in company with the prosecutrix and his two friends. There is no dispute in the evidence in this respect. One of the boys, not the defendant, accompanied the chief of police and pointed out the place where the car stopped. This corresponds with the evidence of other parties as to where the car stopped. The chief of police testified that this place was in Buffalo County. We see no reason why this evidence would be inadmissible in the light of all the other evidence relating to venue. There is no denial but that all of the parties were together. The following authorities are applicable.

In Clarke v. State, 125 Neb. 445, 250 N. W. 551, following Weinecke v. State, 34 Neb. 14, 51 N. W. 307, the court held that: "The venue of an offense may be proved 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." See, also, Clark v. State, 151 Neb. 348, 37 N. W. 2d 601; Kirkendall v. State, 152 Neb. 691, 42 N. W. 2d 374.

Defendant's assignment of error is without merit.

The defendant contends the trial court erred in overruling the defendant's motion for new trial on the showing made at the hearing thereon.

It appears the defense had exhausted its peremptory challenges with respect to jurors. The trial court directed that a talesman be called, which the sheriff did from persons present at the trial. This talesman, it appears, had on occasions been a special officer at a dance hall run by private persons and his services were paid for by such persons. He was never deputized as a special deputy sheriff nor did he ever receive any remuneration from the county for any services rendered in its behalf. There is nothing to show that this talesman

ever discussed the case at any time with the sheriff or any other person. It is true that he visited the sheriff's office occasionally. He gave his occupation as a farmer. He was not interrogated as to any other occupation he might have had. He qualified as a juror. The trial court was justified in regarding the failure to interrogate this juror as to any other occupation he may have had as a waiver of the same. See Hickey v. State, 12 Neb. 490, 11 N. W. 744.

Opportunity for prejudice or disqualification of jurors is not sufficient to raise a presumption that they exist. See, § 29-2006, R. R. S. 1943; Fisher v. State, 154 Neb. 166, 47 N. W. 2d 349; Ringer v. State, 114 Neb. 404, 207 N. W. 928.

This assignment of error is without merit.

The defendant contends the trial court erred in overruling the defendant's motion to withdraw a juror and discharge the jury because of misconduct of the county attorney and because the chief of police was improperly permitted to testify concerning statements alleged to have been made by the defendant.

It appears from the record that when the boys were bringing the prosecutrix home they held a conversation to the effect that another woman, on a previous occasion, did not resist to the extent the prosecutrix did. This evidence was objected to and the objection sustained. However, the county attorney again asked the question and it appears in the record that this evidence might have been admitted. We do not approve of evidence of this kind being offered and admitted. From a review of the same, and under the circumstances shown by the record, we do not find it was so prejudicial as to require a reversal of this case. See Melcher v. State, 109 Neb. 865, 192 N. W. 502.

Upon the entire record there is no error prejudicial to the accused, and the judgment of the district court is affirmed.

AFFIRMED.

ETHEL REED ET AL., APPELLEES, V. M. M. RINGSBY ET AL., APPELLEES, IMPLEADED WITH FORREST HARNLY, APPELLANT.
54 N. W. 2d 318

Filed June 27, 1952. No. 33190.

1. Trusts. In the matter of control of discretionary powers of a trustee, the real question is whether it appears that the trustee is acting in that state of mind in which it was contemplated by the settlor that he should act.
2. ———. Where discretion is conferred upon the trustee with respect to the exercise of a power, its exercise is not subject to control by the court, except to prevent an abuse by the trustee of his discretion.
3. ———. A court of equity has power and authority to remove a trustee from his office, when any substantial personal disability exists in the trustee, when he fails to perform the duties of his position, when he has misconducted himself in office, when hostile relations exist between the trustee and his beneficiaries of such a nature as to interfere with the proper execution of the trust, or under any other conditions which render his removal necessary for the best interests of the trust estate, particularly where it appears that the trustee's personal interests conflict with, or are antagonistic to, his duties as trustee under the terms of his trust.
4. ———. A court of equity has power to remove a trustee for hostility between himself and the beneficiaries, which, in combination with other circumstances, interferes with the proper administration of the trust.
5. ———. The mere fact that the trustee named by the settlor is one of the beneficiaries of the trust is not a sufficient ground for his removal or for refusing to confirm his appointment as trustee, even though a large degree of discretion is by the terms of the trust conferred upon the trustee.

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

Ginsburg & Ginsburg, and *Walter M. Herbert,* for appellant.

Clarence G. Miles, for appellees.

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

SIMMONS, C. J.

In this action the trial court had, by decree which became final, declared that a trust existed in a "substantial part" of an estate. A declaration of trust was filed to which objections were made. The trial court held that the amount declared to be held in trust was in compliance with the decree; refused to remove the trustees; and made an allowance of attorney fees. Defendant Forrest Harnly appeals. We affirm the judgment of the trial court.

This case originated as an action to quiet title to real estate. It is now in essence a contest between the residuary beneficiaries of a will who are also the trustees and the beneficiary of what has been determined to be a trust provided in the will. The issues here were developed as follows: Blanche E. Ringsby died testate, the owner of Lincoln real estate. By her will she devised "all of my property, both real and personal, unto my two sisters Zelma Sweet and Ethel Reed and express the desire that my two said sisters shall use a substantial part of the proceeds therefrom for the benefit of Forrest Harnly and Florence Keens who live in my residence at this time and in whom I have a special interest." Ethel Reed was named as executrix in the will and was given a power of sale for the purposes of paying charges against the estate.

It became necessary that the real estate be sold and to quiet title to effect the sale. Action was brought for that purpose. The two sisters will be hereinafter referred to as the plaintiffs. Forrest Harnly was named as one of the defendants. He will hereinafter be referred to as the defendant.

Defendant by answer and cross-petition contended that under the will all of the property of testatrix should be held in trust for his use and benefit and the benefit of Florence Keens; that the trustees had denied the trust, refused to perform it, and should be removed; and that

a successor trustee should be appointed. He prayed accordingly.

To this the plaintiffs answered praying for an affirmative declaration that defendant had no right or interest in or to any of the assets of the estate.

The action was tried. The evidence is not here.

It appears that Florence Keens filed a claim against the estate for $600. During the progress of the trial it was stipulated that her claim be paid and she filed a disclaimer of any right, title, or interest in the real estate and consented to judgment against her. She is not presenting any issue here.

The court on May 25, 1951, so far as important here, decreed that the entire estate (subject to the payment of charges and costs of administration and incumbrances against the real estate) belonged to the plaintiffs subject to "the following trust in favor of the defendant Forrest Harnly: that the said Ethel Reed and Zelma H. Sweet as trustees shall hold the property coming into their hands as trustees to the extent of a substantial part thereof; that said trustees shall have the discretion to determine what shall constitute a substantial part of said property and shall have discretion to determine how and when such substantial part of said property should be used for the benefit of the defendant Forrest Harnly." The court retained jurisdiction for the purpose of determining whether the trustees had discharged their duties. It was further decreed that Florence Keens had no interest in the proceeds of the sale except that her claim should be allowed. Both parties agree that this has become a final decree.

On September 13, 1951, the plaintiffs filed a declaration of trust. In it they referred to the decree; recited that the assets of the estate had been completely liquidated, all charges paid, and that the net of the estate amounted to $4,144.02; and declared that upon the assumption that the sum of $4,144.02 would not be reduced by the allowance of an attorney's fees to the de-

fendant, they were setting aside and placing in a separate fund the sum of $1,000 to be held in trust "for the benefit" of the defendant, they to later determine as to how and when the fund was to be so used depending on the "needs" of the defendant and what would "contribute to his welfare and well being."

To this declaration the defendant filed objections upon a considerable number of grounds. Defendant requested that the trustees be examined in open court to determine whether the declaration represented a reasoned determination made by the trustees. Hearing was had on the declaration and the objection.

On January 19, 1952, the court entered its decree. The court found that the declaration was in compliance with the will and the court's decree entered on May 25, 1951; that it represented the exercise of a reasonable discretion of the trustees; that the $1,000 set aside was a substantial part of the net estate; that the trustees had not done or failed to do anything which justified their removal as trustees; and that they had fully complied with the will and decree to date and in the future have the discretion, subject to the supervision and control of the court, to determine what sums shall be used from the trust "for the benefit" of the defendant.

The court reserved for later determination the disposition of the trust fund upon the death of defendant or the trustees.

The court by decree overruled and dismissed the objections; decreed that the declaration was a fair and proper exercise of the discretion of the trustees; and decreed that the trustees had not been guilty of any breach or violation of trust. The court further ordered the payment of $150 from the trust fund to defendant's attorneys and charged all costs to the plaintiffs.

After motion for a new trial was made and overruled, defendant appeals from the decree of January 19, 1952.

The trial court was confronted, as are we, with this

fact situation. There is a final decree that a "substantial part" of this net estate is a trust fund; and that the trustees have a discretion to determine what shall constitute a substantial part of the property and have discretion to determine how and when such substantial part of said property should be used for the benefit of the defendant.

It appears that Forrest Harnly was from childhood subject to certain mental limitations, and that at the time here involved was working for a take-home pay of about $80 a month. He was also the beneficiary of a small trust fund other than that here involved.

It appears from the evidence of one of the trustees that they arrived at the sum of $1,000 by the following method. They reasoned that a "substantial part of the proceeds" mentioned in the will was for the benefit of both defendant and Florence Keens, who had been paid $600. They added that to the $4,144.02, and arrived at a total of $4,744.02. They concluded that a division by thirds was proper, i. e., one-third to each of the plaintiffs and one-third to defendant and Florence Keens. Using $4,800 as a base, one-third of that being $1,600, they took from that the $600 paid Florence Keens, and set aside $1,000 for the trust for defendant.

The net of defendant's contention is that that formula results in too small an amount. Defendant offers no other formula save to suggest, as he does here, that all of the net estate be held in trust for defendant. Obviously, such a result is contrary to the terms of the will as construed in the final decree. That contention was an issue in the trial that resulted in the final decree. It was determined adversely to the defendant. That conclusion is just as binding on the parties now as are the other provisions of the decree. We can no more re-examine that question than we can the question of whether or not a trust was created by the will.

Defendant argues here that the declaration is unreasonable and an abuse of discretion, and is not the result of

a reasoned determination of the trustees. We have set out the basis of the reasoning of the trustees.

Defendant contends further that the declaration is unreasonable and an abuse of discretion because it did not consider and weigh properly the needs of defendant present and prospective. The record shows they did but came to a different conclusion than does the defendant.

It is further urged that the declaration is unreasonable in that it is the result of improper motives and influences. Here it is urged that the plaintiffs did not consider that defendant needed an attorney and caused expense to the estate by having employed attorneys; that they have a feeling of unfriendliness to the trustee of the other small fund; that they felt that trust should be used first; and that they had a desire to protect this trust for themselves as the ultimate beneficiaries of it. These contentions ignore in part the fact of the retained control of the fund by the court.

There is in this record affirmative evidence of a kindly friendship of the plaintiffs to the defendant and no substantial showing otherwise.

All of this argument leads to the fact that a different ultimate amount could have been determined. It does not show that the plaintiffs came to a conclusion that is without the bounds of the discretion vested in them by the will as construed by the final decree. 2 Scott on Trusts, § 187, pp. 987, 988, says that in the matter of control of discretionary powers of a trustee, "The real question is whether it appears that the trustee is acting in that state of mind in which it was contemplated by the settlor that he should act. * * * where discretion is conferred upon the trustee with respect to the exercise of a power, the court will not interfere with him in his exercise or failure to exercise the power so long as he is not guilty of an abuse of discretion. The mere fact that if the discretion had been conferred upon the court, the court would have exercised the power differently is not a sufficient reason for interfering with

the exercise of the power by the trustee." See, also, In re Estate of Vohland, 135 Neb. 77, 280 N. W. 241.

The rule is stated in Restatement of the Law, Trusts, § 187, p. 479, as follows: "Where discretion is conferred upon the trustee with respect to the exercise of a power, its exercise is not subject to control by the court, except to prevent an abuse by the trustee of his discretion." See, also, Clark v. Fleischmann, 81 Neb. 445, 116 N. W. 290.

We find no reason that would justify a court interfering with the determination of the trustees made in their exercise of their discretion.

Defendant next contends that the district court erred in failing to remove the trustees. This was not an issue in the written objections to the declaration of trust although it seems to have been determined in the decree. This was an issue in the litigation that resulted in the final decree. Since that time the plaintiffs have taken no action to administer the fund save to make the declaration of trust and set aside the fund. It is contended they should be removed because of the claimed hostility to the attorneys of defendant, their feeling with reference to this litigation and toward the trustee of the other fund, and particularly their claim to the undistributed portion of the trust and their self interest conflicting with that of the defendant. Whether these considerations were presented to the trial court in the hearing that resulted in the final decree is not disclosed by this record. These plaintiffs testified as to a full willingness to carry out this trust as directed by the court. They have done and failed to do nothing contrary thereto. In Burnham v. Bennison, 121 Neb. 291, 236 N. W. 745, we stated the general doctrine that: "A court of equity has power and authority to remove a trustee from his office, when any substantial personal disability exists in the trustee, when he fails to perform the duties of his position, when he has misconducted himself in office, when hostile relations exist between the trustee and his

beneficiaries of such a nature as to interfere with the proper execution of the trust, or under any other conditions which render his removal necessary for the best interests of the trust estate, particularly where it appears that the trustee's personal interests conflict with, or are antagonistic to, his duties as trustee under the terms of his trust." In Pavel v. Hotovy, 131 Neb. 373, 268 N. W. 297, we held: "A court of equity has power to remove a trustee for hostility between himself and the beneficiaries, which, in combination with other circumstances, interferes with the proper administration of the trust."

The facts here do not call for that action.

In Restatement of the Law, Trusts, § 107, p. 280, it is said: "The court will less readily remove a trustee named by the settlor than a trustee appointed by the court or by a third person who is by the terms of the trust authorized to appoint a trustee. * * * Thus, the mere fact that the trustee named by the settlor is one of the beneficiaries of the trust is not a sufficient ground for his removal or for refusing to confirm his appointment as trustee, even though a large degree of discretion is by the terms of the trust conferred upon the trustee. * * * Illustration: 1. A bequeaths all his property to B, his son, in trust to pay the income and so much of the principal as in his discretion shall be necessary for the support and comfort of C, A's widow, and on C's death to hold the property or what remains thereof free of trust. The court will not remove B as trustee or refuse to confirm his appointment as trustee because of his conflicting interest. Such conflicting interest is, however, a factor to be considered by the court in determining later whether in administering the trust B is guilty of an abuse of discretion in failing to pay to C sufficient for her support and comfort." See, also, 1 Scott on Trusts, § 107.01, p. 561.

The trial court did not err in refusing to remove the trustees.

Defendant next contends that the declaration is improper because it is recited that the application of the sum is to be dependent on the "needs" of defendant whereas the will and the decree provided that the trust should be for the "benefit" of the defendant. It is contended that the trustees construe needs as more restrictive than benefits. The word benefit is used elsewhere in the declaration. We have quoted the use of these words in the instruments here. In the objections the defendant himself uses the word "needs." The matter is one within the control of the court in determining questions that may arise in the administration of the trust. The assignment has no merit.

Finally the defendant urges that the court erred in failing to award proper attorney's fees. We find in the record two affidavits as to the amount of work done and time consumed by the attorneys. We find no evidence as to the value of the services. Apparently the matter was left to the discretion of the trial court. The court exercised it. We see no reason for finding that the determination was unreasonable.

The judgment of the trial court is affirmed.

AFFIRMED.

PARL W. DENNIS, APPELLANT, V. ROBERT BERENS, APPELLEE.
54 N. W. 2d 259

Filed June 27, 1952. No. 33194.

1. **Trial: Judgments.** In considering a motion for summary judgment the court should view the evidence in the light most favorable to the party against whom it is directed.
2. ———: ———. A summary judgment is authorized only when the moving party is entitled to a judgment as a matter of law. If there is a genuine issue of fact to be determined, a summary judgment may not be properly entered.
3. ———: ———. The court examines the evidence on motion for summary judgment, not to decide any issue of fact presented, but to discover if any real issue of fact exists.

4. ———: ———. The burden is upon the party moving for summary judgment to show that no issue of fact exists, and unless he can conclusively do so the motion must be overruled.
5. ———: ———. Where a defendant in a personal injury action moves for summary judgment, the evidence in support thereof must eliminate every basis of liability on the part of the defendant presented by the pleadings in order that it might be properly sustained.

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

Ephraim L. Marks, for appellant.

Mecham, Stoehr, Moore, Mecham & Hills, for appellee.

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

CARTER, J.

This is an action for damages sustained by the plaintiff, a pedestrian, who was struck by an automobile operated by the defendant. The trial court entered a summary judgment for the defendant and the plaintiff appeals.

The record shows that defendant took the deposition of the plaintiff prior to trial, in which the plaintiff testified substantially as follows: Plaintiff was walking from west to east across Twenty-fourth Street at the alley between Chicago and Cass Streets in the city of Omaha. Before crossing the street plaintiff stopped on the sidewalk and looked both ways, and saw the defendant's car approaching from the north almost a block away. He also saw a car approaching from the south about two blocks away. He saw that he had ample time to cross the street and started across. When he reached the west curb of Twenty-fourth Street he looked north again and saw defendant's car about even with Cass Street one-half block away. He continued into the street and when he got to the center of the west steetcar track he observed defendant's car about 20 feet from him. He tried to avoid being hit but the speed of the car

prevented his doing so. He estimated the speed of the car at 35 miles an hour and says the car did not slow down before the impact. He testified that he walked across the street at his normal gait and that there were no obstructions impairing his view. Upon the evidence herein set forth the trial court sustained defendant's motion for a summary judgment in favor of the defendant.

The summary judgment statute, section 25-1332, R. S. Supp., 1951, provides in part as follows: "The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The foregoing statute is patterned after Rule 56 of the Federal Rules of Civil Procedure. See 28 U. S. C. A., Federal Rules of Civil Procedure, Rule 56, p. 153. The interpretations placed upon Rule 56 by the federal courts prior to the passage of the summary judgment act will have great weight, therefore, in our interpretation of the act.

In considering a motion for a summary judgment the court should view the evidence in the light most favorable to the party against whom it is directed, giving to that party the benefit of all favorable inferences that may be reasonably drawn therefrom. Ramsouer v. Midland Valley R. R. Co., 135 F. 2d 101; Dulansky v. Iowa-Illinois Gas & Electric Co., 191 F. 2d 881.

A summary judgment is authorized only when the moving party is entitled to a judgment as a matter of law. If there is a genuine issue of fact to be determined, a summary judgment may not be properly entered. Sartor v. Arkansas Natural Gas Corp., 321 U. S. 620, 64 S. Ct. 724, 88 L. Ed. 967. The court examines the evidence on motion for summary judgment, not to decide any issue of fact presented in the case, but to discover if any real issue of fact exists. Sprague v. Vogt, 150 F. 2d 795. In other words, the court can merely determine

that an issue of fact does or does not exist. If such an issue does exist, the summary judgment act has no application; if such an issue does not exist, a motion for a summary judgment affords a proper remedy. The evidence offered in support of the motion is for the purpose of showing that no issue of fact exists, not to try issues on pleadings, depositions, admissions, and affidavits which constitute only a part of the evidence available on a trial on the merits. The burden is upon the moving party to show that no issue of fact exists, and unless he can conclusively do so the motion for summary judgment must be overruled.

It is the contention of the defendant in the present case that the statements of the plaintiff made in his deposition preclude a recovery by him as a matter of law, irrespective of the extent or degree of defendant's negligence. The controlling rule governing the care required of a pedestrian crossing a street between intersections is set out in Trumbley v. Moore, 151 Neb. 780, 39 N. W. 2d 613, wherein we said: "But one who crosses a street between intersections is required to keep a constant lookout for his own safety in all directions of anticipated danger. Where such person crosses the street between intersections without looking at all, or looks straight ahead without glancing to either side, or is in a position where he cannot see and proceeds irrespective of that fact, the situation usually presents a question for the court. Where he looks but does not see an approaching automobile, or sees it and misjudges its speed or its distance from him, or for some other reason concludes that he could avoid injury to himself, a jury question is usually presented."

In the case at bar, plaintiff looked and saw the car approaching from the north about one-half block away. He says it was traveling about 35 miles an hour, and he concluded that he had ample time to cross ahead of it. There is no evidence here in support of the motion that he walked in front of a car without looking at

all, or without taking any precautions for his own safety. Under his evidence he either misjudged the distance the car was from him, or the speed at which it was traveling. It is a question of fact under all the circumstances surrounding the accident as to whether or not plaintiff was negligent in misjudging the speed of the car or its distance from him and assuming that he could safely cross the street. It is for the jury to say whether the injury resulted from his negligence or whether it was due to excessive speed on the part of defendant or to any of the acts of negligence with which he is charged. Plaintiff comes within the latter part of the quoted portion from the Trumbley case. If this were not so, defendant could escape liability even if he deliberately ran the defendant down or irrespective of the last clear chance doctrine. The evidence adduced does not eliminate every basis of liability presented by the pleadings as a matter of law, as it did in the Trumbley case. We think there is a question of fact to be determined in the present case under the evidence presently before the court and that the trial court erred in sustaining a motion for a summary judgment.

REVERSED.

WENKE, J., participating on briefs.

IN RE ESTATE OF MATT J. REPP, DECEASED. ELIZABETH REPP, AN INCOMPETENT, BY LESTER A. DANIELSON, HER GUARDIAN AD LITEM, APPELLEE, V. LAWRENCE REPP ET AL., APPELLANTS.

54 N. W. 2d 238

Filed June 27, 1952. No. 33199.

1. **Divorce: Constitutional Law.** The service of summons and petition in a divorce action, in the case of a nonresident insane defendant, on the county attorney, and the appointment of and service on a guardian ad litem of summons and petition, required by section 35-135, R. S. Wyo. 1931, is not valid constructive or substituted service of summons and does not constitute due

process of law within section 1, Fourteenth Amendment, Constitution of the United States.

2. **Divorce.** Under sections 35-134 to 35-136, R. S. Wyo. 1931, providing for a divorce on the ground of insanity for a period of five years or more, the service of process therein provided must be construed and harmonized with sections 89-817 and 89-822, R. S. Wyo. 1931, and is in addition to general requirements for service of process contained in the latter sections; and jurisdiction over the person is not complete until service is had in accordance with such latter sections.
3. **Judgments.** Where a judgment rendered in one state is challenged in another, a want of jurisdiction over either the person or the subject matter is open to inquiry.
4. ———. One attacking the validity of a judgment has the burden of establishing its invalidity.
5. ———. If the judgment appears on its face to have been entered by a court of general jurisdiction, such jurisdiction over the subject matter and the parties will be presumed, unless disproved by extrinsic evidence or by the record itself.
6. **Constitutional Law: Judgments.** The merits of the cause of action resulting in the judgment may not be reviewed by virtue of the full faith and credit clause of the Constitution of the United States.
7. ———: ———. When the record of the judgment of a sister state shows that service of process, either personal, constructive, or substituted, was not had, within the limitations imposed by the Fourteenth Amendment to the Constitution of the United States, the judgment rendered is not entitled to full faith and credit in this state.
8. **Judgments.** Such a judgment is without validity, even as a matter of comity.
9. **Divorce: Process.** When the granting of divorces is made a judicial function, a hearing is implied at which the defendant is entitled to notice in a manner which is reasonably calculated to give the defendant actual notice of the proceeding and an opportunity to be heard.
10. **Divorce: Constitutional Law.** A divorce decree of a sister state which was entered without the notice required to meet the requirements of due process will be given no effect in this state. A divorce decree is, in this respect, subject to the same rules as to due process as a judgment in other forms of actions.

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

Bertrand V. Tibbels, for appellants.

Neighbors & Danielson, for appellee.

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

CARTER, J.

This is a proceeding brought by Elizabeth Repp, an incompetent person, by her guardian ad litem to establish her statutory marital rights in the estate of her husband. The trial court found that Elizabeth Repp was the wife of Matt J. Repp at the time of the latter's death and decreed that Elizabeth Repp was entitled to share in the estate of Matt J. Repp, deceased, as his surviving spouse. The beneficiaries under the will of Matt J. Repp have appealed.

Matt J. Repp and Elizabeth Repp were married at Fremont, Nebraska, in September 1906, and thereafter one child, Kathryn Rosalie Repp, was born and is one of the beneficiaries of the will of Matt J. Repp. The other beneficiary under the will is Lawrence Repp who was raised from early childhood by the Repps, but was never adopted by them. On March 12, 1931, while the Repps were living at Fremont, Elizabeth Repp was committed to the Norfolk State Hospital as an insane person. She has been confined at the hospital since that date and the record shows that she is incurably insane.

On January 8, 1941, Matt J. Repp filed a petition for a divorce in Natrona County, Wyoming, on the ground that Elizabeth Repp was incurably insane. The record establishes that the petitioner met the requirements of the applicable statutes of Wyoming as to residence. It is the contention of Elizabeth Repp that the district court for Natrona County, Wyoming, never obtained jurisdiction over her person in the action; that the decree of divorce is void; that such divorce decree is not entitled to full faith and credit in this state; and that it has no validity in this state by comity or otherwise. It is the contention of appellants that the Wyoming divorce was valid and must be given full faith and

credit in this state under the provisions of Article IV, section 1, of the Constitution of the United States, and of the Fourteenth Amendment thereto.

Applicable sections of the statutes of Wyoming provide as follows:

"A divorce may be granted when either husband or wife has become incurably insane; provided, that no divorce shall be granted under the provisions of §§ 35-134 to 35-138, unless such insane person shall have been duly and regularly confined in an insane asylum, of this state or of a sister state or territory, for at least five years next preceding the commencement of the action for divorce, nor unless it shall appear to the court that such insanitay (insanity) is incurable; provided further, that no action shall be maintained under the provisions of §§ 35-134 to 35-138, unless the plaintiff is an actual resident of this state, and shall have resided therein for one year next preceding the commencement of such action." § 35-134, R. S. Wyo. 1931.

"The district courts of the several judicial districts of this state shall have jurisdiction of actions for divorce under the provisions of §§ 35-134 to 35-138; and such action shall be brought in the county of this state in which the plaintiff resides, and the court in which such action is about to be commenced shall, upon the filing by the plaintiff of a petition, duly verified, showing that a cause of action exists under §§ 35-134 to 35-138, appoint some person to act as guardian of such insane person in such action, and the summons and complaint in such action shall be served upon the defendant by delivering a copy of such summons and complaint to such guardian, and by delivering a copy thereof to the county attorney of the county in which such action is brought." § 35-135, R. S. Wyo. 1931.

"It shall be the duty of the county attorney upon whom the summons and complaint in such action shall be served to appear for such defendant in such action and defend the same, and no divorce shall be granted

under the provisions of §§ 35-134 to 35-138, except in the presence of the county attorney." § 35-136, R. S. Wyo. 1931.

"Service by publication may be had in either of the following cases: * * * 9. In suits for divorce, for alimony, to affirm or declare a marriage void, or the modification of any decree therefor entered in such suit, when the defendant is a non-resident of the state or conceals himself or herself in order to avoid service or process; * * *." § 89-817, R. S. Wyo. 1931.

"In all cases where service may be made by publication under the provisions of this article, personal service of a copy of the summons and the petition in said action may be made out of the state, and such summons when issued for service out of the state, shall be returnable at the option of the party having it issued, on the second, third or fourth Monday after its date, and shall require the defendant or defendants named therein to answer the petition in said action on or before the third Saturday after the return day named in said summons." § 89-822, R. S. Wyo. 1931.

Section 35-134, R. S. Wyo. 1931, was intended to authorize incurable insanity for a period of five years as a ground for divorce, provided that certain safeguards were complied with. Under section 35-135, R. S. Wyo. 1931, the county attorney was required to be served with summons and complaint, and under section 35-136 to appear in such action and defend the same. Under section 35-135 the court, having jurisdiction of the subject matter of the action, was required to appoint a guardian of such insane person in such action. The latter section also provides that "* * * the summons and complaint in such action shall be served upon the defendant by delivering a copy of such summons and complaint to such guardian, and by delivering a copy thereof to the county attorney of the county in which such action is brought." The first question presented is whether or not compliance with the above quoted portion of sec-

tion 35-135 is sufficient of itself to give the court jurisdiction of the person of a nonresident insane defendant, and whether standing alone it meets the requirements of due process.

In Gorges v. Gorges, 42 Idaho 357, 245 P. 691, the Supreme Court of Idaho dealt with this identical proposition under a similar statute. The court said: "In actions against nonresident defendants for divorce on the ground of insanity, the sections of our statute providing for divorce upon such ground, and the procedure therein provided * * *, should be construed together and harmonized with the general statutes relating to service of process upon nonresidents. * * * We therefore hold that the procedure providing for the appointment of a guardian ad litem in divorce actions against nonresident insane defendants, and service of the summons and complaint upon said guardian and the 'county' attorney, * * * are valid and necessary parts of the procedure in such cases, but are additional to the general requirements for the service of process. Therefore, jurisdiction of the action, or of the parties, * * * is not complete until service is had on the insane defendant in compliance with the requirements of * * *" the general statutes governing process in divorce cases.

In discussing the section similar to section 35-135, R. S. Wyo. 1931, here involved, the Idaho court had this to say: "The guardian ad litem represents the person of the nonresident insane defendant, not for the purpose of giving the court jurisdiction of the subject matter, or of the person of the defendant, on the theory of constructive service, but to aid and assist in properly safeguarding the interests of the incompetent defendant. The prosecuting or 'county' attorney represents the state primarily to the end that the insane defendant may have any known defenses to the action properly interposed, and his rights jealously guarded and protected at each stage of the proceeding; in short, that a trial of the issues would be insured. These provisions of the statute were

not intended to provide a different method of obtaining service of process on nonresident insane defendants in divorce actions, or to supersede the general statutes relating to service of process on nonresidents, but should be construed to be additions to the procedure in this class of cases. Service of copies of summons and complaint on the prosecuting or 'county' attorney, and the appointment of, and service on, the guardian ad litem, operated to give these functionaries notice of the pendency of the proceeding. Such service, in the case of nonresident insane defendants, is not valid constructive or substituted service of summons, and does not constitute due process of law within the meaning of section 1 of the fourteenth amendment to the federal constitution."

The foregoing interpretation of the statute eliminates questions of unconstitutionality because of conflicts with the due process clause of the state as well as the federal Constitution, a construction, we think, which the court was obliged to place upon it under the ordinary rules of statutory construction. We approve and adopt the reasoning of the Idaho court and hold that sections 35-134, 35-135, and 35-136, R. S. Wyo. 1931, must be construed in conjunction with sections 89-817 and 89-822, R. S. Wyo. 1931. We hold, therefore, that the procedure providing for the appointment of a guardian ad litem in divorce actions against nonresident insane defendants, and the service of summons and complaint upon such guardian and the county attorney, are valid and necessary parts of the procedure in such cases, but are in addition to the statutory provisions concerning the service of process in divorce actions generally. Standing alone they do not constitute valid constructive or substituted service of summons. Consequently, the jurisdiction of the court over the person of the defendant, a nonresident insane spouse, is not complete unless service is had on the defendant as required by sections 89-817 or 89-822, R. S. Wyo. 1931.

The defendants contend that plaintiff has not affirma-

tively shown that service of process was not had upon defendant in accordance with either of sections 89-817 or 89-822, R. S. Wyo. 1931. The rule in such cases is that when a judgment rendered in one state is challenged in another, a want of jurisdiction over either the person or the subject matter is open to inquiry. The party attacking the validity of the judgment has the burden of establishing its invalidity. Sutton v. Leib, 342 U. S. 402, 72 S. Ct. 398, 96 L. Ed. 352. If such judgment on its face appears to be one entered by a court of general jurisdiction, such jurisdiction over the subject matter and the parties will be presumed, unless disproved by extrinsic evidence or by the record itself. Adam v. Saenger, 303 U. S. 59, 58 S. Ct. 454, 82 L. Ed. 649; Milliken v. Meyer, 311 U. S. 457, 61 S. Ct. 339, 85 L. Ed. 278, 132 A. L. R. 1357. The merits of the cause of action resulting in the judgment may not be reviewed by virtue of the full faith and credit clause of the federal Constitution. Fauntleroy v. Lum, 210 U. S. 230, 28 S. Ct. 641, 52 L. Ed. 1039; Titus v. Wallick, 306 U. S. 282, 59 S. Ct. 557, 83 L. Ed. 653.

No attempt was made to prove want of jurisdiction of the parties or of the subject matter by extrinsic evidence. The question for determination is whether the record itself shows a want of jurisdiction over the person of Elizabeth Repp. This necessarily requires that the record of the district court for Natrona County, Wyoming, establish of itself an inconsistency between the facts shown by the record and the findings and judgment rendered thereon, as to the question of jurisdiction over the person of Elizabeth Repp.

The record of the divorce action, authenticated as required by law, shows the following facts bearing upon the question of the court's jurisdiction over the person of Elizabeth Repp. The prayer of the petition filed on January 8, 1941, requested the appointment of John W. Newell of Edgerton, Wyoming, as the guardian of Elizabeth Repp for the purpose of obtaining service of process

upon her. A praecipe was filed requesting the issuance of summons addressed to the sheriff of Natrona County, Wyoming. A summons was issued as prayed, directing the sheriff of Natrona County, Wyoming, to notify Elizabeth Repp of the pendency of the divorce action. The only return filed showed an acceptance of service of a copy of the summons by the county attorney of Natrona County. On February 7, 1941, the guardian ad litem acknowledged service of a copy of the petition and summons in the action, and consented that the trial could be held at any time. The trial was held on February 7, 1941, one day prior to the answer day contained in the summons issued for service on Elizabeth Repp in Natrona County, Wyoming. The decree of the court recites that defendant appeared by her guardian and was represented by the county attorney of Natrona County, Wyoming. No default was entered against Elizabeth Repp, the decree finding that she was legally served with process. The clerk of the district court certifies that the instruments contained in the transcript certified to by him are a full, complete, and exact copy of all instruments, records, entries, and filings filed or made in the divorce action.

We think this evidence establishes, along with other undisputed evidence in the record, that personal service of process was not had or attempted as authorized by section 89-822, R. S. Wyo. 1931. No claim is made that service was had by publication in accordance with section 89-817, R. S. Wyo. 1931. It will be noted that the praecipe filed requested the issuance of summons for Elizabeth Repp in Natrona County, Wyoming. The plaintiff in the action Matt J. Repp, knew of course that Elizabeth Repp was confined in the Norfolk State Hospital, Norfolk, Nebraska, and that personal service could not be had upon her in Natrona County. It must have been contemplated that service upon Elizabeth Repp in Natrona County, Wyoming, would be obtained by service upon the guardian and county attorney. It is evident

from the record that plaintiff relied wholly upon compliance with the provisions of section 35-135, R. S. Wyo. 1931, to obtain service of process upon Elizabeth Repp. This is competent evidence, when considered along with the records of the case heretofore detailed, that no personal service was had or attempted as required by section 89-822, R. S. Wyo. 1931. It is evident also that reliance was had in obtaining process over the person of Elizabeth Repp upon section 35-135, R. S. Wyo. 1931, only. Otherwise, a hearing could not have been held one day prior to the return day of the summons issued. The hearing could have been held on February 7, 1941, only if reliance was solely placed upon the service had upon the guardian and county attorney, and their consent to an otherwise premature hearing. We hold therefore that the record in the divorce case shows that service of summons was not had on Elizabeth Repp by publication (§ 89-817, R. S. Wyo. 1931), or by personal notice in lieu thereof (§ 89-822, R. S. Wyo. 1931). This being true, the service had does not constitute due process under section 1 of the Fourteenth Amendment to the Constitution of the United States.

It is fundamental, we think, that a judgment of a sister state which does not meet the fundamental requirements of due process as required by section 1 of the Fourteenth Amendment to the Constitution of the United States has no validity in any state, even as a matter of comity. In Griffin v. Griffin, 327 U. S. 220, 66 S. Ct. 556, 90 L. Ed. 635, the court said: "A judgment obtained in violation of procedural due process is not entitled to full faith and credit * * *. Moreover, due process requires that no other jurisdiction shall give effect, even as a matter of comity, to a judgment elsewhere acquired without due process. Restatement of Judgments, § 11, Comment c." The adequacy of substituted service so far as due process is concerned is dependent upon whether or not the form of substituted service is reasonably calculated to give the defendant

actual notice of the proceedings and an opportunity to be heard. Milliken v. Meyer, *supra.* In the case at bar, the record shows that the substituted service required by section 89-822, R. S. Wyo. 1931, was not had at all. Consequently, no legal process was had upon the defendant and due process was not had.

It is argued by defendants below that divorce was originally a legislative function and consequently the Legislature is not obliged to comply with the due process clauses of the state and federal Constitutions. In this respect we point out that legislative divorces are prohibited by section 27, Article III, of the Constitution of the State of Wyoming. The granting of divorces in that state is a judicial function which implies a hearing at which the defendant is entitled to a notice consistent with due process. Without it a divorce decree of a sister state is not entitled to full faith and credit, even as a matter of comity. German Savings and Loan Society v. Dormitzer, 192 U. S. 125, 24 S. Ct. 221, 48 L. Ed. 373; Thompson v. Thompson, 226 U. S. 551, 33 S. Ct. 129, 57 L. Ed. 347; Williams v. North Carolina, 317 U. S. 287, 63 S. Ct. 207, 87 L. Ed. 279, 143 A. L. R. 1273; on second appeal, 325 U. S. 226, 65 S. Ct. 1092, 89 L. Ed. 1577, 157 A. L. R. 1366; Griffin v. Griffin, *supra;* Forrest v. Fey, 218 Ill. 165, 75 N. E. 789, 109 Am. S. R. 249, 1 L. R. A. N. S. 740.

Other points raised by the appeal have been examined and we have found them inapplicable or without merit under the record before us. The judgment of the trial court is correct and it is affirmed.

AFFIRMED.

MERLE ONSTOTT, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.
54 N. W. 2d 380

Filed July 11, 1952. No. 33169.

1. **Venue.** A motion for a change of venue in a criminal case is addressed to the sound discretion of the trial court, and its ruling

thereon will not be disturbed unless an abuse of such discretion is disclosed.

2. **Rape.** In a prosecution for assault with intent to commit rape, it is not essential to a conviction that the prosecutrix should be corroborated by the testimony of other witnesses as to the particular act constituting the offense. It is sufficient if she be corroborated as to material facts and circumstances which tend to support her testimony, and from which, together with her testimony as to the principal fact, the inference of guilt may be drawn.
3. **Witnesses: Appeal and Error.** The jury are the judges of the credibility of the witnesses who testify before them and of the weight of their testimony, when properly admitted, and, unless the decision of the jury thereon is clearly wrong, their verdict will not be molested.
4. **Rape.** In a prosecution for statutory rape, evidence of other criminal acts of the same sort occurring shortly before or after the act charged is admissible to explain the act charged or corroborate the testimony of the prosecutrix.
5. **Criminal Law.** Where the punishment of an offense created by statute is left to the discretion of a court, to be exercised within certain prescribed limits, a sentence imposed within such limits will not be disturbed unless there appears to be an abuse of such discretion.

ERROR to the district court for Banner County: JOHN H. KUNS, JUDGE. *Affirmed.*

Townsend & Youmans, for plaintiff in error.

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

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

WENKE, J.

Merle Onstott was convicted by a jury in the district court for Banner County of assault with intent to commit rape. After the verdict had been returned he filed a motion for a new trial. The trial court overruled this motion for a new trial and then sentenced him to 10 years in the Nebraska State Penitentiary. He brings this error proceeding to review his conviction and sentence. We shall refer to the plaintiff in error as the defendant.

Defendant's first assignment of error is the overruling of his plea in abatement. During the oral argument he abandoned this assignment. It is without merit in view of the record, the statute, and our holdings thereunder. See, § 29-1812, R. R. S. 1943; Huette v. State, 87 Neb. 798, 128 N. W. 519; Roberts v. State, 145 Neb. 658, 17 N. W. 2d 666.

Defendant's second assignment of error is the court's overruling of his motion for change of venue.

The statute provides: "All criminal cases shall be tried in the county where the offense was committed unless it shall appear to the court by affidavits that a fair and impartial trial cannot be had therein; in which case the court may direct the person accused to be tried in some adjoining county." § 29-1301, R. R. S. 1943.

In reviewing a trial court's ruling in this regard we have applied the following principle: " 'A motion for a change of venue in a criminal case is addressed to the sound discretion of the trial court, and its ruling thereon will not be disturbed unless an abuse of such discretion is disclosed.' Simmons v. State, 111 Neb. 644." Peterson v. State, 116 Neb. 268, 216 N. W. 823. See, also, Sweet v. State, 75 Neb. 263, 106 N. W. 31.

The showing made by defendant in support of his motion consists of the verified motion of defendant, his affidavit, an affidavit of defendant's mother, an affidavit of one of defendant's counsel, and a transcript of the evidence at the preliminary hearing. The affidavits and motion consist primarily of generalities and conclusions. Without considering the showing of the State made in opposition thereto, we find the showing made by defendant to be insufficient to show a situation which would require the trial court to grant the change. Consequently the trial court did not abuse its discretion in denying it.

The defendant contends the evidence is insufficient to sustain his conviction. In this respect the following principles are applicable:

"In a prosecution for rape, competent evidence must show beyond a reasonable doubt not only that defendant committed the act charged, but that he did so under such circumstances that every element of the alleged offense existed, and where the evidence fails to meet that test, it is insufficient to support a conviction." Cascio v. State, 147 Neb. 1075, 25 N. W. 2d 897.

"In a prosecution for assault with intent to commit rape, it is not essential to a conviction that the prosecutrix should be corroborated by the testimony of other witnesses as to the particular act constituting the offense. It is sufficient if she be corroborated as to material facts and circumstances which tend to support her testimony, and from which, together with her testimony as to the principal fact, the inference of guilt may be drawn." Hughes v. State, 154 Neb. 86, 46 N. W. 2d 904.

"The jury are the judges of the credibility of the witnesses who testify before them and of the weight of their testimony, when properly admitted, and, unless the decision of the jury thereon is clearly wrong, their verdict will not be molested." Morrow v. State, 146 Neb. 601, 20 N. W. 2d 602.

" 'This court, in a criminal action, will not interfere with a verdict of guilty, based upon conflicting evidence, unless it is so lacking in probative force that we can say, as a matter of law, that it is insufficient to support a finding of guilt beyond a reasonable doubt.' Williams v. State, 115 Neb. 277, 212 N. W. 606." Haines v. State, 135 Neb. 433, 281 N. W. 860.

"It is only when there is a total failure of proof in a criminal case to support a material allegation in the information, or where the testimony adduced is of so weak or doubtful a character that a conviction based thereon could not be sustained, that the trial court will be justified in directing a verdict of not guilty." Wanzer v. State, 41 Neb. 238, 59 N. W. 909.

As to corroboration the following additional principles are applicable:

"* * * corroboration may consist of the proof of such surrounding facts and circumstances as will support her testimony against the accused as to the principal fact, and will identify the accused as the party guilty of the crime. It may consist of circumstantial evidence. Nabower v. State, 105 Neb. 848; Kotouc v. State, 104 Neb. 580; Day v. State, 102 Neb. 707; Hammond v. State, 39 Neb. 252." Robbins v. State, 106 Neb. 423, 184 N. W. 53.

" 'Where, in a prosecution for assault with intent to commit rape, prosecutrix testifies unequivocally to facts which would constitute the offense, a sufficient corroboration is shown if opportunity and inclination, on the part of the defendant, to commit the offense are shown, and the circumstances proved by other witnesses tend to corroborate the testimony of prosecutrix.' Aller v. State, 114 Neb. 59." Lewis v. State, 115 Neb. 659, 214 N. W. 302.

"In a prosecution for statutory rape, evidence of other criminal acts of the same sort occurring shortly before or after the act charged is admissible to explain the act charged or corroborate the testimony of the prosecutrix. * * * Hudson v. State, 97 Neb. 47; Leedom v. State, 81 Neb. 585, and Woodruff v. State, 72 Neb. 815." Smith v. State, 127 Neb. 776, 257 N. W. 59. See, also, Evers v. State, 84 Neb. 708, 121 N. W. 1005.

Likewise the letter written by defendant, which he had delivered to his brother Carroll, was properly admitted and was evidence tending to corroborate the testimony of the prosecutrix as to the offense charged. See Leedom v. State, 81 Neb. 585, 116 N. W. 496.

Defendant was living in the home of his brother at the time. He committed the offense with which he was charged upon his niece, who at that time was between 10 and 11 years of age. She testified to the details of the principal offense and also to similar or like acts committed upon her by him shortly prior thereto. Her sisters, who were 9 and 12 years of age at the time, testified to the fact that defendant committed like or similar

acts upon them shortly before and shortly after the offense with which he is here charged was committed. Her story is further corroborated by other facts and circumstances in the record, particularly by the letter defendant wrote to his brother shortly after the offense was committed. It would serve no useful purpose to the profession, the public, or the parties involved, particularly these three young girls, to set out in detail and leave a permanent record of this unfortunate occurrence in their young lives. Since the record presents a factual question for the jury, which it has answered, it is not the prerogative of this court to interfere therewith. We find the contention to be without merit.

Finally defendant suggests that the sentence is excessive and asks this court, under the powers granted it by section 29-2308, R. R. S. 1943, to reduce it.

Of this authority we said in Truman v. State, 153 Neb. 247, 44 N. W. 2d 317: "It is true that under section 29-2308, R. R. S. 1943, we have the authority to reduce a sentence when, in our opinion, it is excessive. But, as stated in Bright v. State, 125 Neb. 817, 252 N. W. 386: 'Where the punishment of an offense created by statute is left to the discretion of a court, to be exercised within certain prescribed limits, a sentence imposed within such limits will not be disturbed unless there appears to be an abuse of such discretion.' "

We find nothing, under the facts and circumstances in the record as determined by the jury's verdict, which causes us to believe that the trial court abused its discretion by imposing upon defendant the sentence that it did.

In view of the foregoing we affirm the verdict of the jury and the sentence imposed by the district court.

AFFIRMED.

IN RE ESTATE OF JOHN H. VANDERMUELEN, DECEASED. HATTIE E. HILL, APPELLANT, V. C. M. HUMLICEK ET AL., APPELLEES.
54 N. W. 2d 366

Filed July 11, 1952. No. 33183.

Wills. Ordinarily a proponent of a will, before action is taken thereon, should be permitted to withdraw from the petition for probate for the purpose of objecting to the probate thereof unless, by his conduct, he has estopped himself from so doing.

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

McKillip, Barth & Blevens, for appellant.

Thomas & Thomas, F. H. Mize, and *Lightner & Johnson,* for appellees.

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

WENKE, J.

This appeal from the district court for Butler County involves the proceedings instituted in the county court of Butler County to administer the estate of John H. Vandermeulen, who died on July 25, 1951, a resident of that county.

Appellant Hattie E. Hill, a sister of said decedent, an heir at law and a beneficiary under the terms of his will, filed her petition in the county court of Butler County on July 28, 1951, praying that the last will and testament of decedent and codicil thereto, which she deposited with the county court at the same time, be admitted and allowed to probate. Therein she also asked the county court to fix a time and place for a hearing thereon for that purpose which the county court did.

This was all properly done in accordance with the statutes relating thereto which provide:

"Every person other than the judge of probate, having the custody of any will, shall, within thirty days after he has a knowledge of the death of the testator, deliver the

same into the county court which has jurisdiction of the case, or to the person named in the will as executor." § 30-213, R. R. S. 1943.

"When any will shall have been delivered into or deposited in any probate court having jurisdiction of the same, together with a petition for its probate, such court shall appoint a time and place for proving it, when all concerned may appear and contest the probate of the will, and shall cause public notice thereof to be given by publication under an order of such court, in such newspaper printed in this state as the judge shall direct, three weeks successively, and no will shall be proved until notice shall be given as herein provided; * * *." § 30-217, R. R. S. 1943.

On August 20, 1951, appellant filed a "Withdrawal and Dismissal of Petition" whereby she sought to withdraw and dismiss, with prejudice, her petition for probate of the will and codicil thereto of decedent.

The filing of a petition in the county court for the purpose of administering the estate of a deceased person is not an "action" as contemplated by section 25-601, R. R. S. 1943. See, In re Estate of Glover, 104 Neb. 151, 175 N. W. 1017; In re Estate of Marsh, 145 Neb. 559, 17 N. W. 2d 471.

Concurrently with this "Withdrawal and Dismissal of Petition" the appellant filed "Objections to Probate and Allowance of Purported Will and Codicil."

Motion was made to strike appellant's "Withdrawal and Dismissal of Petition." This motion the county court sustained and the withdrawal and dismissal of petition was stricken. From this order appellant appealed to the district court.

The principles applicable to proceedings to administer estates of deceased persons are fully discussed in In re Estate of Marsh, *supra*. Therein we stated: "'"A proceeding in the probate court to settle the estate of a decedent is a proceeding in rem, and everyone interested in such settlement is a party in the probate court whether

he is named or not." In re Estate of Sweeney, 94 Neb. 834, 144 N. W. 902.' Nilson v. Tekamah Investment Co., 133 Neb. 180, 274 N. W. 465. See, also, In re Estate of Creighton, 91 Neb. 654, 136 N. W. 1001. In the case of In re Estate of Glover, 104 Neb. 151, 175 N. W. 1017, we held that, 'The filing of a petition in the county court for the appointment of an administrator of the estate of a deceased person is not an "action" as contemplated in section 7654 Rev. St. 1913 (now section 25-601, R. S. 1943)', and that the petitioner by filing a dismissal of his petition, no action being taken thereon by the court, could not deprive the court of its jurisdiction thereof and its power to continue with the administration. The same would be true of a petition filed for the purpose of probating a will and any contest thereof. When a petition is filed to administer or probate an estate the proceeding becomes one in rem to which every one interested is a party. To permit any one or more of these parties to dismiss the action or an appeal therefrom, might prevent the court from performing its duty of safeguarding the interests of all parties whether before the court in person or not. As stated in In re Estate of Jurgensmeier, *ante*, p. 459, 17 N. W. 2d 155: '* * * it is the duty of the court to protect the interests of all parties, whether actually before the court or not. Sorensen v. Sorensen, 68 Neb. 490, 98 N. W. 837.' However, this does not prevent the court from exercising complete power over the actions of which it is given jurisdiction. The county court has original and exclusive jurisdiction in probate matters, which is conferred upon the district court in those matters appealed to it. Within this jurisdiction it has power over all proceedings before it, including the right to dismiss. In exercising this power it is the duty of the court to protect all parties to the proceeding, whether before the court in person or not, and any failure to do so is subject to review. * * * The effect of such dismissal of an appeal by the district court is to leave the parties as

they were before the appeal was perfected and is an affirmance of the order of the lower court."

Under these principles the appellant could not withdraw or dismiss her petition without court approval. Thus she is now left as both a proponent and contestant. However, ordinarily a proponent of a will, before action is taken thereon, should be permitted to withdraw from the petition for probate for the purpose of objecting thereto, unless, by his conduct, he has estopped himself from so doing. See, 2 Page on Wills, § 623, pp. 177, 178; Wilson v. Van Zant, 85 Colo. 276, 275 P. 905. Whether or not the latter is here true has never been determined for significantly appellant has never sought to withdraw from her petition for probate of the will and codicil thereto for the purpose of objecting to the probate thereof.

When the appeal was lodged in the district court a motion was made to dismiss the appeal on the ground that the order appealed from was not a final order within the meaning of section 30-1601, R. R. S. 1943. This motion the district court sustained and thereupon dismissed the appeal. It is from this order that the appeal is taken.

Section 30-1601, R. R. S. 1943, provides: "In all matters of probate jurisdiction, appeals shall be allowed from any final order, judgment or decree of the county court to the district court by any person against whom any such order, judgment or decree may be made or who may be affected thereby."

Section 25-1902, R. R. S. 1943, which also has application, provides in part: "* * * an order affecting a substantial right made in a special proceeding, * * * is a 'final order' which may be vacated, modified or reversed, as provided in this chapter."

Under these statutes we think the ruling of the district court to be correct. None of appellant's rights have ever been determined. The action is still pending in the county court subject to a determination of whether or not decedent died testate. If he did not, then administration

of decedent's estate as that of a person dying intestate would be proper.

AFFIRMED.

SCOTTSBLUFF NATIONAL BANK, A CORPORATION, APPELLANT, V. BLUE J FEEDS, INCORPORATED, A CORPORATION, APPELLEE.
54 N. W. 2d 392

Filed July 11, 1952. No. 33184.

1. **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.
2. **Corporations: Banks and Banking.** The resolution of a corporation designating a bank as depositary for corporate funds and authorizing its designated officer or agent to borrow money from the bank in the name of the corporation on behalf of the corporation does not authorize the bank to loan money on corporate notes executed and delivered by such officer or agent and deposit the proceeds in his personal account for his own use and purposes.
3. ———: ———. When such a transaction is attempted, the bank is put upon notice by the very forms of the transaction itself and the corporate resolution, and thereby the bank has a duty of inquiry and investigation imposed upon it to ascertain that its own and such officer or agent's authority is sufficient to authorize the transaction in order to hold the corporation liable thereon.
4. ———: ———. The fact that such officer or agent might have accomplished the same result by another method without imposing liability on the part of the bank therefor is not controlling.
5. **Bills and Notes: Contracts.** A negotiable instrument as between the parties requires a consideration the same as any other contract, and when there is no consideration, the original note and each successive renewal thereof are void and such absence of consideration is a defense to such instruments.
6. ———: ———. In order for a detriment to the promisee to constitute a valid consideration for a note or contract, it must have been within the express or implied contemplation of the parties and known to and agreed to by them.
7. **Corporations: Banks and Banking.** The true test of liability by a bank in cases where it, without requisite authority, loans money on a corporate note executed by a corporate officer or

agent and deposits the proceeds to the personal credit of such officer or agent, is not solely that the bank obtains a profit or benefit therefrom by its initiative action, but that by failure to perform a duty of inquiry and investigation, it aided such officer or agent in a misappropriation of corporate funds.

8. **Estoppel.** The doctrine of estoppel has no application where all the interested parties have equal knowledge of the facts or where the party claiming its benefit is chargeable with notice of the facts or is equally negligent or at fault.

9. ———. The rule that as between two innocent parties the loss should fall on him who made the loss possible protects only those who exercise ordinary care and caution in performance of duty.

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

Davis, Stubbs & Healey, and *Richard D. Wilson,* for appellant.

Young, Williams & Holm, and *James H. Anderson,* for appellee.

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

CHAPPELL, J.

The Scottsbluff National Bank, hereinafter designated as plaintiff or the bank, brought this action at law against Blue J Feeds, Incorporated, hereinafter designated as defendant or the corporation, to recover upon a promissory note for $30,000. The note represented the execution, renewal, and subsequent consolidation and renewal of two corporate notes, one for $20,000, originally dated July 2, 1949, and the other for $10,000, dated August 3, 1949. Defendant admitted liability with respect to the $20,000 item but denied liability with respect to the $10,000 item, primarily upon the ground that the proceeds therefrom were not credited by the bank to defendant's account therein, but, as requested by Frank R. Warden, defendant's vice president, they were unlawfully, without any authority or inquiry with relation thereto, credited by the bank to the personal account of

Frank R. Warden for his own use and purposes. After hearing upon the issues, jury waived, whereat evidence was adduced, the trial court rendered a judgment in favor of plaintiff for $20,000 with interest at five percent from March 27, 1950, upon defendant's admitted liability, but otherwise denied liability of defendant upon the $10,000 item, and, with respect thereto, rendered a judgment in favor of defendant. The entire controversy here relates to such $10,000 item. Plaintiff's motion for new trial was overruled, and it appealed, assigning in effect that the findings of fact, conclusions of law, and judgment based thereon were not sustained by the evidence but were contrary thereto and contrary to law. We conclude that the assignments should not be sustained.

It is elementary that in a law action such as this, tried without a jury, findings of the court have the effect of a verdict of a jury, and judgment thereon will not be disturbed unless clearly wrong. Cotner College v. Estate of Hester, 155 Neb. 279, 51 N. W. 2d 612.

The relevant facts are not in dispute. Most of them were actually stipulated. Insofar as important here, they were as follows: Defendant corporation was originally, from June 1936 to January 1947, a partnership, composed of John R. Jirdon and Frank R. Warden, who as such engaged in the grain and feed business at Gering, Nebraska. Warden was sole manager of the business and handled its fiscal affairs. Jirdon was not ordinarily consulted except upon matters of policy. Such partnership had a deposit or checking account at plaintiff bank beginning in 1945. Prior thereto, its fiscal affairs were handled at the Live Stock National Bank in Omaha. During its existence as such, the partnership itself made no borrowings from plaintiff. However, during such period Warden, who also had an account at plaintiff bank, personally borrowed money from plaintiff for the partnership and himself, but there was no evidence that he ever paid any of his personal indebtedness to plain-

tiff with a partnership check. The partnership business prospered, and the capital investment of both Jirdon and Warden increased substantially. On such investments they each received seven percent interest. Thus, from June 1936 until January 1947, Warden was trusted by Jirdon, and during all of such period the record does not disclose any defalcation of partnership funds by Warden.

On January 2, 1947, they formed defendant corporation, with John R. Jirdon, president, Frank R. Warden, vice president, and R. D. Hildebrandt, secretary-treasurer. The secretary-treasurer had only a nominal interest in the corporation. Eight hundred shares of paid-up capital stock were issued for a par value of $100 each. Out of such shares, 240 were issued to Warden and 160 to his relatives. The corporation, on February 1, 1947, had $64,651.55 of surplus and undivided profits. Its property statement of January 2, 1950, showed capital stock, $80,000, with surplus and undivided profits of $148,654.50. Thus, it was concededly always entirely solvent, had excellent credit, and no creditors are here involved in any manner.

After its formation, the corporation designated plaintiff as its corporate depositary, opened an account therein, and established credit with such bank. The corporation deposited $50,000 from other sources, and transferred $40,000 from the partnership account to the corporation account in plaintiff bank. On January 15, 1947, defendant corporation tendered and delivered to plaintiff its own duly prepared, adopted, and certified corporate resolution which defined the authority of Warden and the bank with relation to funds of the corporation to be handled by the bank. It was prepared on a printed form of the Live Stock National Bank of which Jirdon was then a director. Insofar as important here, it provided: "(1) Be It Resolved, that THE SCOTTSBLUFF NATIONAL BANK OF SCOTTSBLUFF Nebraska, be and hereby is designated a depositary *in which the funds*

of this Corporation may be deposited by its officers, agents, and employes, and that the Vice-President F. R. Warden, * * * shall be and * * * hereby is authorized to endorse *for deposit* or negotiation any and all checks, drafts, notes, bills of exchange, and orders for the payment of money, *either belonging to or coming into the possession of this Corporation.* * * * (2) Be It Further Resolved, that the Vice-President F. R. Warden * * * of this Corporation * * * (is) authorized to SIGN ANY AND ALL CHECKS, DRAFTS, AND ORDERS, including orders or directions in informal or letter form, against *any funds at any time standing to the credit of this Corporation with the said Bank,* and/or against *any account of this Corporation with the said Bank,* and that the said Bank hereby is authorized to honor any and all checks, drafts and orders so signed, including those drawn to the individual order of any such officer and/or other person signing the same, without further inquiry or regard to the authority of said officer(s) and/or other person(s) or the use of said checks, drafts and orders, or the proceeds thereof. (3) Be It Further Resolved, that the PRESIDENT AND/OR VICE PRESIDENT, singly or jointly of this Corporation (are) * * * authorized to *borrow from time to time on behalf of this Corporation from the said Bank* such sums of money for such time and upon such terms as may to them, or any of them, seem advisable, and to execute in the name of the Corporation notes, drafts, or agreements for the re-payment of any sums so borrowed, * * *." (Italics and numerals supplied.) Concededly, insofar as important here, the resolution was never rescinded or modified as provided therein.

After incorporation, Warden continued to manage the business and fiscal affairs of the corporation and transacted defendant's business with the bank in the manner authorized by the aforesaid resolution, with certain exceptions, one of which was the transaction here involved.

In that connection, on July 2, 1949, Warden borrowed

$20,000 from plaintiff and executed a corporate note therefor in which the bank was payee. The proceeds of such loan were deposited in defendant's account. However, neither the fact of the borrowing nor of the deposit as such appeared in any form on defendant's corporation books, except that on the same day Warden, for whom no provision had been made for salary, falsely credited his personal corporate drawing account with that amount on defendant's books. Such $20,000 is the item for which defendant admitted liability.

Defendant also had a branch office in Casper, Wyoming, where Warden also had a personal corporate drawing account on the books of defendant corporation. Daily and monthly reports were sent to the office at Morrill where Jirdon and Hildebrandt lived. At first such reports were carefully examined. However, thereafter over a considerable period of time, having confidence in Warden's integrity, they simply checked total sales and volume. Such reports related solely to the operations at Gering and not at Casper, from which none were received. The daily reports showed deposits in a lump sum, and the balance in defendant's account, without any listing of individual checks. Over a period of time, Warden cashed numerous corporate checks, until his personal corporate accounts in both Gering and Casper were greatly overdrawn, but they are not directly involved here. The disposition of two such check transactions in the light of paragraph (2) of the resolution, which with respect thereto gave Warden and the bank practically unlimited authority without the necessity of inquiry by the bank with regard to the use of the proceeds thereof, will be found in a companion case, Blue J Feeds, Inc. v. Scottsbluff Nat. Bank, *post* p. 84, 54 N. W. 2d 404.

The following transaction constitutes the subject matter of the instant case. On August 3, 1949, Warden again went to plaintiff bank and borrowed $10,000, executing and delivering to it a corporate note therefor in which

the bank was payee. At that time, however, Warden instructed an officer of the bank to deposit all the proceeds of such loan in his own personal account. Such officer, a vice president of the bank, well knowing that Warden was so personally receiving the proceeds, complied with such instructions without further inquiry, and himself made out and delivered to Warden an initialed bank deposit slip and caused all of the proceeds to be deposited in Warden's personal account instead of defendant's account. All previous borrowings from plaintiff by defendant upon corporate notes had been deposited to defendant's corporation account. There were at least nine such previous borrowing transactions, for a total of $130,000, which had all been previously deposited in defendant's account. The instance here involved was the one and only borrowing by Warden upon defendant's corporate notes in which the proceeds were deposited to any account except the corporation's account. The vice president of the bank himself so testified.

On the same day but not at the same time as the borrowing transaction, and not as a part thereof, Warden wrote a check on his personal account for $6,000, which he deposited with several others in defendant's corporate account, and credited his corporate drawing account, then overdrawn several thousand dollars, with that amount. Be that as it may, Warden's bank statement for August 1949 shows that he paid out the entire $10,000 for his own use and purposes during that month, and in that connection plaintiff makes no claim that the $6,000 then credited to Warden's account with defendant was a benefit to the corporation out of the proceeds of the $10,000 loan.

On September 30, 1949, the $20,000 note dated July 2, 1949, was renewed by Warden, who paid the interest to plaintiff with his own personal check. It was likewise again renewed by him on November 29, 1949. On November 1, 1949, the $10,000 note of August 3, 1949, was also renewed by Warden, who paid the interest thereon

to the bank with his own personal check. It was likewise again renewed by him on December 31, 1949. On February 1, 1950, however, Warden consolidated the two notes into one for $30,000, and paid the interest to plaintiff thereon with a corporate check. That note was likewise renewed by him on March 27, 1950. It is the note upon which plaintiff predicated this action.

The record discloses that notice of maturity of notes given to the bank in the corporate name were customarily sent by plaintiff to Gering where Warden was in charge, and concededly, if he received such notices they were destroyed by him. There is no evidence that any of defendant's officers other than Warden ever had any knowledge of the $10,000 note transaction until June 24, 1950, and no record of it ever appeared in defendant's corporation books and records.

After Warden did not call at the bank to renew or pay the note which matured on June 1, 1950, plaintiff tried to telephone Warden but he could not be contacted. Thereafter, on June 24, 1950, just two days before Warden's death, the bank called Hildebrandt, secretary-treasurer, at Morrill about the $30,000 note, who replied that they had no record of such a note or indebtedness. Prior thereto, the bank never made any inquiry of any officer of the corporation except Warden concerning the transaction.

On January 2, 1950, at the annual meeting of the corporation, Jirdon noticed that the balance sheet indicated that Warden's drawing account with the corporation was overdrawn some $20,528.48. This was accomplished by the cashing of corporate checks by Warden, which was authorized by paragraph (2) of the corporate resolution, and the false entry as aforesaid of a $20,000 credit in his drawing account on July 2, 1949. It was then explained by Warden that he had thus overdrawn to pay obligations owing to others, whereupon he offered to and did put up 240 shares of stock to secure payment of a $17,000 note then executed and delivered by him to defendant as

payee. The stock certificates showed that they had been endorsed to the corporation about a month before, which Warden explained as having been done by him to protect the corporation. He then owned an additional 80 shares, and agreed to pay and make up the balance of $3,528.48 in the future. The stock was then worth $200 a share and ample security. However, the fact is that at that time the directors knew nothing about the note transactions here involved, and, of course, they were not in any manner considered or included in the aforesaid settlement with Warden. The transactions here involved were not discovered until June 24, 1950, and the full extent of corporate check withdrawals by Warden was only discovered some time thereafter by extensive audits supplemented by outside information not obtainable from defendant's records. At the time of Warden's death on June 25, 1950, the corporation's balance sheets showed nothing owing the plaintiff bank.

Plaintiff contended that the resolution aforesaid authorized the bank to loan $10,000 upon the corporate note executed and delivered to it by Warden, and to deposit the same in his personal account. Plaintiff also argued that by virtue of the fact that it received no benefit, but suffered a detriment as consideration for the transaction, and that by application of estoppel and innocent party doctrines, defendant would be liable for the $10,000 transaction. We conclude otherwise.

Paragraph (2) of the resolution, it will be noted, related to the authority of Warden to "SIGN ANY AND ALL CHECKS, DRAFTS, AND ORDERS, including orders or directions in informal or letter form, *against any funds at any time standing to the credit of this Corporation with the said Bank, and/or against any account of this Corporation with the said Bank,* * * *." (Italics supplied.) As a matter of course, a borrowing by corporate note which was deposited solely in Warden's account, could not upon any theory be construed as a check, draft, or order "against any funds at any time standing to the

credit of this Corporation with the said Bank," or "against any account of this Corporation with the said Bank * * *."

The proceeds of the loan never were an account of the corporation with the bank, or a fund standing to the credit of the corporation. In fact, it was initially the bank's own money, which after the transaction appeared as a fund standing to the credit of Warden personally. Paragraph (2) of the resolution had no relation whatever to borrowing by the corporation. Rather, borrowing transactions were authorized and controlled by paragraphs (1) and (3) of the resolution. Paragraph (1) specifically designated plaintiff as "a depositary in which the funds of this Corporation may be deposited by its officers, agents, and employees, * * *." Paragraph (3) specifically provided that Warden was authorized to borrow money "in the name of the Corporation" but only "on behalf of the Corporation." It clearly gave to the bank no authority to loan money "in the name of the Corporation" and deposit the proceeds in Warden's personal account instead of the account of the corporation.

In that connection, the general rule is: "Express authority to execute or indorse commercial paper in the principal's name will, in the absence of anything indicating a different intention, be construed as confining the authority of the cases to the execution and indorsement of such paper in the transaction of the principal's business and for the benefit of the principal. Such authority does not include authority to draw or indorse negotiable paper for the benefit or accommodation of any other person; authority to sign accommodation paper or as security for a third person must be specially given. Nor does express authority of the nature in question allow the agent to make or indorse negotiable paper for his own use and behalf." 2 Am. Jur., Agency, § 176, p. 140. See, also, 2 C. J. S., Agency, § 112, p. 1306; 2 C. J., Agency, § 285, p. 641.

Therefore, when the transaction here involved was attempted, the bank was put upon notice and there was im-

posed upon it a duty of inquiry and investigation to ascertain its own authority and that of Warden. This was not done. If it had done so, it would have readily learned that Warden had no authority to borrow money in the name of the corporation for his own uses and purposes. It knew that such funds had never theretofore been deposited in Warden's personal account. The bank's position was the same as if it had actual knowledge of such lack of authority, either by the written resolution or otherwise, because it was charged upon the face of the resolution, Warden's stated interest in the transaction, and the note itself with knowledge of the facts, which an inquiry would have developed. Kuhns v. Live Stock Nat. Bank, 137 Neb. 459, 289 N. W. 893; American Surety Co. v. Smith, Landeryou & Co., 141 Neb. 719, 4 N. W. 2d 889; Bank of Benson v. Gordon, 103 Neb. 508, 172 N. W. 367; McCann v. State, 4 Neb. 324.

It is generally understood that: "Unless otherwise agreed, authority to act as agent includes only authority to act for the benefit of the principal." Restatement, Agency, § 39, p. 98. In that connection: "If a third person has notice of a limitation of an agent's authority, he cannot subject the principal to liability upon a transaction with the agent in violation of such limitation." Restatement, Agency, § 166, p. 406. As stated in comment (a) to this section: "Any substantial departure by an agent from the usual methods of conducting business is ordinarily a sufficient warning of lack of authorization." Again, in comment (b) to this same section, referring to § 39 *supra*, it is said: "If, therefore, the third person has reason to believe that the agent is acting for his own benefit, he cannot subject the principal to liability upon a contract which in fact is unauthorized." Again, in comment (c) to this same section it is said: "Where circumstances indicate that the agent may be acting in fraud of the principal, a person dealing with the agent is required to exercise care in investigation in order to hold the principal liable."

Also, as stated in Restatement, Agency, § 167, p. 408: "If a third person dealing with an agent has notice that the agent's authority is created or described in a writing which is intended for his inspection, he is affected by limitations upon the authority contained in the writing, unless misled by conduct of the principal."

In Employers' Liability Assurance Corp. v. Hudson River Trust Co., 250 App. Div. 159, 294 N. Y. S. 698, citing many authorities, the court in dealing with constructive notice and the duty to inquire, imposed by the very form of withdrawals and deposits, distinguished between cases involving: (1) Dealings of a bank with trustees and representatives of estates, such as relied upon by plaintiff in this case; (2) dealings of a bank with public officers; and (3) dealings of a bank with officers or agents of a private corporation such as that at bar. With regard to the third type, the court said: "In the case of an officer or agent of a private corporation dealing with its funds the authority of such officer or agent is not known to all but depends upon the authority conferred upon him by the corporation which he represents. In such class of cases a bank knowingly receiving corporate funds for deposit in the individual account of such officer or agent is held to be under the duty of making inquiry to ascertain the extent of his authority in the transaction." See, also, Farmers' Loan & Trust Co. v. Fidelity Trust Co., 86 F. 541, 30 C. C. A. 247, 56 U. S. App. 729; First Nat. Bank v. Drovers' & Mechanics' Nat. Bank, 244 F. 135; Chase & Co. v. Norfolk Nat. Bank, 151 Va. 1040, 145 S. E. 725; Oklahoma State Bank v. Galion Iron Works & Mfg. Co., 4 F. 2d 337.

The fact that Warden might have accomplished the same result by another method without liability on the part of the bank is not controlling in this case, as argued by plaintiff. In Bank of Giles County v. Fidelity & Deposit Co., 84 F. 2d 321, it is said: "What it ought to have done is not what it did do, and it cannot escape

liability upon the mere conjecture that what did happen to the funds might have also happened had the bank not been derelict in its dealings with those funds."

Plaintiff argued that there was consideration for the note because the bank suffered a detriment, and that defendant was liable because plaintiff did not obtain any benefit from the transaction. We conclude otherwise. As a matter of fact, the bank did receive a benefit. It initially retained the funds credited to Warden in the bank. Over a long period of time, it collected a large amount of interest upon the loan, a benefit or income received out of the transaction, the very purpose for which the bank existed. We may assume, however, for purpose of argument only that it obtained no benefit, and arrive at the same result. It is elementary that consideration may be a detriment to the promisee as well as a benefit to the promissor. However, a negotiable instrument as between the parties requires a consideration the same as any other contract, and where there is no consideration, the original note and each successive renewal thereof is void, and such absence of consideration is a defense to the instrument. 7 Am. Jur., Bills and Notes, § 234, p. 926, §§ 247, 248, p. 941; § 62-128, R. R. S. 1943. Likewise, it is the rule that in order for a detriment to the promisee to constitute a valid consideration for a note or contract, it must have been within the express or implied contemplation of the parties and known to and agreed to by them. Blain v. Johnson, 201 Iowa 961, 208 N. W. 273; Bard v. Kent, 19 Cal. 2d 449, 122 P. 2d 8, 139 A. L. R. 1032; 1 Williston on Contracts (Rev. Ed.), § 102A, p. 326. Ordinarily a detriment to the promisee cannot be consideration for a note unless the party sought to be held is in some manner privy to the transaction. In other words, the borrowing on a note such as here, involved two elements: (1) Issuance of the note in the name of defendant corporation; and (2) delivery of the consideration to defendant, or it must appear that the detriment claimed

by delivery thereof to Warden was authorized by defendant, making it privy to the transaction. To hold otherwise would permit plaintiff, upon receiving the note, to give the proceeds to any stranger and thereby bind defendant. No such authority was ever given by defendant, and the detriment, if any, suffered by plaintiff was purely the result of its own lack of care and diligence in completing the transaction and disposing of the funds as it did for Warden's own use and purposes. In this case the business of the bank and the business of Warden, not that of defendant, was being promoted by the bank and Warden.

True, in some cases courts have laid emphasis upon the fact that the bank obtained a profit or benefit by the transaction to illustrate that they thereby actually aided the agent or trustee in a misappropriation of funds. The true test is not the procurement of a benefit by the bank by its initiative action, but the infliction of a loss of funds resulting from the presence of constructive notice or knowledge, requiring inquiry with regard thereto, and the obtaining of requisite authority, which was not done by plaintiff. In other words, the primary question is whether or not the bank with notice failed to inquire and thus actually aided Warden in misappropriating the fund, which in fact should have been credited to the account of the corporation. Hale, Cabot and Buck v. Windsor Savings Bank, 90 Vt. 487, 98 A. 993. Other cases heretofore cited also support such conclusion.

We come then to estoppel. In that connection, the proximate result of the situation presented here was wholly the lack of any care and diligence by plaintiff bank in accepting the note and depositing the funds in Warden's personal account, without making any inquiry as required. The transaction involved was a single, strange, and unusual one, which never appeared upon defendant's books. It was concealed from defendant by Warden, and in fact it was concealed from defendant

by the bank, who was silent about either its execution or existence insofar as all other officers of the corporation were concerned, from August 3, 1949, until June 24, 1950, only two days before Warden's death. Defendant had a right and was not negligent in reposing confidence in Warden as a trusted agent, and continuing to do so until it received knowledge or information that he was untrustworthy. American Surety Co. v. Smith, Landeryou & Co., *supra*. When defendant did receive such knowledge, it was long after the transaction here involved had occurred, and the proceeds deposited in Warden's account had been spent by him for his own use and purposes. Any information obtained after August 3, 1949, would have served no purpose unless the transaction was subsequently ratified by defendant. That did not occur.

"To constitute an equitable estoppel, there must exist a false representation or concealment of material facts; it must have been made with knowledge, actual or constructive, of the facts; the party to whom it was made must have been without knowledge or the means of knowledge of the real facts; it must have been made with the intention that it should be acted upon; and the party to whom it was made must have relied on or acted upon it to his prejudice." Walker v. Ehresman, 79 Neb. 775, 113 N. W. 218. See, also, Peters Trust Co. v. Cranmore, 114 Neb. 491, 208 N. W. 635; State ex rel. Truax v. Burrows, 136 Neb. 691, 287 N. W. 178.

The above statement was quoted with approval in American Surety Co. v. Smith, Landeryou & Co., *supra*, which case is authority for the controlling conclusion here that plaintiff was itself negligent because it was put on inquiry by the very form of the transaction in the light of its authority prescribed in the resolution, but nevertheless failed to perform its duty. Such conclusion invokes application of the rule in American Surety Co. v. Smith, Landeryou & Co., *supra*, citing numerous cases, to the effect that defendant's estoppel

by negligence does not arise in favor of a plaintiff who itself was guilty of negligence.

As concluded in W. E. Richmond & Co. v. Security Nat. Bank, 16 Tenn. App. 414, 64 S. W. 2d 863: "The doctrine of equitable estoppel is well established. An essential element is the entire good faith and innocence of the party imposed on. An estoppel by representation cannot be claimed by one acting thereon, if he knows of, or has been put upon inquiry as to its falsity; and where one with a convenient opportunity to ascertain the real facts by the exercise of reasonable diligence neglects to do so after having been put upon inquiry, he will not be permitted to defeat another's just rights by urging an equitable estoppel based on his having acted to his disadvantage in relying upon that other's innocently mistaken representation regarding those facts, where such representation was not made for the purpose of inducing him so to act. Eyers Woolen Co. v. Gilsum, 84 N. H., 1, 146 A., 511, 64 A. L. R., 1196; Vineland v. Fowler Waste Mfg. Co., 86 N. J. Law, 342, 90 A., 1054, L. R. A., 1915B, 711."

In 19 Am. Jur., Estoppel, § 86, p. 741, it is said: "Good faith is generally regarded, however, as requiring the exercise of reasonable diligence to learn the truth, and, accordingly, estoppel is denied where the party claiming it was put on inquiry as to the truth and had available means for ascertaining it, at least where the element of actual fraud is absent." See, also, 21 C. J., Estoppel, § 130, p. 1129; 2 Pomeroy, Equitable Estoppel (4th ed.), § 810, p. 1662.

As stated in 31 C. J. S., Estoppel, § 103, p. 329, citing First Nat. Bank of Bridgeport v. First Nat. Bank of Hartington, 111 Neb. 441, 196 N. W. 691: "Furthermore, in accordance with well settled general principles governing equitable estoppels, no estoppel can arise where all the parties interested have equal knowledge of the facts, or where the party setting up the estoppel

is chargeable with notice of the facts, or is equally negligent or at fault."

As stated in Ricketts v. Scothorn, 57 Neb. 51, 77 N. W. 365, 73 Am. S. R. 491, 42 L. R. A. 794: "An estoppel in pais is defined to be 'a right arising from acts, admissions, or conduct which have induced a change of position in accordance with the real or apparent intention of the party against whom they are alleged.' Mr. Pomeroy has formulated the following definition: 'Equitable estoppel is the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed, either of property, or contract, or of remedy, as against another person who in good faith relied upon such conduct, and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right either of property, of contract, or of remedy.' (2 Pomeroy, Equity Jurisprudence 804.)"

The fact is, however, that defendant did nothing voluntarily to induce the bank to change its position, and it never did so. Its position was that it had authority to so loan and deposit the money in the first instance. However, that authority did not exist, and upon first learning of the transaction, which had long theretofore been completed, defendant repudiated it. It cannot be said that plaintiff bank ever relied in good faith upon any subsequent conduct of defendant. It was not induced by defendant in any manner to refrain from learning the facts, as it was initially obligated to do, and saving itself from loss, if any.

In Scharman v. Scharman, 38 Neb. 39, 56 N. W. 704, this court held that: "To sustain an estoppel because of the omission to speak there must be both the specific opportunity and the apparent duty to speak. The party maintaining silence must have known that some one was relying thereon, and was either acting, or about to act, as he would not have done had the truth been told." See,

also, Smith v. White, 62 Neb. 56, 86 N. W. 930. In City of Lincoln v. McLaughlin, 79 Neb. 74, 112 N. W. 363, this court held: "In order to constitute an equitable estoppel by silence or acquiescence, it must be made to appear that the facts upon which it is sought to make the estoppel operate were known to the parties against whom the estoppel is urged."

It will be readily seen that since the note never appeared on defendant's books, and its existence was never known by it until June 24, 1950, the foregoing rules will not permit plaintiff to recover upon any theory of estoppel, by silence or otherwise.

In that connection, the general rule is that knowledge of an agent is imputed to his principal. The reason for the rule is to protect innocent third persons. However, there is an exception to the rule where the agent is engaged in an independent fraudulent scheme in behalf of his own interests and without the scope of the agency.

In Exchange Bank of Wilcox v. Nebraska Underwriters Ins. Co., 84 Neb. 110, 120 N. W. 1010, 133 Am. S. R. 614, this court said: "We think it may be regarded as well established that where an agent's duty to his principal is opposed to or even remotely conflicts with his own interest, or the interest of another party for whom he acts, the law will not permit him to act, nor will it hold his acts or his knowledge gained in such transaction obligatory upon his principal."

Also, as held in Koehler v. Dodge, 31 Neb. 328, 47 N. W. 913, 28 Am. S. R. 518: "A corporation is not chargeable with the knowledge nor bound by the acts of one of its officers in a matter in which he acts in behalf of his own interests, and deals with the corporation as a private individual, and in no way represents it in the transaction."

In this case, of course, neither Warden nor plaintiff bank was authorized to act in the manner in which they did, and the resulting transaction was not subsequently ratified by defendant, because it had no knowl-

edge of the material facts until long after it was completed, and upon the face of it Warden never purported to act for defendant, but only acted for himself. See 13 Am. Jur., Corporations, §§ 977, 978, p. 930.

There is another rule applicable here, which provides: "A principal is not estopped to deny the authority of his agent to perform a particular act, on the ground that it was within the agent's apparent authority, unless the authority to perform it was apparent to the person dealing with the agent, and by him relied on." First Nat. Bank v. Farmers & Merchants Bank, 56 Neb. 149, 76 N. W. 430.

As we have heretofore said, it was apparent upon the face of the transaction that Warden had no authority to borrow money from the bank in the name of the corporation for his own use and purposes, and the resolution gave the bank no authority to make such a loan. It was limited by the resolution to borrowing by Warden in the name of the corporation on behalf of the corporation.

Finally, plaintiff argued that it should recover upon the ground that 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. A mere reading of the contention in the light of what has been heretofore said discloses that it has no application in this case.

In State ex rel. Spillman v. Dunbar State Bank, 121 Neb. 528, 237 N. W. 684, it is said: "It is an old rule of law that, when one of two innocent parties must suffer, the one whose oversight or laches has made the occurrence of the event possible must suffer, rather than the one who is entirely without blame." See, also, 31 C. J. S., Estoppel, § 103, p. 325; 21 C. J., Estoppel, § 176, p. 1170; Apostoloff v. Levy, 174 N. Y. S. 828.

Generally the rule that as between two innocent

parties the loss should fall upon the one who made the loss possible protects only those who exercise ordinary care and caution in performance of duty. Hill Syrup Co. v. National City Bank, 129 Wash. 171, 224 P. 578.

In this case, plaintiff was put on notice by the transaction in the light of the resolution limiting its authority, which required inquiry before acting. It is not in the position of an innocent party, entitled to charge the loss against defendant. As stated in Ernst v. Searle, 218 Cal. 233, 22 P. 2d 715: "Here the injury never would have occurred had appellant properly performed the duty imposed upon it by law to investigate the authority of the agent with whom it was dealing."

The findings and judgment of the trial court substantially conformed with the foregoing facts, rules, and conclusions, and for the reasons heretofore stated, the judgment should be and hereby is affirmed.

AFFIRMED.

BLUE J FEEDS, INCORPORATED, A CORPORATION, APPELLANT, V. SCOTTSBLUFF NATIONAL BANK, A CORPORATION, APPELLEE.
54 N. W. 2d 404

Filed July 11, 1952. No. 33185.

Corporations: Banks and Banking. A resolution of the board of directors of a corporation that is specific, express, and explicit to show the intention of the corporate officers to authorize a bank to honor all checks drawn by one of its officers, or to him, or upon which he directed the use or disposition of the proceeds, without further inquiry or regard to the authority of said officer, absolves the bank from any responsibility for the payment of corporate checks or the use of the proceeds thereof.

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

Young, Williams & Holm, and *James H. Anderson*, for appellant.

Davis, Stubbs & Healey, and *Richard D. Wilson,* for appellee.

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

MESSMORE, J.

This is an action at law brought by Blue J Feeds, Incorporated, a corporation organized under the laws of Nebraska with its principal place of business at Gering, hereafter referred to as corporation, against Scottsbluff National Bank, a corporation organized under the laws of the United States with its principal place of business at Scottsbluff, hereafter referred to as bank, to recover from the bank on two causes of action the amount of corporate funds on deposit which Frank R. Warden, vice president and managing officer of the corporation, is alleged to have transferred without authority and unlawfully to the bank in payment of two personal notes to the bank, the payments being made on two separate occasions.

The pleadings, so far as necessary to a determination of this appeal, are, in substance, as follows:

The amended petition of the corporation alleges that Frank R. Warden was vice president of the corporation and Douglas R. Lovell, son-in-law of Warden, was an employee of the corporation; and that the corporation maintained at all times here involved a checking account with the bank in which it had deposited funds in excess of $5,020.83. It further alleges that on November 12, 1948, Warden and Lovell wrongfully and without authority withdrew and diverted from the funds so deposited $5,020.83 which Warden turned over to the bank in payment of his personal debt to the bank, which debt was represented by a personal note; that the bank knew the funds were the property of the corporation and that the note represented the personal debt of Warden; that the bank participated in and benefited by Warden's unlawful diversion of corporate funds; that the diversion

and payment was made by means of a check made November 12, 1948, drawn on the corporation's checking account in the bank, signed by Lovell, in the amount of $20,083.33, payable to the order of the bank; and that the bank received the check, caused it to be paid out of corporate funds, and retained the proceeds thereof, applying $5,020.83 to the payment of the personal debt of Warden. It further alleges that the bank made no inquiry as to the authority of Warden or Lovell to use such funds for such purpose; that if inquiry had been made it would have learned that neither had such authority; that the bank was negligent in not making inquiry; that such transactions constituted a wrongful and unlawful diversion of funds of the corporation; and that demand was made and refused and no part thereof was paid.

The allegations of the second cause of action are substantially the same as the first, except it involves a note dated March 1, 1949, in the sum of $5,063.19, upon which payment was made May 31, 1949, and alleges that by the diversion and payment by means of a corporate check for $15,189.57 signed by Warden, $5,063.19 of said amount was applied in payment of Warden's personal debt to the bank. The corporation prays judgment on the two causes of action in the amount of $10,084.02, interest, and costs.

The amended answer of the bank to both causes of action pleaded in the amended petition denies generally any liability on its part to the corporation on the two transactions pleaded therein; alleges that the corporation succeeded the partnership of Jirdon and Warden; that Warden was the vice president and managing officer of the corporation and was authorized by resolution prepared and adopted by the directors of the corporation, delivered by it to the bank, and filed by the bank, to handle transactions in the name of the corporation; and that the two transactions here involved

were handled in accordance with the authority granted by the resolution.

The amended reply of the corporation to the amended answer of the bank is in fact a general denial that the resolution mentioned in the amended answer authorized Warden, the managing officer of the corporation, to handle the two transactions here involved as pleaded in the amended answer.

Jury was waived and trial had to the court. The trial court rendered judgment for the bank with respect to both causes of action. Motion for new trial filed by the corporation was overruled and the corporation appeals.

The record discloses that John R. Jirdon has lived at Morrill, Nebraska, since 1915, and at the time the transactions involved in this action took place he was the owner of nine separate corporations. Prior to 1935, Frank Warden was a feed salesman. Jirdon's grain and elevator company was one of his customers. In June 1936, Warden and Jirdon started into the feed business together under the name of John R. Jirdon Twin Cities Division. They acquired a feed mill and elevator at Gering. Jirdon put up the capital, and Warden was given the right to acquire an interest in the partnership from the earnings of the business. He acquired such an interest until the partnership was on an equal basis to each partner in 1945. Warden was the sole manager of the partnership business, and Jirdon was concerned with, and consulted on, the policy of the business. Prior to 1945, the business of the partnership was handled through the Live Stock National Bank of Omaha, of which Jirdon was a director. In the fall of 1945, the partnership started a checking account with the Scottsbluff National Bank. Warden had a personal account and established a line of credit with the bank. Jirdon continued to reside at Morrill and Warden lived at Gering. Warden was authorized to write checks for and on behalf of the partnership. The record discloses many

occasions, too numerous to set out, where Warden wrote checks on the partnership account, deposited the proceeds of the checks to his personal account, and paid personal obligations in the form of notes to the bank which he was owing at the particular time. There is no question but that Warden was trusted explicitly by Jirdon, and vested with the sole management of the partnership business so far as the partnership and the bank were concerned.

The corporation was formed and organized on January 2, 1947, with 800 shares of capital stock issued, par value of $100 per share. Two hundred and forty shares were issued to Warden, and two blocks of 80 shares each to his immediate family. Jirdon received the balance of the shares and made a division of some of them to his immediate family. Roy Hildebrandt received 10 shares. The officers of the corporation were John R. Jirdon, president, Frank Warden, vice president, and Roy Hildebrandt, secretary and treasurer. It appears that Hildebrandt was secretary and treasurer of numerous corporations of which Jirdon was the head officer, especially so where the books of such corporations were kept at Morrill.

The corporation carried on its business in the same manner as the partnership. Warden was the sole managing officer of the business and the only person, except for bookkeepers and clerks, who had business with the bank or any dealings with the bank with reference to corporation affairs.

When the corporation was formed it deposited with the bank $50,000 from outside sources, transferred $40,000 from the partnership account, and made arrangement with the bank for a line of credit. It appears that the corporation was a substantial one, beginning business with paid-up capital of $80,000, and surplus and undivided profits of $64,651.55, according to the financial statement given to the bank at the opening of its business on February 1, 1947. The corporation grew until the

financial statement of January 1950 showed a capital of $80,000, and surplus and undivided profits of $148,654.50. It thus appears that the corporation was at all times solvent.

On January 15, 1947, the corporation delivered to the bank its corporate resolution which was on a form of the Live Stock National Bank of Omaha. It also appears that the same form of resolution was furnished to the Gering National Bank and to the Casper National Bank of Casper, Wyoming. The material parts of this resolution are as follows: "Be It Further Resolved, that the Vice-President F. R. Warden, Director Louis W. La Salle, Bookkeeper Jareld H. Mills of this Corporation (are) (is) authorized to SIGN ANY AND ALL CHECKS, DRAFTS, AND ORDERS, including orders or directions in informal or letter form, against any funds at any time standing to the credit of this Corporation with the said Bank, and/or against any account of this Corporation with the said Bank, and that the said Bank hereby is authorized to honor any and all checks, drafts and orders so signed, including those drawn to the individual order of any such officer and/or other person signing the same, without further inquiry or regard to the authority of said officer(s) and/or other person(s) or the use of said checks, drafts and orders, or the proceeds thereof.

"Be it Further Resolved, that the PRESIDENT AND/OR VICE PRESIDENT, single or jointly of this Corporation (are) (is) authorized to borrow from time to time on behalf of this Corporation from the said Bank such sums of money for such time and upon such terms as may to them, or any of them, seem advisable, and to execute in the name of the Corporation notes, drafts, or agreements for the re-payment of any sums so borrowed, * * *."

The first paragraph above set forth of the resolution is involved in the instant case, while the second paragraph falls under the transaction involved in the case

of Scottsbluff Nat. Bank v. Blue J Feeds, Inc., *ante* p. 65, 54 N. W. 2d 392.

A signature card was filed with the bank authorizing Warden and two other employees of the corporation as above indicated to sign corporate checks.

The transactions involved in the instant case are but a small part of the financial dealings had by Warden involving the partnership and the bank over a period from the fall of 1945 until the corporation was formed on January 2, 1947, and then involving the corporation until Warden's death in June 1950. We have heretofore made reference to the partnership transactions had with the bank and Warden's authority in respect thereto. Several transactions had by the corporation with the bank appear in the record and the parties are in accord with reference to most of them. They have been examined and it would serve no useful purpose to set them out in this opinion. It is apparent from the record that by authorization of the other corporate officers Warden was granted and exercised practically unlimited authority in dealing with the bank in corporate affairs in the manner provided by that part of the resolution here involved.

The transactions involved in the instant case may be summarized as follows: The record shows that on October 13, 1948, the corporation borrowed $15,000 from the bank on a corporate note, the proceeds of which were deposited to the corporate account. On the same day Warden borrowed from the bank on his personal note the sum of $5,000, and paid the same with corporate check No. 3015 on November 12, 1948, the check being in the amount of $20,083.33, of which $15,062.50 was applied to the payment of the corporate note then owed by the corporation, and the balance was applied, at Warden's direction, to the payment of his $5,000 note with accrued interest of $20.83.

On December 2, 1948, Warden borrowed from the bank on his personal note the sum of $5,000, which he

renewed on March 1, 1949, and paid the same with corporate check No. 3424 on May 31, 1949. This check was in the amount of $15,189.57, of which $10,126.38 was applied to the payment of a corporate note then owed by the corporation and the balance was applied, at Warden's direction, to the payment of his $5,000 note with accrued interest of $63.19.

On November 12, 1948, Warden caused himself to be charged upon his personal drawing account at Gering with an expenditure of $5,000 by check No. 3015, and on June 1, 1949, with an expenditure of $5,063.19, by check No. 3424.

On January 2, 1950, at an annual meeting of the directors of the corporation, Warden informed Jirdon and Hildebrandt that he had been using corporate funds to pay personal indebtedness. From the records of the corporation he was indebted to it in the amount of $20,528.48. In fact, an examination of the corporate books would have indicated defalcations far in excess of this amount. A settlement was negotiated with Warden by the terms of which he delivered to the corporation a promissory note in the amount of $17,000, dated January 2, 1950, due in one year, with interest at 5 percent per annum, secured by 240 shares of capital stock of the corporation of a value at that time of approximately $48,000. The exact amount is not determinable because the defalcations were not known. He was to pay in cash to the corporation $3,528.48 within a reasonable time. At the same time Jirdon was negotiating the sale of the corporation. No objections were made to the withdrawals of corporate money by Warden. The other directors of the corporation knew he was using corporate funds to pay his personal indebtedness but felt the corporation was adequately secured by the settlement. Thereafter Warden handled the corporate funds in the same manner as previously, without objections on the part of Jirdon and Hildebrandt who did not question his authority to so handle the corporate funds, and only questioned the

same after his death in the latter part of June 1950.

Reports summarizing each day's business were prepared by Warden and submitted by him to Jirdon and Hildebrandt at Morrill. Monthly balance sheets were likewise prepared by him for each place of business of the corporation, and were made separately. These reports were examined to some extent. Hildebrandt consolidated the annual balance sheets from the Gering and Casper offices, and prepared income tax returns and supplied the bank with financial statements discerned by the balance sheets. This is apparently the only kind of examination made of the corporate books. There was no examination made by Jirdon and Hildebrandt of the full and complete records of transactions indicating the banking business of the corporation which were either called for by Warden or sent in the name of the corporation each calendar month. The statements requested an examination of such accounts.

There is nothing in the record to indicate Warden's salary as a corporate officer. He apparently had an unlimited drawing account. Nor does the record disclose the accounting method used by the corporation with reference to the division of corporate profits. It does show numerous and extensive withdrawals from separate funds both by cash and check for personal use, in addition to various credits to Warden, indicating payments by him to the corporation. Such payments at times were sufficient to create a credit balance in his favor.

The principal amount and interest of Warden's share of both of the checks involved in this case were charged to him on the corporation books at Gering simultaneously with the writing of the checks. These amounts show as a debt of Warden to the corporation on January 13, 1950. These two $5,000 items upon which this suit is based were a part of Warden's indebtedness to the corporation.

The corporation assigns as error that the findings of

fact by the trial court and the trial court's conclusions of law therefrom are contrary to the evidence, not sustained by sufficient evidence, and contrary to law.

In Employers' Liability Assurance Corp. v. Hudson River Trust Co., 250 App. Div. 159, 294 N. Y. S. 698, three types of cases with reference to constructive notice and inquiry to be made affecting checks, withdrawals, and deposits in banks were distinguished. The one involved in this case relates to the dealings of a bank with the officers or agents of private corporations. In this connection several cases are cited. In the case of an officer or agent of a private corporation dealing with its funds the authority of such officer or agent is not known to all but depends upon the authority conferred upon him by the corporation which he represents. In such class of cases a bank knowingly receiving corporate funds for deposit in the individual account of such officer or agent is held to be under the duty of making inquiry to ascertain the extent of his authority in the transaction.

In the instant case the bank complied with the rule set forth in the above-cited case. It ascertained Warden's authority to transact corporate affairs with it through the resolution prepared and adopted by the corporate officers and furnished to the bank, wherein the authority was set out. We deem this sufficient compliance. From an analysis of the resolution it is clear that the specific, express, and explicit intention of the corporate officers was to authorize the bank to honor all checks drawn by Warden, or to him, or upon which Warden directed the use or disposition of the proceeds without further inquiry or regard to the authority of said affairs. It specifically authorizes the bank "to honor any and all checks * * * so signed, * * * without further inquiry or regard to * * * the use of said checks, * * * or the proceeds thereof." We construe the resolution to mean that the bank was not at the time nor under the circumstances shown by the evidence under any duty to inquire or investigate further the authority of Warden

to direct the disposition of checks Nos. 3015 and 3424 heretofore set out. Such checks were drawn upon the account of the corporation, charged thereto, and reflected in the canceled checks and statements delivered to the corporation at the end of each calendar month.

From our research we are unable to find cases, wherein under a factual situation similar to the case at bar involving the extensive authority granted a corporate officer as appears in the language of the resolution here considered, that are in disagreement with the analysis we have placed upon the resolution.

It is apparent after the decision in Kuhns v. Live Stock Nat. Bank, 137 Neb. 459, 289 N. W. 893, that the Live Stock National Bank corrected the language of the resolution which this court held was not broad enough to protect the bank in the Kuhns case. Therefore, after the decision in such case the resolution was amended to make it broad enough to protect the bank in the event a similar situation would arise again. This is the amended resolution that we have in the instant case, which is on a Live Stock National Bank form, possibly obtained by Jirdon who was a director of the Live Stock National Bank, to be utilized for the purpose of the corporation in the instant case in its dealings with this bank or banks wherein it had deposits. We hold that part of the resolution pertinent to this case absolves the bank from any liability for the payment of the corporate checks involved herein, or the proceeds thereof, under the express, specific authority granted to the bank as evidenced by the resolution.

In view of our conclusion, we deem it unnecessary to set forth or analyze other assignments of error.

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

AFFIRMED.

ALCIE MCCOY, WIDOW OF LLOYD A. MCCOY, DECEASED, APPELLANT, V. GOOCH MILLING AND ELEVATOR CO., APPELLEE.
54 N. W. 2d 373

Filed July 11, 1952. No. 33208.

1. **Workmen's Compensation: Appeal and Error.** On any appeal to this court in a workmen's compensation case the cause will be here considered de novo upon the record.
2. **Workmen's Compensation.** The burden of proof is upon the claimant in a compensation case to establish by a preponderance of the evidence that personal injury was sustained by the employee by an accident arising out of and in the course of his employment.
3. ———. An employee, sustaining an accidental injury arising out of and in the course of his employment, will not be denied compensation for failure to give notice of claim within six months or to commence his action within one year from the date of the accident, when it appears from the evidence that the injury was latent and did not result in compensable disability until after the expiration of the time for giving notice of claim and commencing action, provided notice is given and action commenced within the statutory period after the employee has knowledge that the accident has caused a compensable disability.
4. ———. The word "latent" is defined as the time within which a disease is supposed to be in existence without manifesting itself, that is, during which time it lies dormant.
5. ———. Where the statute has become a bar to a claim for compensation during the lifetime of the injured employee, it is also a bar to a claim by his dependents after his death.
6. ———. When an employee meets with an accident which accelerates or aggravates an existing impairment to a state of disability, such disability not being the result of a natural progression of the impairment, there may be an award of compensation therefor.

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

Mockett, Davies, Pace & Perkins, for appellant.

Davis, Stubbs & Healey, and *Richard D. Wilson,* for appellee.

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

WENKE, J.

This is a workmen's compensation case. Alcie McCoy, widow of Lloyd A. McCoy, deceased, filed her petition in the Nebraska Workmen's Compensation Court seeking compensation benefits which she claims are due from the Gooch Milling and Elevator Co. under the workmen's compensation law because of the death of her husband on April 22, 1950. She bases her claim on the contention that decedent died as a result of an operation made necessary because of injuries he suffered in an accident that occurred on April 5, 1950, while he was employed by the Gooch Milling and Elevator Co., which accident she claims occurred in the course of and arose out of his employment. Hearing was had to the member of the workmen's compensation court assigned thereto. He entered an award in claimant's favor. Within the time fixed by statute the company filed its waiver of rehearing before the workmen's compensation court and appealed directly to the district court for Lancaster County. Trial was had in the district court and on January 25, 1952, the court rendered a decree in favor of the company, vacated and set aside the award of the judge of the workmen's compensation court, and dismissed the action. Her motion for new trial having been overruled, claimant appealed.

Appellant's first contention is that the court erred in overruling her motion to dismiss the appeal. This motion was made on October 4, 1951, at the beginning of the trial. It was based on the fact that trial had not been had within 30 days after the docketing of the appeal from the award of the judge of the workmen's compensation court. The appeal was filed in the district court on October 2, 1950.

Section 48-179, R. S. Supp., 1951, relating to rehearings before the workmen's compensation court sitting en banc, provides in part: "* * * within thirty days thereafter (the workmen's compensation court) shall proceed to hear said cause de novo." (Insertion ours.)

Section 48-181, R. S. Supp., 1951, provides, when rehearing is waived and appeal taken directly to the district court, as follows: "Such appeal to the district court shall be taken and perfected in the same manner as provided for appeals to the compensation court. In such cases the trial in the district court shall be a trial de novo."

It is apparently appellant's thought that the foregoing quote from section 48-181, R. S. Supp., 1951, makes the 30-day provision in section 48-179, R. S. Supp., 1951, applicable to district courts. While section 48-181, R. S. Supp., 1951, does provide that "Such appeal to the district court shall be taken and perfected in the same manner as provided for appeals to the compensation court," however, this language would not include the 30-day provision as to trial in the workmen's compensation court as provided in section 48-179, R. S. Supp., 1951, as the trial, after the appeal is perfected, is no part of the appeal itself. The only language applicable to trial in the district courts is the following from section 48-181, R. S. Supp., 1951: "In such cases the trial in the district court shall be a trial de novo." There is no time requirement in this language nor do we find any relating to trials in the district courts when a rehearing before the full workmen's compensation court is waived and an appeal taken direct from the award of a judge of the workmen's compensation court thereto.

The Workmen's Compensation Act, as appellant contends, was undoubtedly intended by the Legislature to bring about an expeditious settlement of claims between injured employees and their employers. This is self-evident from the numerous provisions in the act fixing the time within which certain procedural acts must be performed. But what is true of claims arising under the Workmen's Compensation Act is likewise true of other litigation. All litigation should be disposed of by the courts as expeditiously as circumstances will permit and to accomplish this purpose counsel for the parties

involved owe a duty to prepare and submit their cases at the earliest possible date.

After the appeal was perfected to the district court, and the case was for trial de novo, the burden then rested on the appellant to establish her claim in that court. The petition on appeal was filed on October 2, 1950. Appellant filed her answer thereto on October 16, 1950. Appellee filed a reply on October 20, 1950. No further pleadings were filed until October 4, 1951, when appellant filed a reply to appellee's reply. However, on August 30, 1951, appellant filed a "Request for Admissions" to which appellee responded on September 8, 1951. Trial was commenced on October 4, 1951. We find nothing in the record to indicate that a request for trial was made and denied or that appellee in any manner endeavored to delay it. Under these circumstances we find no error in the court's overruling appellant's motion to dismiss.

Factually the appellant contends her claim that the disability which the operation was designed to remove was compensable can be sustained on either of two theories. First, that decedent was suffering from a recurrent bilateral hernia, compensable in origin, which culminated in disability within one year of the commencement of this action on July 10, 1950, or second, that the fall of April 5, 1950, aggravated a nondisabling recurrent bilateral hernia to the extent that it became disabling.

Whether or not the operation of April 21, 1950, for the purpose of correcting the condition above referred to was necessary and, if so, a proximate cause of decedent's death on April 22, 1950, we need not consider unless appellant is correct in one or the other of her contentions that the disability which the operation sought to correct was compensable.

"On any appeal to this court in a workmen's compensation case the cause will be here considered de novo upon the record." Beam v. Goodyear Tire and Rubber

Co., 152 Neb. 663, 42 N. W. 2d 293. See, also, Peek v. Ayres Auto Supply, 155 Neb. 233, 51 N. W. 2d 387.

"The burden of proof is upon the claimant in a compensation case to establish by a preponderance of the evidence that personal injury was sustained by the employee by an accident arising out of and in the course of his employment." Beam v. Goodyear Tire and Rubber Co., *supra.*

As to the first of these contentions the record shows the decedent began his employment with Gooch Milling and Elevator Co., hereinafter referred to as the company, in 1925 and was in its employ at all times up until his death on April 22, 1950; that on November 23, 1938, while lifting 140-pound bags of flour into a feeder, he accidently injured himself; that as a result of this accident he developed a bilateral inguinal hernia which resulted in his being disabled as of December 3, 1938; that on December 5, 1938, he was operated on to correct this condition; that the results of the operation were satisfactory and decedent was discharged from the hospital on December 19, 1938; that he returned to work on January 14, 1939; that during this period of disability decedent was paid compensation by the company's compensation insurance carrier for total temporary disability and also for his medical and hospital expenses; that no lump sum settlement of the company's liability resulting from this condition was ever made and entered into by the parties and approved by a court; that about a month after returning to work the condition recurred; that decedent was able to control his condition by means of a truss which he thereafter wore; and that further surgery to correct this condition was not had until April 21, 1950.

"An employee, sustaining an accidental injury arising out of and in the course of his employment, will not be denied compensation for failure to give notice of claim within six months or to commence his action within one year from the date of the accident, when it appears

from the evidence that the injury was latent and did not result in compensable disability until after the expiration of the time for giving notice of claim and commencing action, provided notice is given and action commenced within the statutory period after the employee has knowledge that the accident has caused a compensable disability." Travelers Insurance Co. v. Ohler, 119 Neb. 121, 227 N. W. 449.

"* * * failure to give the employer notice of a claim for compensation within the statutory period of six months is not necessarily a defense, if the accidental injury is latent and progressive and cannot with reasonable certainty be recognized at first as compensable, where notice is given within six months from the time the employee acquires knowledge of a compensable disability as a result of the accident." Flesch v. Phillips Petroleum Co., 124 Neb. 1, 244 N. W. 925. See, also, § 48-133, R. S. 1943.

"When an employee receives an accidental injury arising out of and in the course of the employment which activates a dormant disease, the failure to file a petition within a year is not a bar if the petition is filed within one year after the employee acquires knowledge of a compensable disability." Dryden v. Omaha Steel Works, 148 Neb. 1, 26 N. W. 2d 293. See, also, § 48-137, R. S. 1943.

"The word 'latent' is defined as the time within which a disease is supposed to be in existence without manifesting itself, that is, during which time it lies dormant." Kurtz v. Sunderland Bros. Co., 124 Neb. 776, 248 N. W. 84.

"In the event of failure to comply with the formal statutory requirements, with reference to claim for compensation as distinguished from notice of injury, recovery of compensation may be permitted only if the employee's accidental injury is latent and progressive and cannot with reasonable certainty be recognized at first as compensable, where claim for compensation is made within six months from the time the employee

acquires knowledge of a compensable disability as a result of the accident." Park v. School District, 127 Neb. 767, 257 N. W. 219.

"A 'recurring hernia' at the same spot, as the word 'recurring' signifies, is a return of a former hernia, which, though temporarily arrested by the operation, * * * a successful result did not follow a skillful operation." Crawford v. Tampa Inter-Ocean S. S. Co., Inc., (La. App.), 150 S. 875. And, as therein correctly held: "The original injury received by Crawford on May 28, 1932, is responsible for his present condition."

"Where the statute has become a bar to a claim for compensation during the lifetime of the injured employee, it is also a bar to a claim by his dependents after his death." Price v. Burlington Refrigerator Express Co., 131 Neb. 657, 269 N. W. 425.

When the hernial condition resulting from the accident of November 23, 1938, and sought to be corrected by the operation of December 5, 1938, recurred in February 1939, about a month after he returned to work, there is no question but what decedent was fully aware of that fact. At that time, under the provisions of the workmen's compensation law, he could have had the recurrent condition corrected at the expense of his employer, both for medical and hospital expenses, and have been paid compensation for any period he was disabled because thereof. This he did not choose to do. Since this condition was not latent but known to decedent, the period of time provided by the workmen's compensation law in which he could assert his rights began to run. When that period expired his rights ceased to be enforceable. It appears that at some time subsequent thereto the recurrent hernial condition reached a stage where an operation was performed to correct it. That fact did not change the situation.

We find the time within which decedent could make claim because of the recurring hernial condition in February 1939 had expired in his lifetime and the fact that

the recurrent hernial condition worsened, making necessary corrective surgery in April 1950, did not toll the statute. Neither did it create a new right which could relate itself back to the accident of November 23, 1938, because there was nothing latent about the hernial condition when it recurred in February 1939.

As to the second of these contentions the record establishes, without dispute, the following: That on April 5, 1950, while working decedent fell backward off the top of a 4-foot stepladder; that as a result of the fall he received a comminuted type of Colles fracture of his left wrist; that he was taken to the Lincoln General Hospital where Dr. C. Fred Ferciot took care of his injury; that he returned to his home on April 6, 1950; that on April 21, 1950, he was operated on by Dr. H. B. Morton to correct a disabling recurrent bilateral inguinal hernial condition; and that he died on April 22, 1950.

The first question that must be decided, which relates to this question, is whether or not certain evidence admitted by the trial court, over objection, was admissible. On rebuttal appellant testified that on April 6, 1950, while she was bathing decedent and in response to her remark about how much larger the hernia was, "He said it was getting larger." She also testified that a day or two later, "He said he had to have this hernia taken care of before he could go back to work, because the last fall had just wrecked him."

Both parties agree this testimony would not have been admissible as part of appellant's case in chief. This we think is correct in view of our holdings in Price v. Burlington Refrigerator Express Co., *supra*; Hamilton v. Huebner, 146 Neb. 320, 19 N. W. 2d 552, 163 A. L. R. 1; and Muff v. Brainard, 150 Neb. 650, 35 N. W. 2d 597.

In its defense the company introduced numerous witnesses with whom decedent had come in contact shortly after the accident. All these witnesses testified that decedent had made no statement or complaint to them that his hernial condition had in any way been affected

by his fall on April 5, 1950. This evidence was all negative in character. It is on the theory that she has the right to rebut this testimony that appellant contends the evidence is properly admissible. The company, on the other hand, contends that while the adverse party is entitled to prove the remainder of a conversation, where part of a conversation is put in evidence, it is limited to statements made at the same time and place, in other words, to that which is part of the same conversation but which may modify or explain the part admitted.

But here the question does not relate to conversations admitted but to testimony as to what he did not say. That is negative testimony relating to the question involved. Under this situation we think the court properly admitted the evidence.

"When an employee meets with an accident which accelerates or aggravates an existing impairment to a state of disability, such disability not being the result of a natural progression of the impairment, there may be an award of compensation therefor." Earhart v. Cyclone Fence Co., 99 Ind. App. 48, 190 N. E. 558.

The evidence discloses that on April 5, 1950, decedent's tour of duty was from 4 p. m. to midnight; that shortly after 6 p. m. of that day he was working on the sixth floor of the company's place of business in Lincoln, Nebraska; that he was then engaged in turning up grease cups on flour sifters; that to get to the grease cups, some of which were located near the top of the flour sifters, decedent used a 4-foot stepladder with a platform fastened on the top; and that while standing on this platform performing this work he fell backwards onto the floor.

Oscar Backman, who was running the flour mill at that time, was working on the sixth floor and heard decedent fall but did not actually see the accident. He immediately went to the place of the accident. There he found decedent on his feet holding his left wrist,

which decedent told him he thought he had broken in the fall. Decedent's only complaint was in regard to his wrist. He was able to walk in a normal manner and without assistance, walking some 30 feet to the elevator which they took to the first floor. There they met Harold Payne, another company employee. Decedent stayed with Payne until Lloyd E. Graham, the plant superintendent, arrived. Decedent told Payne he had broken his wrist but complained of nothing else. He walked without assistance. Soon Lloyd E. Graham, the company's plant superintendent, arrived. He had been called by Backman. Graham took decedent, upon the latter's request, to the Lincoln General Hospital. Decedent walked to Graham's car and got in. When he got to the hospital he got out of the car and walked into the hospital. His only complaint to Graham was about his wrist. His walk was normal at all times.

At the hospital Dr. C. Fred Ferciot, whom decedent asked to have take care of him, treated the injury which proved to be a comminuted type of Colles fracture of the left wrist. He made no complaint to Dr. Ferciot of anything except his wrist. After decedent was released from the hospital on April 6, 1950, he reported to Dr. Ferciot at his office on April 7, 8, 10, 14, and 18, 1950. On these occasions he mentioned that he had a hernia but never mentioned that he thought it had been affected by the fall. In fact, on the last call, he mentioned to Dr. Ferciot that he was planning to have the hernial condition taken care of while he was disabled because of his wrist.

After decedent was released from the hospital on April 6, 1950, he went home in a taxi arriving there about 2 p. m. That evening, because of the condition of his arm, appellant bathed him. She remarked how much larger his hernia was and she testified he replied, "* * * it was getting larger."

About a week after the accident decedent called Graham and asked him to stop at his house on his way

home. This Graham did. Decedent then suggested to Graham that he thought it would be a good idea to have his hernial condition, which was getting worse, taken care of while he was disabled with his broken wrist and wondered if the medical plan of the company would take care of it. Graham told decedent he did not know but would talk to H. B. Lilly, the company's president, about it as Lilly was in charge thereof.

Lilly testified that some ten days or two weeks after the accident decedent called him on the phone and told him he had had a hernial condition for some time, and since he would be off work for some time because of his broken wrist he thought it would be a good idea to have it repaired. He asked if the company's medical plan would cover the doctor's bill for the operation. Lilly advised decedent that it would and, in fact, it was paid by the company out of the funds held in trust for that purpose.

On April 17, 1950, decedent consulted Dr. H. B. Morton in regard to his hernial condition. Dr. Morton testified he found decedent suffering with a disabling recurrent bilateral direct inguinal hernia, the left one being the largest and about three inches in diameter. The operation of April 21, 1950, was for the repair of these hernias. He also testified that decedent complained of the fact that he could not hold the left hernia with his truss and consequently was uncomfortable with it, and that he was anxious to have it repaired. Dr. Morton further testified that decedent did not at any time indicate to him he thought there was any connection between the then condition of his hernias and the accident of April 5, 1950, but did tell him that he was off work because of his broken wrist and that while off work he would like to have his hernial condition repaired.

In his personal history of decedent, made on April 20, 1950, when he entered the Bryan Memorial Hospital for the operation of April 21, 1950, Dr. Morton stated under "Present Illness" as follows: "The hernia on the

left came back several months ago and is gradually getting larger."

Without going into further detail this resume of the evidence gives a sufficiently comprehensive view of the facts as they relate to decedent and his hernial condition from the time of the accident up until his operation on April 21, 1950. It will be noted that to no one with whom he came in contact after the accident, except appellant, did he indicate that he associated the then condition of his hernias with the accident which he suffered on April 5, 1950. This is particularly significant as to Dr. Morton whom he consulted in regard to having them repaired.

We realize appellant testified to the contrary, as is evidenced in part by her testimony hereinbefore quoted, and that Dr. Morton, based on a hypothetical question, gave as his opinion that by reason of the fall decedent's hernial condition changed from a nondisabling one to one that was disabling. However, Dr. Morton also testified: "* * * I found no evidence which would lead me to say whether this had developed suddenly or gradually." Also, "That (trauma) is an unusual causitive factor, for a hernia to develop on aggravation, * * *." And further, "Q. Therefore a secondary, but it would be a basis of your findings, was also the fact this recurrent bilateral hernia was the direct result of this falling off a ladder, rather than any gradual enlargement of the original hernia. You have no way of measuring that, except it could happen that way, or could happen from a gradual atrophy of the system, or of the muscles? A. I think the answer to that last question would have to be yes; that either process could. Q. And his working at his trade, with an incipient hernia, or a hernia the size of a golf ball, over a period of years, and at his age, could result in an enlargement of the opening there, and a weakening of the wall. It could be that, or could be by reason of a fall, or by reason of a traumatic impalement on a sharp board, or something of that sort

or other? A. My opinion on that would be, yes."

We come to the conclusion that the evidence establishes decedent had a hernial condition that was gradually getting worse; that the fall suffered in the accident on April 5, 1950, in no way affected that condition; that because the company had a medical plan which would cover the medical expenses of an operation decedent decided to have this condition relieved by an operation while he was off duty as the result of the broken wrist which he suffered from his fall on April 5, 1950; and that unfortunately the operation resulted in death. Under these circumstances we find no causal connection between the accident and the hernial condition which necessitated the operation.

In view of the foregoing it is not necessary to discuss the question of whether or not the operation was a proximate cause of the death. Even if it was so determined that would not help appellant in view of our finding that there was no causal connection between the accident and the hernial condition making the operation necessary.

Since our decision is the same as that of the trial court we affirm its decision.

AFFIRMED.

CHARLES E. LEDWITH ET AL., APPELLANTS, V. BANKERS LIFE INSURANCE COMPANY OF NEBRASKA, A CORPORATION, ET AL., APPELLEES.

54 N. W. 2d 409

Filed July 18, 1952. No. 33133.

1. Statutes. If a statute is unambiguous courts will not by interpretation or construction usurp the function of the lawmaking body and give it a meaning not intended or expressed by the Legislature.
2. ———. A statute is not available for construction as a matter of course. If it is unambiguous there is no room for construc-

tion and courts may not search for its meaning beyond the statute itself.

3. ———. In the consideration and application of a statute effect should be given, if possible, to all its several parts and nothing should be avoided. The subject of the enactment and the language thereof in its plain, ordinary, and popular sense should be considered to determine the legislative will.

4. ———. It is the duty of the court, so far as practicable, to give effect to the entire language of a statute and to reconcile the different provisions of it so that they are consistent, harmonious, and sensible.

5. **Retirement Benefits.** The benefits of a retirement plan are contingent deferred compensation, presently earned, but payable in the future to employees upon condition that they possess the qualifications required by the plan and that they comply with the conditions and regulations imposed on receipt by them of the retirement benefits.

6. **Statutes.** A particular intention expressed in an amendment of a statute, in conflict to some extent with a general intention of the statute, will be given effect only to the extent of the conflict, leaving the statute as it was before the amendment to operate outside the scope of the amendment.

7. ———. The intention of the Legislature may be expressed by omission as well as by inclusion.

8. ———. The maxim, expressio unius est exclusio alterius, means that where a statute enumerates the things upon which it is to operate, or forbids certain things, it is to be construed as excluding from its effect all those not expressly mentioned, unless the Legislature has plainly indicated a contrary purpose or intention.

9. ———. It is not the province of the court to read into a statute something omitted from it by the Legislature or to discover a meaning not warranted by the legislative language.

10. ———. The omission of a word from an amendment of a statute must be assumed to have been intentional and for a purpose. Courts in giving effect to the amendment may not supply the omission.

11. **Insurance: Retirement Benefits.** Officers of a domestic insurance company are not employees within the meaning of section 44-213, R. S. Supp., 1951, authorizing the company to establish and administer a retirement plan for the benefit of employees.

12. **Statutes.** The Legislature is presumed to have had in mind all previous legislation upon the subject so that in the construction of a statute or a part thereof courts may consider the pre-

existing law and any other act relating to the same subject or of a similar nature to the statute under consideration although not precisely in pari materia.

13. ———. Courts will when necessary to effectuate the intention of the Legislature substitute the disjunctive "or" for the conjunctive "and."

14. **Retirement Benefits.** The Legislature did not make the validity of a retirement plan established by a domestic insurance company for its employees depend upon contributions by the employees to the cost of the plan, neither did it prohibit such contributions.

15. **Pensions.** It is in the concept of a pension, when a reward for service, that the service be rendered before the pension be granted and the reward must be free from any character as the discharge of an existing legal or contractual liability.

16. **Retirement Benefits.** Credit for past services and similar expressions in the field of retirement systems mean no more than a standard or formula by which to measure the amount of benefits that satisfy the desired objective.

17. **Corporations: Equity.** Within the limits of their authority directors possess full discretionary powers, and in the honest and reasonable exercise of them, are not subject to control by courts at the instance of stockholders or policyholders. The wisdom or expediency of business policies and methods of executing them are left to the discretion and decision of the board of directors. In the absence of usurpation, fraud, gross negligence, or transgression of statutory limitations courts of equity will not intervene at the suit of dissatisfied policyholders merely to overrule and control the discretion of directors on questions of corporate management, policy, or business.

APPEAL from the district court for Lancaster County: JOHN L. POLK, JUDGE. *Reversed and remanded with directions.*

Charles Ledwith and *Max Kier,* for appellants.

Woods, Aitken & Aitken, Robert W. Devoe, and *James N. Ackerman, for appellees.*

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

BOSLAUGH, J.

Appellants, policyholders of the Bankers Life Insurance

Company of Nebraska, brought this suit in equity against appellees to obtain an adjudication that the retirement plan adopted by the insurance company for the benefit of its salaried employees, including its officers, was illegal and invalid; that the amount set aside from the free surplus of the company on account of the retirement plan was illegally appropriated therefrom; that appellees be required to restore the amount thereof to the surplus of the company; and for relief incidental thereto.

When appellees are mentioned herein, otherwise than as a group, the Bankers Life Insurance Company of Nebraska will be identified as the company, and the individual appellees by those words.

The basis of the relief sought by appellants was in substance the following:

(1) That the retirement plan of salaried employees of the company violates the law of the state in the respects that (a) the statute (§ 44-213, R. S. Supp., 1951) does not permit the inclusion of officers under a retirement plan for employees; (b) the statute prohibits the payment of the whole cost of the plan by the company and requires cash contributions thereto by the beneficiaries of the plan; and (c) the formula of the plan for the measurement of retirement benefits includes consideration of past services and this violates the law of the state prohibiting pensions.

(2) That the individual appellees and the other officers and directors of the company engaged in a plan and conspiracy to defraud policyholders by establishing and financing the retirement plan for salaried employees of the company; that they were in control as stockholders, officers, and directors; that the individual appellees were trustees for the policyholders under the trust agreement controlling the mutualization of the company; that the stockholders, officers, and directors made themselves chief beneficiaries of the retirement plan, arranged to continue indefinitely in control of the company, and placed for their benefit a charge or lien on the policy-

holders; and that they have thus been guilty of fraud, breach of trust, and self-dealing with the surplus of the company for their personal advantage and to the prejudice of the policyholders.

The claims of appellants were each denied by appellees.

The district court found generally against appellants and rendered and entered a judgment of dismissal.

The company was organized in the year 1887 as a capital stock legal reserve life insurance company. Its status was unchanged until December 31, 1949. A provision of the insurance law of Nebraska since 1913 has been that: "No domestic company shall pay any salary, compensation or emolument to any officer, trustee or director thereof, in excess of a reasonable compensation for the services performed by such person, and in no case amounting in any one year to more than five thousand dollars to any person, firm, or corporation unless a greater sum shall be first authorized by a vote of two thirds of the board of directors of such company, if a stock company * * * and if a mutual assessment company * * * by a vote of two thirds of those present in person or by proxy, of the policyholders * * *. No such company shall make an agreement with any of its officers or employees, except soliciting agents, whereby it agrees that for any services rendered, or to be rendered, they shall receive any salary or compensation that will extend beyond a period of five years from the date of such agreement, nor shall it pay any pension whatsoever." § 44-213, R. S. 1943. The Legislature of 1945, by an amendment, inserted a comma after the word "whatsoever" and added this language, "but any such company may establish, participate in, and administer a retirement plan or plans for the benefit of its employees and agents, or any reasonable classification thereof, if such plan has been filed with and approved by the Department of Insurance." § 44-213, R. S. Supp., 1951. This act became effective on August 10, 1945. The company gave consideration to a retirement plan and made a re-

quest that its chief counsel and actuary prepare such a plan in the fall of that year. Investigation and study of the subject were made and continued until a plan was proposed and submitted to the Department of Insurance during January 1946. Additional consideration of the matter was given until September 5, 1946, when the company made formal application for approval of its final draft of a retirement plan for its salaried employees. The plan the company had proposed was approved by its board of directors on September 25, 1946, and by the Department of Insurance on November 7, 1946. It became effective on December 31, 1946. The provisions thereof are numerous. A summary of some of them will be sufficient for a consideration of the matters to be decided in this case. These are:

The word "employees" means all permanent active full-time salaried home office employees, including officers, building employees, employees in investment branch offices, and cashiers of agency branch offices who have been designated as such by the company, but does not include employees who are paid part salary and part commission.

The words "retirement date" mean the last day of the calendar month in which the sixty-fifth birthday falls, in case of a male employee, and in which the sixtieth birthday falls in case of a female employee.

The words "retirement annuity" mean a monthly income payable by the company upon the retirement of an employee or after the retirement date and continuously thereafter so long as the employee shall live, and shall be due on the last day of each calendar month. The first payment shall be due one month after the retirement date.

The general scope of the plan includes a retirement annuity based on the value of the employee's services to the company measured by the salary he has received from it. All employees with the company, as hereinbefore defined, are eligible for the plan and shall retain

membership therein only so long as they continue as employees of the company or thereafter so long as they are in receipt of retirement annuities or disability retirement allowances. For all employees reaching retirement age after December 31, 1950, the monthly annuity payments shall be equal to one-twelfth of two percent of each salary payment made by the company to the employee prior to the employee's sixty-fifth birthday in the case of male employees and prior to the sixtieth birthday in case of female employees, less the amount to which the employee is entitled for the same month under the primary insurance benefit of the Federal Social Security Act (as described in section 202(a) of the Federal Social Security Act, 1939 Amendment, Title 42, section 402(a), U. S. C. A.). For employees retiring on or before January 1, 1951, monthly annuity shall be the greater of the amount produced by the formula above or one-twelfth of two percent of the average annual salary paid by the company to the employee in the ten years immediately preceding December 31, 1945, or the employee's retirement date, whichever is the later date, multiplied by the number of years of service prior to such date up to but not exceeding 35 years, less the same deduction for social security benefits. (The last provision was only applicable to six of the senior officers of the company who had passed the maximum retirement age before the plan was made effective.) The plan contemplates that the cost of the provisions will be borne entirely by the company but it reserves the right to modify this provision in the future in its discretion. The company reserves the right to change or discontinue the plan at any time subject to the approval of the Director of Insurance, but no change or discontinuance shall adversely affect the benefits under the plan established prior to the date of change or discontinuance.

It is argued by appellants that the word "employees" as used in the statute (§ 44-213, R. S. Supp., 1951) may not be interpreted to include officers; that an employee

is one who is employed by another and who works for wages in the service of an employer; that he is distinguished from an official or an officer; that an officer is one who holds or is lawfully vested with an office as for instance an officer of an insurance company; and that the Legislature recognized this and distinguished an officer from others doing service for an insurance company in the first part of the statute by mentioning "officer, trustee or director" and clearly made a distinction between an employee and officer of such a company in a later provision by the language therein "No such company shall make an agreement with any of its officers or employees * * *." The 1945 amendment of the statute permits a retirement plan to be established and administered for the benefit of its "employees and agents * * *." It is concluded by appellants that if the Legislature had intended that officers might be included in any retirement plan authorized by the statute it would have used clear and appropriate language to express that intention and permission as it did in the provisions of the original statute, and that the amendment does not apply to or include officers of the company and its retirement plan is invalid at least as to all provisions thereof for the benefit of its officers.

The position of appellees in this respect is in substance that the word "employees" as used in the statute has no fixed meaning that controls in all situations; that the Legislature could not have selected a word of broader connotation and inclusion; that whether one who works or performs services for another is an employee is not determined by the rank or importance of the position he holds or the character of the service rendered; that the flexibility of the term "employees" is of special significance because of the rule that statutory provisions for pensions or retirement systems must be liberally construed so that their beneficial purposes may be broadened rather than narrowed; that the use of the word "employee" in legislation in this state has been

for many years construed to include officers by administrative departments charged with its enforcement or application within the knowledge of the Legislature and its acquiescence constitutes legislative approval; that the terms of the amendment evidence a purpose of the lawmakers to authorize a broad and liberal coverage of the retirement plans authorized; and that it was the intent of the amendment that officers were included in the term "employees." However appellees do not consider or discuss the character of the statute as to whether it is clear and unambiguous in meaning or ambiguous and of doubtful meaning.

If the statute (§ 44-213, R. S. Supp., 1951) is not ambiguous, construction of the provisions thereof applicable to and controlling the coverage of a retirement plan authorized thereby is not permissible or required and resort may not be had in this regard to any of the many aids available in the construction of a statute of doubtful meaning to ascertain the intention of the Legislature. In Armstrong v. Board of Supervisors, 153 Neb. 858, 46 N. W. 2d 602, it is said: "If the language of a statute is clear and unambiguous, courts will not by interpretation or construction usurp the function of the lawmaking body and give it a meaning not intended or expressed by the Legislature." See, also, Federal Farm Mortgage Corp. v. Adams, 142 Neb. 202, 5 N. W. 2d 384; 50 Am. Jur., Statutes, § 225, p. 204. A statute is not to be considered as appropriate for construction as a matter of course. It is only ambiguous statutes of uncertain meaning to which the rules of construction have application. In Cross v. Theobald, 135 Neb. 199, 280 N. W. 841, this court said: " 'Where the language of a statute is plain and unambiguous and its meaning clear and unmistakable, there is no room for construction, and the courts are not permitted to search for its meaning beyond the statute itself.' "

The obligation of the court in the consideration and application of a statute is to determine and give effect

to the purpose and intention of the Legislature as ascertained from the entire language thereof considered in its plain, ordinary, and popular sense. It is the duty of the court to give effect to the whole and each part of the statute if not in conflict with the legislative intent and to reconcile the different provisions of it, if possible, so as to make them logical, harmonious, and sensible. In Hansen v. Dakota County, 135 Neb. 582, 283 N. W. 217, it is said: "It is a fundamental rule of statutory construction that effect must be given, if possible, to all its several parts. No sentence, clause or word should be rejected as meaningless or superfluous, if it can be avoided; but the subject of the enactment and the language employed, in its plain, ordinary and popular sense, should be taken into account, in order to determine the legislative will. It is the duty of the court to discover, if possible, the legislative intent from the statute itself. It must be borne in mind that, in the legislative field, the legislature is supreme so long as it keeps within constitutional limits * * *." In In re Application of Rozgall, 147 Neb. 260, 23 N. W. 2d 85, the rule is stated: "Provided always that the interpretation of a statute is reasonable and not in conflict with legislative intent, it is a cardinal rule of construction of statutes that effect must be given, if possible, to the whole statute and every part thereof and it is the duty of the court, so far as practicable, to reconcile the different provisions so as to make them consistent, harmonious, and sensible. Just as an interpretation which gives effect to the statute will be chosen instead of one which defeats it, so an interpretation which gives effect to the entire language will be selected as against one which does not." See, also, In re Application of Silberman, 153 Neb. 338, 44 N. W. 2d 595; State ex rel. Hubbard v. Northwall, 150 Neb. 894, 36 N. W. 2d 282.

The statute from 1913 until the amendment of it in 1945 prohibited any agreement of more than five years duration between a domestic insurance company and any of

its officers and employees, except soliciting agents, for salary or compensation for services rendered or to be rendered. The amendment of 1945 was obviously intended to affect and remove to some extent this prohibition. It authorized any company of this character to establish and administer a retirement plan or plans for the benefit of its "employees and agents." The amendment significantly omitted the word "officers." The Legislature indicated no purpose or intention to alter or dispense with the bar of the statute as it existed before the amendment as to officers of any such company. The specific provisions decisive of this contention are: "No such company shall make an agreement with any of its officers or employees, except soliciting agents, whereby it agrees that, for any services rendered or to be rendered, they shall receive any salary or compensation that will extend beyond a period of five years from the date of such agreement * * * but any such company may establish, participate in, and administer a retirement plan or plans for the benefit of its employees and agents, or any reasonable classification thereof, if such plan has been filed with and approved by the Department of Insurance." § 44-213, R. S. Supp., 1951.

The retirement plan of the company and the benefits thereunder are a form of contingent deferred compensation for personal services of the employees and an integral part of the wage and salary structure of the company. The benefits provided by the plan constitute "salary, compensation or emolument" as these terms are used in the statute. This is conceded by appellees. These characteristics of a retirement plan have been recognized and established by judicial decisions. Inland Steel Co. v. National Labor Relations Board, 170 F. 2d 247, 12 A. L. R. 2d 240, adopted and approved the ruling of the defendant board that: "'* * * the term "wages" as used in Section 9 (a) must be construed to include emoluments of value, like pension and insurance benefits * * *. Realistically viewed, this type of wage en-

hancement or increase, no less than any other, becomes an integral part of the entire wage structure * * *.'" In Retirement Board v. McGovern, 316 Pa. 161, 174 A. 400, the court said: "This act provides for retirement pay. Retirement pay is defined as 'adjusted compensation' presently earned, which * * * is payable in the future * * *. The compensation is earned in the present, payable in the future to an employee, provided he possesses the qualifications required by the act, and complies with the terms, conditions, and regulations imposed on the receipt of retirement pay." In Opinion of the Justices, 88 N. H. 511, 192 A. 494, it is said: "Viewing the bill in this aspect, we see no attributes of a pension in the payments it proposes. They are to be for teaching to be furnished, and not for past teaching for which the agreed compensation has been fully paid. While past teaching may be a required qualification for one to benefit from the retirement payments proposed by the bill, its terms include no allowance of payment therefor." In McBride v. Allegheny County Retirement Board, 330 Pa. 402, 199 A. 130, the Pennsylvania court said: "Retirement pay is a part of the compensation for services rendered during active employment." In Kieran v. Hunter College Retirement Board, 255 App. Div. 378, 7 N. Y. S. 2d 612, the New York court said: "A retirement pension is in the nature of pay withheld to induce continued faithful service. It amounts to compensation for services previously rendered." In Bausewine v. Philadelphia Police Pension Fund Assn., 337 Pa. 267, 10 A. 2d 446, the court said: "* * * there can be no doubt that the fund is a retirement fund and the payments retirement pay; as such they represent in part adjusted compensation."

The company could not legally have contracted to pay retirement benefits to its employees before the statute was amended in 1945. A valid retirement plan of the company by virtue of the amendment of the statute must be within the authority granted by the terms

thereof. A particular intention expressed in an amendment of a statute in conflict to some extent with a general intention expressed in the statute will be given effect only to the extent of the conflict, leaving the statute as it was before its amendment to operate outside of the scope of the amendment. State ex rel. Missouri P. Ry. Co. v. Clarke, 98 Neb. 566, 153 N. W. 623; Lee v. Lincoln Cleaning & Dye Works, 144 Neb. 659, 14 N. W. 2d 227; Mancuso v. State, 123 Neb. 204, 242 N. W. 430; 50 Am. Jur., Statutes, § 367, p. 371. Stated differently the general provision of the statute under consideration, that all agreements by an insurance company with its officers or employees for a term of more than five years for salary or compensation for services are prohibited, is controlled and modified by the special provision of the amendment authorizing the company to have a retirement plan for its employees, but only to the extent of the authority granted by the amendment and the general provisions of the statute continue to operate outside of or beyond the scope of the amendment. In considering the amendment made to the statute it is important to bear in mind that the Legislature was not attempting to impose a prohibition upon insurance companies, but was engaged in modifying or removing a part of an existing one. If it intended what appellees contend, it would more appropriately have repealed the entire prohibition.

The statute provides in substance that no insurance company shall make an agreement, to extend beyond five years from its date, with any of its officers or employees for compensation or salary for services, except the company may have a retirement plan for the benefit of its employees. The fact that the lawmakers used the terms "officers or employees" in the first part of the sentence and omitted the word "officers" in the latter part of the sentence when it was considering and dealing with the general subject of compensation or salary points strongly and convincingly to the conclusion that it was

the intention of the Legislature to authorize retirement plans for employees and agents but not for officers; and that the prohibition in the first part of the sentence should continue as to officers but that it was removed as to benefits of retirement plans for employees. The intent of the Legislature is expressed by omission as well as by inclusion. In re Estate of McKee, 71 N. D. 545, 3 N. W. 2d 797. This doctrine has been recognized and applied by this court. In School District of Omaha v. Adams, 151 Neb. 741, 39 N. W. 2d 550, it is stated: "The maxim, expressio unius est exclusio alterius, which is operative in the law as an aid in the determination of legislative intent with reference to statutory grants of power, means that where a statute enumerates the things upon which it is to operate, or forbids certain things, it is to be construed as excluding from its effect all those not expressly mentioned, unless the Legislature has plainly indicated a contrary purpose or intention." The court may not read into a statute something omitted from it by the Legislature. Neither is it the duty nor within the province of the court to discover a meaning not warranted by the legislative language. Wessel v. City of Lincoln, 145 Neb. 357, 16 N. W. 2d 476; Hansen v. Dakota County, *supra;* Luther v. State, 83 Neb. 455, 120 N. W. 125, 20 L. R. A. N. S. 1146; State ex rel. Thayer v. School District, 99 Neb. 338, 156 N. W. 641.

The effect of the language used prohibiting an insurance company from assuming by contract an obligation for salary or compensation to officers or employees thereof for services for a period longer than five years was to classify persons performing services regularly for it (1) as officers, (2) as employees, and (3) as soliciting agents. The company was barred from contracting with any of the first two classes, officers or employees, for pay for their services for a longer period than five years. A contract for compensation of the third class for an indefinite period was permitted. The prohibition as to

employees was abrogated to the extent of retirement benefits for them but the prohibition was continued without change as to officers. The change in the phraseology of an amendatory statute raises a presumption that a departure from the old law was intended. The Legislature is presumed to know language used in a statute and if a subsequent act on the same or similar subject uses different terms in the same connection the court must presume that a change in the law was intended. Likewise the omission of a word in an amendment of a statute will be assumed to be intentional and for a purpose. Where it is apparent that a substantive portion of a statute has been omitted from an amendment thereof courts have no authority to supply the omission. That would be judicial legislation. A statute should be effectuated as its language warrants. Ex Parte Hoese, 48 S. D. 337, 204 N. W. 174; Voorhies v. Faust, 220 Mich. 155, 189 N. W. 1006, 27 A. L. R. 706; Plummer v. Davis, 169 Okl. 374, 36 P. 2d 938; Pirie v. Chicago Title & Trust Co., 182 U. S. 438, 45 L. Ed. 1171, 21 S. Ct. 906; Wyman, Partridge & Co. v. Tierney, 42 Wyo. 321, 294 P. 781, 75 A. L. R. 667; Hall v. Baylous, 109 W. Va. 1, 153 S. E. 293, 69 A. L. R. 527; Wine v. Commonwealth, 301 Mass. 451, 17 N. E. 2d 545, 120 A. L. R. 889; 50 Am. Jur., Statutes, §§ 275, 276, pp. 261, 263.

Section 44-213, R. S. Supp., 1951, is in this regard clear and free from doubt. Officers of a domestic insurance company are not employees within the meaning of the statute authorizing the company to establish and administer a retirement plan for the benefit of its employees. The retirement plan of the company, to the extent it attempts to include officers in its coverage, is unauthorized and invalid.

Appellants contend that a retirement plan authorized by the legislation of 1945 for an insurance company requires participation of the employees by contribution to the cost of it; and that the Legislature intended to differentiate between a pension and a retirement system

and the distinction it made is in the requirement of a contribution by the employees to the fund from which costs of operation and benefits are satisfied. This, they say, the plan of the company fails to do. They insist the words "participate in" as used in the act mean to have or enjoy a part or share in common with others, and that the company and its employees may "participate in" a retirement plan but the company may not assume and satisfy the total cost of the plan and its operation.

In construing a statute of doubtful meaning courts may consider all statutes on the same subject. Placek v. Edstrom, 148 Neb. 79, 26 N. W. 2d 489, 174 A. L. R. 856. Prior to 1945 Nebraska had adopted legislation in reference to retirement systems in the field of public service as follows: (1) Firemen in metropolitan cities, primary cities, and cities of the first class, except those with home rule charters, as early as 1895 (Laws 1895, c. 39, p. 168); (2) teachers' retirement systems in metropolitan cities in 1909 (Laws 1909, c. 132, p. 477); (3) public library employees in metropolitan cities in 1913 (Laws 1913, c. 152, p. 389); (4) policemen in metropolitan cities in 1921 (Laws 1921, c. 116, art. V, § 10, p. 499); (5) municipal university employees in cities of the metropolitan class in 1943 (Laws 1943, c. 24, p. 116); and (6) firemen in cities of the primary or first class which had adopted home rule charters in 1943 (Laws 1943, c. 92, p. 313). In 1945 there was agitation for legislation on the subject in the general municipal field, in the entire field of teachers, and for grant of authority to insurance companies to permit them to have retirement plans. The existing statutory systems, referred to as "retirement funds," "relief and pension funds," "pensions," and "retirement plans," had varying characteristics but they also had important common features. One of the statutory plans mentioned above was noncontributory, four of them were contributory, and one was optional as to whether contribution should

or should not be required to be made by the beneficiaries of the plan.

These systems are of two distinct types: (1) A statutory plan complete within itself without discretion granted any administering agent or authority—the plans for firemen in 1895, teachers in 1909, and policemen in 1921, fall within this first class of legislation; and (2) a statutory grant of authority to a governmental agency to adopt a retirement plan within the framework of the grant—the plan for employees of municipal universities is of the second class of legislation. The Legislature of 1945 enacted the first class of legislation for a Nebraska municipal retirement system of employees of cities (except Omaha), villages, and rural electric power districts in L. B. 217 (Laws 1945, c. 37, p. 173), and for a retirement system for school employees in L. B. 120 (Laws 1945, c. 219, p. 637), and the second class of legislation for domestic insurance companies in L. B. 86 (Laws 1945, c. 106, p. 340). L. B. 217 and L. B. 120 provide absolute and fixed requirements for the employee and employer in the municipal employees and school employees systems as to benefits, retirements, contributions, and other conditions. The city, village, power districts, and the schools which chose to enter the system found a plan which was final and complete without discretion in any respect in any authority administering it.

L. B. 86, the product of the same Legislature, constituted what may properly be called an enabling statute authorizing domestic insurance companies to formulate retirement plans for their employees and agents. It is proper and helpful to consider the two types of legislation for retirement plans enacted by the 1945 session of the Legislature in deciding the legislative purpose and intent, and the proper meaning of a part of the act involved in this contention. The title of L. B. 86 contains the language: "* * * to provide that a domestic insurance company may establish and admini-

ster a retirement plan for the benefit of its employees and agents * * *." The grant of authority in the act itself contains the words: "* * * but any such company may establish, participate in, and administer a retirement plan or plans for the benefit of its employees and agents * * *." Laws 1945, c. 106, p. 340. The words "participate in" could not have been considered important because they are entirely omitted from the title to the act. There is no requirement in the title or the body of the act requiring employees to contribute anything on account of any retirement plan authorized. It contains no standard by which any amount of contribution from the employees could be measured. There are no boundaries, neither minimum nor maximum, for this purpose. It cannot be assumed that this was an oversight. The members of the Legislature were then well aware of the essentials of retirement plans, the matter of contributory or noncontributory plans, the mechanics and formulas for measuring such matters, as well as provisions for benefits, and other related conditions. They informed themselves and developed legislation in L. B. 217 consisting of many printed pages of the Session Laws in which they set forth and adopted a detailed, carefully worked out, and comprehensive retirement plan for Nebraska municipalities. Laws 1945, c. 37, p. 173. They expressly provided therein an exact basis and formula for contribution by the employees. But the same Legislature did not choose to include a similar provision or any requirement for contribution by employees with regard to retirement plans for the insurance industry, nor did they bar a contributory plan. They recognized the need for flexibility in this field. They elected to and did place the responsibility for the legislative approval of a particular plan on the Department of Insurance.

If a statute is susceptible of more than one interpretation, the language used must be construed in its plain, ordinary, and popular sense. If there is one con-

struction which results in an absurdity and another avoids such a result, the latter may be accepted. In re Guardianship of Kraft, 150 Neb. 171, 33 N. W. 2d 534; State ex rel. Hubbard v. Northwall, *supra*. The position of appellants, that the company may not pay the cost of the plan but that the employees must satisfy some portion thereof or the enabling statute is violated and the plan is invalidated, is based upon the argument that the definition of "participate in" is limited to the meaning of "sharing." This is obviously only one of several meanings of "participate." A commonly accepted usage and meaning is "to take part in" in the sense of entering into. 31 Words and Phrases, p. 132. It may mean affirmative action as distinguished from silence or inaction. Head v. New York Life Ins. Co., 43 F. 2d 517. This is a more natural, plain, and ordinary meaning of the word as it is used in the applicable statute than the one selected and advanced by appellants.

The argument is also made that because of the presence of the conjunction "and" the three verbs "establish, participate in, and administer" impose three separate and mandatory prerequisites to a valid retirement plan. This assumption is over optimistic. The laxity in the use of the conjunctive "and" and the disjunctive "or" is so frequent that the doctrine has been accepted that they are interchangeable and that one may be substituted for the other if to do so is necessary to give effect to any part of a statute or to effectuate the intention of the Legislature. State ex rel. City of Grand Island v. Union P. R. R. Co., 152 Neb. 772, 42 N. W. 2d 867; Carlsen v. State, 127 Neb. 11, 254 N. W. 744. The presence of the words "participate in" does not authorize the many and elaborate implications imperative to sustain this contention of appellants. The alternative sense of the verb phrase is evident without regard to the presence of the conjunction. The statute does not require contribution by employees to the cost of retirement plans authorized by it.

Appellants assert that the benefits of the retirement plan of the company are pensions prohibited by statute and that through the formula for the measurement of the benefits retroactive effect is given to the amendment of 1945. § 44-213, R. S. Supp., 1951. A pension is a gratuity where it is granted for services previously rendered and which, at the time they were rendered, were fully paid for and gave rise to no legal obligation for further compensation. City of Lincoln v. Steffensmeyer, 134 Neb. 613, 279 N. W. 272, 119 A. L. R. 914; State ex rel. Haberlan v. Love, 89 Neb. 149, 131 N. W. 196, 34 L. R. A. N. S. 607, Ann. Cas. 1912C 542; Kern v. City of Long Beach, 29 Cal. 2d 848, 179 P. 2d 799; Manning v. Spry, 121 Iowa 191, 96 N. W. 873; People v. Westchester County Nat. Bank, 231 N. Y. 465, 132 N. E. 241, 15 A. L. R. 1344; 40 Am. Jur., Pensions, § 1, p. 960. The retirement plan involved herein does not provide for a gratuity. The benefits thereof are not a pension, the plan in this respect is not prohibited by the statute, and does not give a retroactive effect to the statute which permits the company to have the plan. It does not provide for benefit payments to any persons other than those employed by the company at the time or subsequent to the time it became effective. There is no management discretion in the allotment or measurement of benefits. The plan is a part of the basic salary structure of the company. The benefits are a form of contingent deferred compensation and the plan is uniform in its application to all covered employees. It did not become operative for more than a year after the effective date of the legislation authorizing it. Inland Steel Co. v. National Labor Relations Board, *supra;* Opinion of the Justices, *supra;* Retirement Board v. McGovern, *supra;* Bausewine v. Philadelphia Police Pension Fund Assn., *supra;* Kern v. City of Long Beach, *supra;* Mattson v. Flynn, 216 Minn. 354, 13 N. W. 2d 11; State ex rel. Sena v. Trujillo, 46 N. M. 361, 129 P. 2d 329, 142 A. L. R. 932.

Retirement plans for employees for various reasons have become and are accepted as part of the national economic and wage structure. The 1945 Legislature recognized this, was well aware of the statutory prohibition against pensions in the form of gratuities or gifts, provided for retirement plans for the insurance industry as it had previously, and during that session provided retirement plans of various kinds for employees in different departments of the government of the state. The retirement plan of the company does not differ in principle from these statutory plans in its application to employees on its payroll on the date it was effective nor in the objective in measuring benefits. The benefits of the plan of the company may not be characterized or condemned as pensions within the prohibition of the statute.

In any retirement plan a formula for computation of benefits to those who are ultimately to retire is obviously an essential element. The grant of power to insurance companies to have retirement systems contains no formula for this purpose. The plan involved might have used a percentage of the final salary of the employee. No one would contend that such a basis would produce retroactive operation of the amendment of 1945. The date of the retirement would be after the date of the law, after the effective date of the retirement plan, and after the final salary constituting the measuring basis. There is no different principle or result when the benefits are measured by some other method of computation. The right to retirement benefits, which is the gist of the matter, is determined in either case at a date after the passage of the law. To calculate the benefits by using a formula with arithmetical computations, including salary earned in past years, or including past years of service, is no more giving the act retroactive effect than to predicate the benefit on final salary. Appellants confuse the yardstick with the substantive right of the employee. The right arises by

virtue of employment on the date of the plan plus continued employment for some period of time thereafter. It is permissible for the formula to include consideration of final rate of pay, average rate of pay of past months, past years, total pay, or years of prior service, or any one of many methods of computation. There is no benefit paid for past service, as such, in the plan involved in this case. The basic factor is that the employee must be employed by the company and must have reached the required age at the date he qualifies for retirement benefits. The amount of the benefits is computed on a formula selected to produce the ultimate objective of the plan. "Credit for past services" and like expressions in the field of retirement systems mean no more than a standard by which to measure the amount of benefits that meet the desired objective.

The various statutory plans in this state allow full credit for past service antedating the plan. More than one-half of them provide that the benefits shall be equal to one-half or 50 percent of salary at time of retirement. The allowance of full credit for past service, when the benefits are measured by a percentage of final salary, is implicit in the computation or formula. In State ex rel. Haberlan v. Love, *supra,* this court said: "* * * the relator continued in the service nine years after the law was enacted, and thereby earned a right to his pension under that act * * *. The fact that some firemen earned their pensions by serving a comparatively short time subsequent to 1895, whereas others were compelled to continue in the service for a greater length of time, does not make the legislation void." Likewise in Retirement Board v. McGovern, *supra,* a retirement act was challenged as not being based on adequate present service after the effective date of the act. The court of that state said: "* * * there is no legislative prohibition against the amount of the salary that shall be paid to such employee, or when it shall be paid, or the amount of adjusted compensation then to be provided for and

paid in the future. This compensation may depend on a long or short service after the effective date of the Retirement Act * * *. * * * as it was viewed by other courts in determining the constitutionality of like systems * * * such delayed compensation may be considered as an inducement for the experienced employee and others to remain in the employ of the government." It is also said in Haldeman v. Hillegass, 335 Pa. 375, 6 A. 2d 801: "His right to recovery is unaffected by the non-existence of a retirement system for the many years of his service prior to 1938 * * *." See, also, Matter of Wright v. Craig, 202 App. Div. 684, 195 N. Y. S. 391; State ex rel. Dudgeon v. Levitan, 181 Wis. 326, 193 N. W. 499. The retirement plan of the company is not a prohibited pension, and the formula adopted for determining benefits under it does not result in payments for past services nor does it give retroactive effect to the amendment of 1945.

The basic authority for fixing salaries of employees of stock insurance companies was at the time important to this case granted to, and vested in, the board of directors of the company. § 44-212, R. S. 1943. The articles of incorporation of the company empowered and directed the board to fix salaries and wages in harmony with the statutory provisions. The company was a stock insurance company when the retirement plan was adopted by its board of directors on September 25, 1946.

The retirement plan is a part of the wage and salary structure of the company, and the expenditure it requires is a part of the cost of doing business in the form of contingent deferred compensation for personal services of the employees. The contingent benefits clearly constitute "salary, compensation or emolument" within the statute. § 44-213, R. S. Supp., 1951. The members of the board of directors, three of whom are the individual appellees, were required by the statute, the charter, and the bylaws of the company to formulate and vote for a retirement plan, if it was in the judgment

of the board advisable and in the best interests of the company. The evidence without dispute establishes that the company required a retirement system to meet competition, and to build up and maintain a desirable group of employees for the promotion, conservation, and growth of the business. The record contains ample evidence that the managers of the business were qualified, responsive to the obligations of their trust, and were conducting the company and its business in the best interests of the policyholders. In Royal Highlanders v. Wiseman, 140 Neb. 28, 299 N. W. 459, this court said: "Within the limits of their authority directors possess full discretionary powers, and in the honest and reasonable exercise of such powers are not subject to control by stockholders or by courts at the instance of stockholders. The accepted principle is that the wisdom and expediency of business policies and the methods of executing them are left to the discretion and decision of the board of directors. The established rule is that, in the absence of usurpation, or fraud, or of gross negligence, or transgression of statutory limitations, courts of equity will not interfere at the suit of dissatisfied stockholders merely to overrule and control the discretion of directors on questions of corporate management, policy or business." The reason of this doctrine makes it applicable to and controlling of the challenge made by policyholders of an insurance company instead of stockholders of a corporation. The adoption of the retirement plan by the board of directors of the company and the ratification of it by the policyholders at the annual meeting were compliance with the most exacting requirements of valid and effective corporate action.

The rights of the stockholders of the company in reference to each other and the stock of the company were fixed from the time of the adoption of the plan in January 1941 to transform the company to a mutual insurance company. The validity of the plan and all documents incident thereto was finally adjudged on

July 19, 1941, about five years before there was any thought of a retirement plan for the employees of the company. The duty of the trustees to the stockholders was to observe the precise terms of the trust agreement for handling and paying the purchase price of the stock. The right of the company concerning the stockholders and the stock was plainly and completely fixed. There was no permission for discretion of the trustees in this regard. The company by the terms of the plan and judgment of the court was to and did continue in all respects a stock company until the mutualization was completed on December 31, 1949. The power, function, and responsibility of the board of directors existed until that date. The adoption of a retirement plan before that date for the company, subject to approval of the Department of Insurance, was a matter for determination by and within the discretionary power of the individual appellees and the other directors. If they acted in good faith and for the best interests of the company and policyholders, the duties and responsibilities of the individual appellees as trustees under the mutualization plan for the stockholders did not add to or change their duties or responsibilities to the policyholders with respect to this matter of management decision. In the absence of fraud, unfairness, or transgression of statutory limitations courts of equity will not interfere with, overrule, or control the directors on questions of corporate management, policy, or business upon complaint of stockholders or policyholders. The retirement plan is advantageous to the employees who qualify for its benefits, and experience shows it was not detrimental to the company or the policyholders. Since the year in which it was adopted the increase in the insurance business written by the company has been $60,000,000, the increase in the annual income $1,100,000, and the increase in the assets $9,200,000. It is not unreasonable to believe that the existence of the retirement plan contributed to this very desirable and profitable apprecia-

tion in the business assets and income of the company.

The judgment should be and is reversed with directions to the district court of Lancaster County to render a judgment in this case as follows: That the retirement plan of the Bankers Life Insurance Company of Nebraska involved herein is, and has been at all times, unauthorized and invalid in the respect and to the extent that it provides that the officers of the company are included in the plan and its benefits; that any provision thereof intended to bring any officer of the company within the coverage or benefits of the plan is, and has been since the adoption of it, invalid and such provision is vacated and annulled; that the retirement plan for the benefit of the employees of the company is legal and effective; and that appellees be directed and required to return, restore, and pay to the company and to the proper fund or funds thereof all assets and money set aside, appropriated, or expended for, or on account of, the retirement plan including cost and expense because of the inclusion of the officers of the company in the coverage of the plan.

REVERSED AND REMANDED WITH DIRECTIONS.

WILLIAM CAIN ET AL., APPELLANTS, V. EMILY KILLIAN, APPELLEE.

54 N.W. 2d 368

Filed July 18, 1952. No. 33160.

1. **Deeds.** The fact that a deed was not recorded until after the grantor's death is not of itself sufficient to show nondelivery.
2. ———. The possession of a deed by the grantee, in the absence of opposing circumstances, is prima facie evidence of delivery, and the burden of proof is on him who disputes this presumption.
3. ———. While not conclusive, this presumption controls until overcome by clear and satisfactory proof.
4. **Evidence.** An admission should possess the same degree of certainty as would be required in the evidence which it repre-

sents, and hence mere conjectures or suggestions as to what might have happened if certain circumstances had occurred are not competent.

5. **Depositions: Evidence.** An extrajudicial admission appearing in the deposition of a party taken before trial is not ordinarily final and conclusive upon him, but it may be competent and admissible as evidence in contradiction and impeachment of his present claim and his other evidence given at the trial, to be given such weight as the trier of fact deems it entitled.
6. **Equity: Appeal and Error.** Actions in equity, on appeal to this court, are triable de novo in conformity with section 25-1925, R. R. S. 1943, subject, however, 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.

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

John F. Kerrigan, for appellants.

Haggart & Haggart, for appellee.

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

SIMMONS, C. J.

This is an action to set aside a deed; to quiet title to land as against the cloud of a deed; and to secure an accounting of rents and profits. The trial court found for defendant. Plaintiffs appeal. We affirm the judgment of the trial court.

Plaintiffs are brothers, a sister, and a niece of defendant. They are sons, a daughter, and a granddaughter of the grantor of the deed in question. Defendant grantee is a daughter of grantor.

Plaintiffs brought this action against defendant alleging undue influence, lack of consideration, lack of execution, and other defects in the deed. Plaintiffs took defendant's deposition. As a result of testimony thus secured, they amended their petition to allege lack of

delivery of the deed. That is the substantial issue presented here.

Some of the facts are either not in dispute or so established as to require only a statement of them. The grantor, hereinafter called the father, was at least prior to the deed in question the owner of several hundred acres of land in Howard County. The land was heavily encumbered. It had two houses on it. In 1938, the father, a widower, lived alone in one house. A married son, one of the plaintiffs, lived in the other house and was tenant on the land. The father was elderly and in poor health. Defendant, a widow with minor children, came to live with and care for her father in 1938. Thereafter until his death, she lived with and cared for him. In May 1944, defendant bought a home in St. Paul, and the defendant and the father moved into that home and resided there until his death.

On October 2, 1945, the father went to a lawyer in St. Paul and had him prepare a warranty deed conveying the land to the defendant. It was signed, witnessed, acknowledged, and taken from the lawyer's office by the father. He gave the deed to defendant at that time and she had it at all times thereafter. The father died July 28, 1950. Defendant recorded the deed August 3, 1950.

The deed contains the customary covenants of warranty, provides that it is subject to encumbrances of record, which the grantee assumes and agrees to pay, and "Grantor reserves the use of said premises during his natural lifetime."

The fact question presented here arises out of such evidence as the following: Plaintiffs at the trial called defendant as their witness and inquired into the statements in her deposition as admissions against interest. She testified that the land was hers the "minute he gave me the deed" although she testified in the deposition that she didn't claim or have title to the land until his death. She testified that the farm would "definitely"

be hers after her father's death. She testified at the trial that had the father changed his mind about the deed and had decided to sell the property or let the property go by will that he could have had the deed back, but that there was no agreement to that effect.

In the deposition, defendant was asked, "I suppose if your father had changed his mind about the deed and had decided to let the property go by the will he could have had the deed back if he wanted it, is that right?" Defendant answered, "That's right. The stipulation in the deed was that he could sell it if he wanted." And again defendant was asked, "That was part of the deal at the time he gave you the deed?" The answer was, "That's right." And again, "He said it was in the deed that if he decided to sell the ranch and go to Arizona, why he could," and that she agreed to that.

If as plaintiffs contend this evidence shows that there was a reservation of the father at the time of the giving of the deed that he could later dispose of the land if he wished, it also shows that, although mistaken, he thought the reservation was in the deed, and that it was there to protect the reserved right after title passed by the delivery of the deed.

There are two other matters of evidence that require mention.

There is evidence that in 1949, about threshing time, defendant asked one of the plaintiffs to go with her to the ranch; that "She thought the tenant out there was beating her out of the grain"; that the man who takes care of land bank matters told her "to go out there and watch when they threshed"; and defendant said to the witness, "it was just as much your interest as mine." The last statement out of context might relate to denial of full ownership in the defendant. But it was said when the father was living with reference to crops which under the deed, defendant did not claim. Obviously, it has no bearing on the issue here.

There is also evidence that the father sold one of

the houses on the land for $700 after "we moved to St. Paul." The moving to St. Paul was in May of 1944. The father executed the deed October 2, 1945, a year and four months thereafter. This evidence is of no controlling importance here.

There is no contention in the evidence or here that the father ever undertook to exercise the alleged reserved right either by seeking to recover the deed, to sell the land, or to have the title pass by will. He allowed the deed to remain in defendant's possession.

The fact that the deed was not recorded until after the grantor's death is not of itself sufficient to show nondelivery. Kellner v. Whaley, 148 Neb. 259, 27 N. W. 2d 183.

Defendant has the benefit of the following rules: The possession of a deed by the grantee, in the absence of opposing circumstances, is prima facie evidence of delivery, and the burden of proof is on him who disputes this presumption. While not conclusive, this presumption controls until overcome by clear and satisfactory proof. Kellner v. Whaley, *supra;* Cerveny v. Cerveny, 154 Neb. 1, 46 N. W. 2d 632.

Plaintiffs offer evidence to overcome this presumption which are in the form of admissions and subject in part to the infirmity pointed out in Kellner v. Whaley, *supra,* wherein we held: "An admission should possess the same degree of certainty as would be required in the evidence which it represents, and hence mere conjectures or suggestions as to what might have happened if certain circumstances had occurred, are not competent."

These admissions are also subject to the rule that: "An extrajudicial admission appearing in the deposition of a party taken before trial is not ordinarily final and conclusive upon him, but it may be competent and admissible as evidence in contradiction and impeachment of his present claim and his other evidence given at the trial, to be given such weight as the trier of fact

deems it entitled." Kipf v. Bitner, 150 Neb. 155, 33 N. W. 2d 518.

There is a direct conflict in the evidence both as to what was said and what was meant. The credibility of the defendant is involved. The trial court heard the evidence of the defendant and resolved those questions in defendant's favor. That conclusion must be considered under the rule that: "Actions in equity, on appeal to this court, are triable de novo in conformity with section 25-1925, R. S. 1943, subject, however, 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." Maddox v. Maddox, 151 Neb. 626, 38 N. W. 2d 547.

Under these rules we conclude the plaintiffs have not met their burden of proof.

Plaintiffs here assign as error the admission of a part of the evidence given by the attorney, who drafted the deed. In reaching our conclusion we have not considered the challenged evidence.

The judgment of the trial court is affirmed.

AFFIRMED.

WENKE, J., participating on briefs.

CARTER, J., dissenting.

The original petition filed in this case alleged that the deed in question was obtained by undue influence on the part of the defendant. The summons was served on January 2, 1951. On April 27, 1951, an amended petition was filed which alleged additionally that the deed was never delivered in the lifetime of Charles Cain with the intent to then pass the title or an interest therein. On January 9, 1951, the deposition of the defendant, Emily Killian, was taken. The plaintiffs' case rests largely, but not wholly, upon the admissions made by the defendant in this deposition.

The admissions made by defendant are substantially as follows: That she did not claim or have title to the land until her father's death; that her father always told her that until he died, or at least until he became so ill that he didn't perhaps talk sense, the farm was then to become hers; that if her father had changed his mind about the deed and decided to let the property go by the will, he could have had the deed back; and that the stipulation in the deed was that he could sell it if he wanted to and that it was part of the deal at the time he gave her the deed. She was then asked: "At any rate, whether or not it was in the deed in so many words, that was the understanding you had with your father?" Her answer was: "That's right." She testified that if her father wanted to sell the ranch he could do so and that these understandings were had at the time the deed was made out, and after that. She says that her father asked her to agree that if he decided to sell the ranch he was free to do so, and that she agreed to it. That she made the foregoing admissions against interest are not denied by her.

On her direct examination at the trial she again admitted that the farm was to be hers after the death of her father, as evidenced by the following question and answer: "Mrs. Killian, during all this time that you had this deed in your pocketbook, it was your father's intention that the farm would definitely be yours after his death, is that right? That's right."

It must be borne in mind that, at the time the deposition was taken, the only issue set forth in the pleadings was that of undue influence in the procurement of the deed by the defendant. Objections were interposed to all questions tending to bring out conversations had between the defendant and her father on the authority of section 25-1202, R. R. S. 1943. The foregoing section of the statute provides, insofar as it is applicable here, that no person, having a direct legal interest in the result of any civil action when the adverse party is the

representative of a deceased person, shall be permitted to testify to any transaction or conversation had between the deceased person and the witness unless the representative shall have introduced a witness who shall have testified to such transaction or conversation, in which case the person having the direct legal interest may be examined in regard to the facts testified to by such witness, but shall not be permitted to further testify in regard to such transaction or conversation. I submit that under the foregoing statute the defendant could properly be interrogated concerning the admissions against interest made by her, and no more. Having admitted the admissions to be true, only the presumption of a legal delivery of the deed stands against the admissions. I contend that the presumption of a legal delivery dissipates itself when opposed by the unequivocal admissions made by the defendant.

The trial court permitted this defendant in her capacity as the nominated executrix in her father's will to waive in open court the privilege of attorney and client between the attorney, who drew the will, and her father. The attorney then gave evidence as to what her father said at the time the will was prepared. This was clearly erroneous under our holding in In re Estate of Coons, 154 Neb. 690, 48 N. W. 2d 778. It is evident that the trial court relied upon this evidence to sustain the legal delivery of the deed for the simple reason that there was no other competent evidence upon which it could be sustained. In my opinion no basis exists for the application of the rule announced in the majority opinion to the effect that suits in equity will be tried de novo on appeal, and when the evidence is in irreconcilable conflict this court will consider the fact that the trial court accepted one version of the facts rather than another. This rule presupposes an irreconcilable conflict in the competent evidence before the court. As I view it there is no competent evidence to establish

the legal delivery of the deed and consequently there is no basis for the application of the rule.

The majority opinion gives credence to a statement by the defendant to the effect that the land was hers the "minute he gave me the deed." This was a conclusion of the witness, self-serving in character, and bore no relation whatever to the question whether or not the deceased intended to presently convey the title to the land on the date of the manual delivery of the deed. The majority apparently deem it important that the father made no attempt in his lifetime to exercise the reserved right to recover the deed, to sell the land, or to have the title pass by will. I fail to see how the failure to exercise a reservation can have any bearing whatever on the intent of the grantor at the time he manually delivered the deed. If he had exercised his reserved right, then probably no litigation would have ensued. If subsequent failure to exercise a reserved right is evidence of intent to convey present title by the manual delivery of a deed, our rules become ambiguous and indefinite, and the legal delivery of a deed becomes contingent upon subsequent conduct. Such is not the law. Even as a circumstance surrounding the transaction it is of little or no evidentiary value.

I submit that plaintiffs made a prima facie case in offering the admissions against interest made by the defendant which overcame the presumption of a legal delivery of the deed. There was no competent evidence in the record to sustain a legal delivery of the deed in accordance with the law of this jurisdiction as set forth in Kellner v. Whaley, 148 Neb. 259, 27 N. W. 2d 183, and Kula v. Kula, 149 Neb. 347, 31 N. W. 2d 96. It is clear to me that the change of position by the defendant shown by the majority opinion, even if it was competent to be shown, was induced by personal interest after the changes made in the amended petition made her evidence, given under oath in a deposition, fatal to the result which she desired. Defendant told a story in her

deposition which was consistent with every subsequent circumstance. She did not file the deed with the register of deeds until after her father's death. She made no claim to the property in his lifetime and concealed the existence of the deed from her brothers and sisters. She repeatedly and unequivocally stated in her deposition that the deed was subject to recall and that the land was to be hers only at her father's death. She made at least one similar admission on the trial in the district court. It is clear to me under the undisputed competent evidence that Charles Cain attempted a testamentary disposition of the land in question by deed in violation of section 30-204, R. R. S. 1943. I would reverse the judgment of the district court and enter a decree setting aside the deed.

WENKE, J., joins in this dissent.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

SEPTEMBER TERM, 1952

BEN A. GREENWOOD ET AL., APPELLEES, V. CITY OF LINCOLN, NEBRASKA, APPELLANT.
55 N. W. 2d 343

Filed October 31, 1952. No. 33175.

1. **Municipal Corporations: Torts.** A municipal corporation while acting by virtue of a grant of sovereign power is not liable, in the absence of a statute, for the negligent or wrongful acts of its officials, servants, or agents.
2. **Municipal Corporations.** It is recognized by the law that the right of a municipal corporation to require the destruction of weeds and worthless vegetation therein is a governmental function for the benefit, comfort, and protection of the health of the public.
3. ———. A city is not liable for acts done in the wrongful performance of purely governmental functions, however improperly the authority is exercised, neither can it ratify the wrongful acts of its servants or agents done in the performance of its governmental functions so as thereby to make itself liable for their acts.

APPEAL from the district court for Lancaster County: JOHN L. POLK, JUDGE. *Reversed and remanded with directions.*

Cline, Williams, Wright & Johnson, and *C. Russell Mattson,* for appellant.

John McArthur, for appellees.

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

BOSLAUGH, J.

Appellees seek to recover damages that they claim were caused them by appellant intentionally and wrongfully destroying a large number of raspberry bushes then growing on the land of appellees located in the city of Lincoln.

The trial of the case produced a verdict and judgment for appellees. The motion of appellant to set aside the verdict returned and the judgment rendered against it and to enter a judgment for it, as the appellant had requested in a motion at the close of the evidence, or in the alternative for a new trial of the case was denied. The case is here by appeal.

The gist of the claim of appellees as made by their petition is that they were the owners of an acreage of land in the city of Lincoln on which a large number of raspberry bushes of producing age and condition were then growing; and that appellant, a city of the primary class, intentionally and wrongfully without the knowledge and in the absence of appellees destroyed the raspberry bushes and thereby caused appellees substantial damage. Appellant denied the allegations of the petition except it admitted that appellees were the owners of the real estate; that Lincoln was a city of the primary class; and that the claim of appellees filed with the city was denied. Appellant further asserted that the real estate was overgrown with various tall weeds; that complaint of the existence of the weeds was made to it; that it gave notice to appellees to cut and destroy the weeds in accordance with an ordinance of the city; that appellees cut the weeds on a small strip of the premises but otherwise disregarded the notice and demand of the city; that it thereafter, by its servants and agents, cut the weeds in the time and manner provided by the ordinance; and that the acts of the city with reference to the property of appellees were in performance of a governmental function of the city of Lincoln for which activity there was no liability of the city to respond in

damages for any injury or loss thereby occasioned appellees.

The record discloses that at the time important to this case the charter of appellant authorized it to provide for and to require the removal and destruction by the owners of weeds and worthless vegetation growing on any lot or land or street or alley abutting thereon within the city. If the owners failed or refused after five days' notice by personal service to do so, the city by its proper representative was required to destroy the weeds and vegetation and to assess the cost thereof against the real estate. An ordinance passed and effective at that time, by virtue of and in harmony with the authority of the charter provision, required every owner of real estate in the city to cut and clear it of weeds and worthless vegetation on or before May 15, July 15, August 15, and November 15 of each year. If the owner failed to do so on five days' notice given by the city, it was required to cut the weeds and vegetation and assess the cost thereof against the real estate.

Complaint was made to appellant of weeds growing on the real estate of appellees. The weed inspector of the city thereafter on September 27, 1950, examined the premises and found "Tall weeds, sunflowers, and the likes" growing thereon—weeds that needed to be cut. He saw no indication of any crop or raspberry bushes growing in the weeds. He prepared and sent to appellees on September 29, 1950, a notice and demand that they cut and remove the weeds and worthless vegetation then growing on their premises within five days or the city would do so and assess the cost against the real estate. The notice and demand was received by appellees on the day it was dated. The growth of weeds and useless vegetation was removed by the owners from a small part of the premises but otherwise the notice and demand was entirely disregarded, either because of indifference or a determination to resist the request of the city, and because thereof on October 12, 1950, a servant

of the city mowed the premises with a power mower belonging to the city. He did this without difficulty or unusual development. It was this operation that appellees claimed destroyed a large number of their growing and producing raspberry bushes.

Appellees planted raspberry bushes in the spring of 1947. They let the natural vegetation consisting of grass and the natural weeds grow on the premises where the raspberry bushes were planted. There was a swale through this area. It overflowed in times of considerable precipitation, and the weeds and vegetation had a tendency to keep the raspberry bushes from washing out. There was a considerable natural growth on the premises consisting of wild grass, sunflowers, rag weed, and all kinds of wild vegetation that is included in natural growth. This area was not cultivated and nothing was done to interfere with the growth of the wild vegetation thereon from the time the raspberry plants were planted in 1947, until and during the year 1950. Some of the wild vegetation was as much as five feet tall.

A determination of the capacity in which appellant was acting at the time of the acts complained of in this case is important and may be decisive. A municipal corporation occupies a dual relation to its citizens and the public. In the performance of its governmental or public duties it is the representative of the state. It has the governmental powers conferred and the burdens imposed upon it by its charter, and is entitled to the privileges, immunities, and exemptions given it by law. The governmental functions of a city are for the benefit of the public and not the corporate entity. A municipal corporation has and is obligated also to perform corporate duties, those expressly imposed upon it by its charter, and also those that devolve upon it by reason of the governmental powers and privileges it has, such as the duty to maintain its streets, alleys, and sidewalks in a reasonably safe condition for their intended use. Its corporate functions are for the benefit of the city as

well as advantageous to the public. A municipal corporation is sometimes authorized to own and conduct a business or commercial enterprise and when it engages therein it is said to be acting in its private or proprietary capacity. It has no duty to conduct such an undertaking and when it does it is entirely voluntary on its part and it thereby enters into a third relation distinct from the dual relations above noted. While occupying this third relation it is engaged in conducting a business and is subject to the law and procedure applicable to a private corporation or person conducting a like business. It has in that regard no governmental functions or corporate duties and has no more privileges or exemptions than a private corporation. Henry v. City of Lincoln, 93 Neb. 331, 140 N. W. 664, 50 L. R. A. N. S. 174; Platte Valley Public Power & Irr. Dist. v. Lincoln County, 144 Neb. 584, 14 N. W. 2d 202, 155 A. L. R. 412.

Appellant argues that the doctrine of governmental immunity interposes to relieve it from liability in this case. It is a well-settled doctrine in this jurisdiction, in harmony with the conclusion of a large number of the courts of the country, that a municipality is not liable for the negligence or misconduct of its officers, agents, or servants in the exercise or performance of public or governmental functions from which it derives no profit, benefit, or advantage, and that the rule of respondeat superior does not apply thereto. In Burke v. City of South Omaha, 79 Neb. 793, 113 N. W. 241, this court said: "The state cannot, without its consent expressed through legislation, be sued for injuries resulting from an act done in the exercise of its lawful governmental powers and pertaining to the administration of government. When this power is exercised, as it must be, through an agent, the agent cannot be sued for injuries resulting from a strict performance of the agency. In such case the act is regarded as the act of the state, and not of the agent, who is the mere instrument of the state, and nothing more; and, if the agent employs serv-

ants in the performance of the act, he cannot be sued for injuries resulting from the negligence of the servants. The rule of respondeat superior does not apply. The state, and not the agent, is the real superior. * * * Municipal corporations are agents of the state in the exercise of certain governmental powers. The preservation of the health and peace of its inhabitants and fire protection afforded the property owner are governmental functions. Gillespie v. City of Lincoln, 35 Neb. 34; Village of Verdon v. Bowman, 5 Neb. (Unof.) 38." See, also, Toft v. City of Lincoln, 125 Neb. 498, 250 N. W. 748; Thompson v. City of Albion, 115 Neb. 208, 212 N. W. 37; Caughlan v. City of Omaha, 103 Neb. 726, 174 N. W. 220; Sheets v. City of McCook, 95 Neb. 139, 145 N. W. 252, 51 L. R. A. N. S. 321; Phoenix Mutual Life Ins. Co. v. City of Lincoln, 91 Neb. 150, 135 N. W. 445.

The power and duty of the city to require the destruction and removal of weeds and undesirable vegetation growing within the city are not questioned. It could not be. The state has granted the cities of the primary class the right to require the owner of real estate to destroy such vegetation and has made it the duty of the city to do so if the owner does not. § 15-268, R. S. 1943. The charter provision and ordinance of appellant are in agreement with the terms of the grant of authority by the state. This is the exercise of the police power for the benefit, protection, comfort, and health of the public. It is a governmental or public function. The activity of the weed inspector and the operation of the mower by the servant of the city in destroying the weeds and vegetation on the premises of appellees did not and could not result in any liability of the city to appellees.

In McFadden v. Town of Jewell, 119 Iowa 321, 93 N. W. 302, 60 L. R. A. 401, 97 Am. S. R. 321, it did not appear by whom the servant of the town was employed to cut the weeds and grass obstructing an alley. While in the work of cutting the weeds and grass he negligently injured a child of tender years. The court said: "Now,

whether it was the town council, or a committee thereof on public health or streets and alleys, or the street commissioner of the town, is immaterial, in our view. Certain it is that in the matter of its control over the streets and alleys within the incorporate limits—and, to make the reference direct, in the matter of clearing the alley in question of weeds—the town was in the exercise of police powers possessed by it as an incident to its existence as a municipal corporation.

"It is well settled that where an act done by an officer or employe of a municipal corporation is essentially in the line of the performance of an official duty, public in character, the municipality cannot be made liable for a tort committed or wrong done by such officer or employe while engaged as such in the performance of the duty in question. That acts done in the execution of police powers and in the enforcement of police regulations are in the nature of the performance of a service for the benefit of the general public cannot well be questioned." See, also, Norman v. City of Chariton, 201 Iowa 279, 207 N. W. 134.

In City of St. Louis v. Galt, 179 Mo. 8, 77 S. W. 876, 63 L. R. A. 778, the court said: "The word 'weed' has a common, everyday, meaning to the mind of every man. * * * it is a fact of common information, of which courts may properly take judicial notice, that a high, rank growth of weeds in a populous community has a strong tendency to produce sickness and to impair the health of the inhabitants, and so may be a nuisance in such locality, notwithstanding they may be comparatively innocuous in the country, when far away from human habitation. * * * Therefore, the right of the defendant to grow weeds upon his city lot is subordinate to the right of society that he shall not do so, because he would thereby endanger the health of others. * * * The ordinance in question strikes at a cause that is known to operate against the public health, and it is therefore a valid exercise of the police power conferred upon the

city of St. Louis." See, also, Village of Verdon v. Bowman, 5 Neb. Unoff. 38, 97 N. W. 229; Lowe v. Conroy, 120 Wis. 151, 97 N. W. 942, 66 L. R. A. 907, 102 Am. S. R. 983, 1 Ann. Cas. 341; Franklin v. City of Seattle, 112 Wash. 671, 192 P. 1015, 12 A. L. R. 247; Annotation, 12 A. L. R. 1136; 18 McQuillin, Municipal Corporations (3d ed.), § 53.35, p. 227; 25 Am. Jur., Health, § 16, p. 295; 37 Am. Jur., Municipal Corporations, § 296, p. 942.

Appellees assert that appellant ratified the acts of its servants who caused the destruction of the raspberry bushes. This position cannot be sustained. The acts complained of herein were under the police power of the city and were done in performance of a duty in the governmental capacity of the city, and even though the acts were negligently or wrongfully done by those to whom the work was entrusted the city is not and could not be liable to the persons injured or damaged by reason of any misconduct of the agents or employees of the municipality. What it had no authority to do it could not ratify when done by another. In Brown v. City of Union Point, 52 Ga. App. 212, 183 S. E. 78, it is said: "* * * For acts done in the illegal performance of purely governmental functions * * * however illegally the authority may be exercised, the municipality is not liable. * * * Nor can a municipality ratify the unlawful acts of its subordinate officials done in pursuance of its governmental functions, so as thereby to make itself liable for such acts." In Bates v. City of McComb, 181 Miss. 336, 179 So. 737, it is said: "A city's employment of an incompetent or vicious person who is subsequently guilty of a tort while engaged in discharge of a governmental duty * * * does not make city liable for his acts and if city is not liable in the first instance, it cannot be made liable by ratification." In Nashville Trust Co. v. City of Nashville, 182 Tenn. 545, 188 S. W. 2d 342, the court said: "A city is without power to enter into a contract rendering it liable for the negligence of its servants in the exercise of a governmental function." In Calwell

v. City of Boone, 51 Iowa 687, 2 N. W. 614, 33 Am. R. 154, the court said: "It is contended, however, that if a city is not liable in the first instance for the illegal acts of its officers in enforcing a police regulation, it may become liable by ratification. But a city has no power to authorize a police officer to commit an unlawful act, and what it cannot do directly it cannot do indirectly by ratification." See, also, Buttrick v. City of Lowell, 83 Mass. 172, 79 Am. D. 721; 63 C. J. S., Municipal Corporations, § 763, p. 56.

Appellant should have been awarded a verdict by instruction of the trial court as it requested at the close of the evidence and its motion for a judgment in its favor should have been granted.

The judgment should be and it is reversed and the cause is remanded with directions to the district court for Lancaster County to render and enter a judgment of dismissal of the case.

REVERSED AND REMANDED WITH DIRECTIONS.

Chappell, J., concurs in the result.

HENRY C. JONES ET AL., APPELLEES, V. CITY OF CHADRON, NEBRASKA, APPELLANT.
55 N. W. 2d 495

Filed October 31, 1952. No. 33200.

1. **Appeal and Error.** If the time for procuring a bill of exceptions in a civil case is not extended beyond the 40 days allowed by statute therefor, the bill of exceptions must be allowed and settled not later than 70 days from the date of the filing of the notice of appeal in the district court.
2. ———. In the absence of a bill of exceptions, it is presumed that an issue of fact presented by the pleadings was established by the evidence, that it was correctly decided, and the only issue that will be considered on appeal is the sufficiency of the pleadings to support the judgment.
3. **Municipal Corporations.** If lands within a city or village adjacent to the corporate limits thereof are so situated that they do not have substantial unity or community of interest with the other portions of the corporate area in the maintenance of

municipal government, justice and equity dictate that such lands should be severed from the municipality.

4. ———. The word adjacent as used in section 17-414, R. S. Supp., 1951, means contiguous or coexistent with.

5. ———. It is indispensable that the petition in a proceeding based on this statute contain a statement of fact showing that the territory sought to be detached is within the municipality and that a substantial part of the boundary thereof is adjacent to a part of the boundary of the city or village.

6. ———. Justice and equity within the intention of this statute do not contemplate the severance of real estate from a municipality when to do so would result in an island of rural land surrounded by urban land.

7. ———. Detachment of land from the corporate limits of a city may be denied where to detach would enhance the difficulties of city administration and would lessen the availability of contiguous areas for urban use.

APPEAL from the district court for Dawes County: EARL L. MEYER, JUDGE. *Reversed and remanded.*

Albert W. Crites, for appellant.

Charles A. Fisher, for appellees.

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

BOSLAUGH, J.

Appellees instituted this proceeding to secure a detachment of unplatted land owned by them within the corporate area of Chadron. The trial court detached a part of the land involved herein. The motion of appellant for a new trial was denied and it has brought the case here by appeal. Appellees have not cross-appealed.

A motion to quash the transcript of the evidence purporting to be a bill of exceptions filed herein was by stipulation of the parties and with the permission of the court submitted at the time of the argument of the case.

The notice of appeal was filed in the district court on February 20, 1952. The proposed bill of exceptions was delivered to appellant on February 25, 1952. It was served on the attorney for appellees and by him re-

turned to the appellant on March 10, 1952, without suggestion or request of amendment or change. The proposed bill of exceptions was presented to the trial judge for allowance and settlement on May 22, 1952. There was no order of the judge who tried the case extending the time within which a bill of exceptions might be procured. A bill of exceptions in a civil case must be allowed and settled not later than 70 days from the time of the filing of the notice of appeal in the district court, if the time for procuring the bill of exceptions has not been extended beyond the original 40 days allowed by statute therefor. §§ 25-1140, 25-1140.02 to 25-1140.05, R. R. S. 1943; Cozad v. McKeone, 149 Neb. 833, 32 N. W. 2d 760; In re Estate of Bingaman, 154 Neb. 240, 47 N. W. 2d 435. The proposed bill of exceptions in this case was presented to the judge who tried the case for allowance and settlement 92 days after the filing of the notice of appeal in the district court. The attempted settlement and allowance thereof was therefore a nullity and the motion to quash it must be and is sustained.

The fact that appellant omitted to preserve the evidence produced at the trial of the case by a bill of exceptions, settled and allowed as the law requires, materially affects and limits the scope of review on appeal. If a purported bill of exceptions has not been prepared and authenticated as the procedure prescribes, its contents will not be noticed by this court for any purpose and no question, a determination of which involves an examination of the evidence offered at the trial, will be considered. In such a situation it is presumed that any issue of fact raised by the pleadings was established by the evidence and that the issue was correctly decided in the trial court. The only issue that can be determined on this appeal, since no legal transcript of the evidence has been furnished, is the sufficiency of the pleadings to support the judgment. Wabel v. Ross, 153 Neb. 236, 44 N. W. 2d 312.

The substance of the petition is as follows: That ap-

pellees are the owners of the unplatted real estate involved herein; that it is located within the corporate limits of the city of Chadron; that no streets or alleys have been located, dedicated, or exist thereon; that it is represented by the drawing designated as exhibit 1 attached to and made a part of the petition; that the three parts of it are designated as "A," "B," and "C"; that the land is agricultural and is used exclusively for agricultural purposes except tract "C" on which there is a building and in which an automobile sales and garage business in conducted; that while the real estate is adjacent to the city of Chadron it receives no benefit therefrom except tract "C" is served with city water; that the real estate is subject to city taxes and all the ordinances and regulations of the city; and that appellees are greatly damaged by the real estate being within the corporate area and are subjected to hardships by the ordinances in the use and enjoyment of their property.

The answer of appellant by denial put in issue the allegations of the petition except it admitted that the real estate described in the petition was within the city and had not been subdivided into blocks, lots, streets, and alleys or platted as provided by statute; and that named individuals were the mayor, members of the city council, and city manager, respectively. The answer contained other matters tending to show that justice and equity did not require that the territory involved or any part thereof should be disconnected from the city.

The real estate detached by decree of the district court is a part of outlot "G" situated in the subdivision designated as Pioneer Townsite Company's First Addition to Chadron, Nebraska, and is identified on the plat made a part of the petition as tract "A." This is what is intended by all references hereafter to the real estate of appellees. The trial court found that justice and equity required detachment of the part of the real estate of appellees designated as tract "A"; that all the statements in the petition with reference thereto were

true; and that it should be and was disconnected from the city of Chadron.

This case is reduced on this appeal to the problem of whether or not the petition of appellees supports the decree rendered by the trial court. The authority for this proceeding is obviously the statute on the subject of detachment of territory within city limits. § 17-414, R. S. Supp., 1951. The statute affords any owner of territory within and adjacent to the corporate limits of the city or village the opportunity to have it severed therefrom if justice and equity require that such territory be disconnected from the municipality. It has been considered in this connection that whenever lands within the boundaries of and adjacent to the corporate limits of a city or village are so situated that they do not have some substantial unity or community of interest with the other portions of the corporate area in the maintenance of municipal government then justice and equity dictate that such lands should be severed and excluded from the corporate territory. Bisenius v. City of Randolph, 82 Neb. 520, 118 N. W. 127; Davidson v. City of Ravenna, 153 Neb. 652, 45 N. W. 2d 741.

It is indispensable that the petition in this kind of a proceeding should show by statement of fact that the territory sought to be detached is within the municipality and that a substantial part of the boundary thereof is adjacent to a segment of the boundary of the city or village. Adjacent as used in this statute means contiguous or coexistent with. There is no allegation of any fact in the petition from which it can be determined that any part of the premises involved is adjacent to any part of the boundary of the city. It is stated in the brief of appellees that "The east line of the real estate involved is * * * also the corporation line of the City of Chadron, Nebraska." There is no allegation or claim that any other part of the premises is adjacent or near to any part of the boundary of the city. Contrary to the statement in the brief it is stated in the petition that the east

line of the premises involved is 50 feet west of the east line of outlot "G" as it is described on the plat of Pioneer Townsite Company's First Addition to Chadron. It is established thereby that there is an area at least 50 feet wide between the east line of the premises involved in this case and the east boundary line of the city, and therefore there is an entire absence of any statement of fact that any part of the premises involved borders on the boundary of the city. The petition therefore fails to show that the tract sought to be detached is not entirely surrounded by other corporate territory.

In this view of the record the petition is defective in substance, and justice and equity do not require the creation of an island of rural land in the city entirely surrounded by urban land. It has been recently decided in Swanson v. City of Fairfield, 155 Neb. 682, 53 N. W. 2d 90, that: "Detachment of land from the corporate limits of a city may be denied where to detach would enhance the difficulties of city administration and would lessen the availability of contiguous urban areas for urban use." The doctrine of this case and the authorities therein referred to are decisive of this appeal.

The judgment should be and is reversed and the cause is remanded to the district court for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

PATTY BAKER CAMPBELL, APPELLANT, V. WILLIAM T. CAMPBELL, APPELLEE.
55 N. W. 2d 347

Filed October 31, 1952. No. 33209.

1. **Divorce.** In a divorce suit in which the custody of a minor child is involved, the rule is that the custody of the child is to be determined by the best interests of the child, with due regard for the superior rights of fit, proper, and suitable parents.
2. **Divorce: Parent and Child.** The care, custody, and control of a

child of tender years is almost uniformly awarded to the mother if she is a fit and suitable person to have its custody.

3. ———: ———. In awarding the custody of minor children, the court looks to the best interests of such children, and those of tender age are usually awarded to the mother. Other considerations being equal, it is usual to award the custody of children to the innocent spouse.
4. ———: ———. Custody of minor children awarded their mother in a divorce action will not be disturbed in a subsequent proceeding to modify the original decree, unless it is shown that the mother is an unfit person to have their custody, or that their best interests require such action.
5. ———: ———. In a divorce case it is generally the best policy to keep minor children within the jurisdiction of the court. However, the welfare of the child should receive the paramount consideration in the determination thereof and this policy should yield to the best interests of the child.
6. ———: ———. A parent who has been awarded the custody of a child in a divorce action may temporarily provide a suitable home for it in the home of its grandparents without losing the right to its custody.

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

R. E. Lunner and *J. L. Richards*, for appellant.

Kirkpatrick & Dougherty, for appellee.

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

CHAPPELL, J.

On June 16, 1951, plaintiff was awarded an absolute divorce from defendant upon the ground that he "has been guilty of extreme cruelty toward the plaintiff as alleged in the plaintiff's petition." Insofar as important here, such decree awarded plaintiff the exclusive care, custody, control, and education of William Thomas Campbell, their only child, who was then but two years and four months old. Defendant was given the right, however, to have such child on alternate Sundays and for two weeks during summer vacation unless sickness or

other unavoidable circumstances prevented. In accord with a property settlement entered into by the parties after plaintiff's petition had been filed, the decree gave defendant the fee simple title to their home in York together with all the household furnishings and furniture then therein. All other property was decreed to be the separate property of the parties. However, plaintiff was awarded $500 alimony, court costs, and $100 attorney fees. In addition, defendant was ordered to pay $50 a month beginning July 1, 1951, to the clerk of the district court as child support until the child reached his majority, became self-supporting, or was deceased. The decree of divorce contained no provision whatever requiring plaintiff to keep such child within the jurisdiction of the court.

On February 13, 1952, plaintiff filed an application requesting permission of the court to remove the child to another state and modify the decree regarding visitation by and the time when defendant should have the child. The basis for the application was economic necessity brought about by changed conditions, to wit: The removal of plaintiff's parents with whom she and the child had been required to live from York, Nebraska, to Fort Morgan, Colorado, and plaintiff's subsequent employment elsewhere.

On the same day defendant filed an application to modify the decree by giving him absolute custody of the child. The basis of his application was that plaintiff had ever since the decree ignored the welfare, care, and control of the child and delegated same to her parents. The application otherwise contained no allegation that plaintiff was not a fit, proper, and suitable person to have the child's custody.

On February 25, 1952, when the child was three years and five days old, a hearing was had on the aforesaid applications, whereat evidence was adduced, and the trial court entered a decree not only denying plaintiff's application but also awarding custody of the child to de-

fendant's parents and enjoining its removal from the jurisdiction of the court. However, plaintiff was permitted to visit the child at reasonable times and places and have the child with her on week ends. The decree also set aside the previous order for child support.

Plaintiff's motion for new trial was overruled, and she appealed, assigning that the judgment was contrary to law and contrary to the evidence. We sustain the assignments.

In comparable cases this court has heretofore established basic, applicable, and controlling rules. As late as Lichtenberg v. Lichtenberg, 154 Neb. 278, 47 N. W. 2d 575, this court held: "In a divorce suit in which the custody of a minor child is involved, the rule is that the custody of the child is to be determined by the best interests of the child, with due regard for the superior rights of fit, proper, and suitable parents.

"The care, custody, and control of a child of tender years is almost uniformly awarded to the mother if she is a fit and suitable person to have its custody."

In Hodges v. Hodges, 154 Neb. 178, 47 N. W. 2d 361, this court also held: "In awarding the custody of minor children, the court looks to the best interests of such children, and those of tender age are usually awarded to the mother. Other considerations being equal, it is usual to award the custody of children to the innocent spouse."

Such case cited with approval Bath v. Bath, 150 Neb. 591, 35 N. W. 2d 509, wherein it was held: "Custody of minor children awarded their mother in a divorce action will not be disturbed in a subsequent proceeding to modify the original decree, unless it is shown that the mother is an unfit person to have their custody, or that their best interests require such action." In that case the mother was originally given custody of two minor male children of tender years. Therein this court refused in a subsequent proceeding to disturb their custody, and she was thus permitted to remove the children from Ne-

braska to California under circumstances comparable with those at bar.

In Syas v. Syas, 150 Neb. 533, 34 N. W. 2d 884, this court held: "Ordinarily the interests and welfare of a child of tender years will be best served by placing the child in the custody of the natural mother provided she is a fit and proper person. * * *

"In a divorce case it is generally the best policy to keep minor children within the jurisdiction of the court. However, the welfare of the child should receive the paramount consideration in the determination thereof and this policy should yield to the best interests of the child." In that case, under circumstances comparable with those at bar, plaintiff was not only given custody of the child but was also permitted to remove it from Nebraska to Wyoming in order for the mother to continue in suitable employment.

It is generally held that a parent who has been awarded the custody of a child in a divorce action may temporarily provide a suitable home for it in the home of its grandparents without losing the right to its custody. 27 C. J. S., Divorce, § 317, p. 1191; McKissick v. McKissick, 93 Or. 648, 184 P. 272; Rice v. Rice, 36 Ariz. 190, 283 P. 922; Kirkpatrick v. Kirkpatrick, 52 Idaho 27, 10 P. 2d 1057; Ohler v. Ohler, 31 Ohio O. 152; Application of Shreckengaust, (Mo. App.), 219 S. W. 2d 244.

The material evidence is without dispute. Plaintiff and defendant, both residents of York, were married there August 1, 1946. On February 20, 1949, their son was born. On May 7, 1951, plaintiff filed a petition for divorce on the ground of extreme cruelty, alleging substantially that during the marriage defendant, a man of violent temper and frequently overcome by fits of anger, had repeatedly sworn at, assaulted, beaten, and bruised her, putting her in constant fear of her own safety and the safety of their child; that on May 5, 1951, defendant, without cause or provocation, severely beat, bruised, and injured plaintiff, striking her upon her

face and body; and after doing so put her out of their home, locked the doors, peremptorily left plaintiff at the home of her parents without her child and without any of her clothing except what she was wearing, and threatened great bodily violence if she should try to see the son or obtain his custody. The fact is that defendant kept the child until the decree of divorce required him to return it to plaintiff. Defendant defaulted upon plaintiff's petition for divorce and has never denied the allegations thereof. The effect of the decree of divorce was to find that the allegations thereof were true. In that connection the present proceeding is simply a continuation of the original divorce action and one of its incidents deemed a part thereof. See, Lippincott v. Lippincott, 152 Neb. 374, 41 N. W. 2d 232; Pasko v. Trela, 153 Neb. 759, 46 N. W. 2d 139, and cases cited therein.

Pending the divorce proceedings, plaintiff, a young woman who had no special training and was without employment or means of support, lived with her parents. After the decree was entered, defendant was required thereby to return the child to plaintiff. He told her upon doing so: " 'If you ever lay a hand on that boy I will kill you.' " During the present hearing he was asked: "Q. Did you ever make a threat to Patty (that is, the plaintiff) that if she wasn't good to Billy you would kill her? A. I did, Bob. If she ever laid a hand on him I would kill her."

For about a month after the decree plaintiff and their son continued to live with her parents. At the end of that period, with permission of defendant, plaintiff took the child and went to a sister's home in Sterling, Colorado, for some five weeks. Her sister's husband was the high school principal there. A few days after their return plaintiff went to Sun Valley, Idaho, to assist and care for another sister who was expecting a child. The boy here involved was left with plaintiff's parents, entirely proper and suitable persons, who gave him ex-

cellent care in a good home. The sister's baby was born on September 28, 1951, after which plaintiff was able to obtain temporary employment there, and thereafter to obtain desirable permanent employment in a drug store at Sun Valley, a year-round recreation center operated by the Union Pacific Railroad. Plaintiff planned to come home about the middle of October and get her child, but she did not do so because her mother advised her to stay there and because she was afraid of defendant. In such situation plaintiff did not return to York until a few days before the hearing upon her application at bar. In the meantime the child was well cared for by plaintiff's parents. However, defendant complied with the child-support order and was permitted to have the child with him on numerous occasions as provided in the decree, at which time the boy was entertained by the father in a rather lavish manner.

There is no competent evidence whatever that plaintiff was not a fit and proper person to have the custody of the child, or that she had in any manner either before the divorce or subsequently failed to properly care for or see that the child was properly cared for. There is competent evidence from which it could be concluded that defendant himself was not such a fit and proper person, although concededly he was financially able to make adequate provision for the child's care and education. The trial court evidently so concluded. It is true that the parents of both plaintiff and defendant did and could give the child a good home. There is also ample competent evidence that plaintiff, the innocent spouse and a fit and proper parent with superior rights, could and would do so, with her present income and payment of child support by defendant. When the divorce was granted, defendant took the home and furniture so that plaintiff, having no employment in York, had nowhere to live except with her parents who, because of the father's ill health, were on March 1, 1952, removing from York, Nebraska, to Fort Morgan, Colorado. In that

situation, plaintiff did the best she could and obtained suitable employment at Sun Valley, Idaho. Her married sister, unemployed outside her home, lives at Ketchum, the residence section of Sun Valley a mile distant, in a good home with ample space and modern facilities. She had a child five months old at the time of this hearing, and her husband was well employed there. They offer to permit plaintiff and her child to live in their home, and the sister, a fit and proper person, offers to care for the child during plaintiff's working hours. Both plaintiff and her parents freely pledged themselves to abide by any reasonable order made by the court with regard to the child's custody or whereabouts. They even offered to provide a bond guaranteeing performance of the decree, but we see no reason for requiring it or deciding whether or not such could be done.

We find no reason whatever for depriving plaintiff of the child's custody or preventing his removal from the jurisdiction of the court to Idaho where apparently his best interests will be served. We therefore conclude that the injunction heretofore entered should be dissolved and the decree of divorce should be modified by the court, permitting plaintiff to so remove the child, but giving defendant the right to visit the child at reasonable times and places where the mother lives and have the child's custody for a continuous period of one month during summer vacation of each year, that is, during either June, July, or August, the time to be selected by plaintiff. If during such period the child is returned to York or taken elsewhere, same shall be at the expense of defendant. Further, the child-support payments of $50 a month, as originally entered against defendant, should be reinstated except for the months respectively from March 1952 to October 1952, inclusive, the period during which the child was in the custody of defendant's parents. All costs in the district court and this court, including a reasonable allowance as attorney fees for

plaintiff's attorney in the district court, and $250 as attorney fees for plaintiff's attorney in this court, shall be and are taxed to defendant.

For the reasons heretofore stated, the judgment of the district court should be and hereby is reversed and remanded, with directions to enter a judgment for plaintiff in conformity with and as directed in this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

VIRGIL WAGNER ET AL., APPELLEES, V. CITY OF OMAHA, NEBRASKA, A MUNICIPAL CORPORATION OF THE METROPOLITAN CLASS, ET AL., APPELLANTS, LINDLEY D. HUTCHINSON ET AL., INTERVENERS AND APPELLEES, JAMES F. GREEN, AMICUS CURIAE.

55 N. W. 2d 490

Filed November 7, 1952. No. 33156.

1. **Municipal Corporations.** Annexation of territory by a metropolitan city pursuant to section 14-117, R. S. 1943, is a legislative matter. However, courts have the power to inquire into and determine whether the conditions exist which authorize the annexation thereof.
2. ———. In doing so it is not for the courts to determine what portions may be properly annexed, for the fixing of boundary lines under this authority is a legislative act.
3. ———. Constitutional and statutory limitations on the nature and extent of the territory which may be annexed to a municipal corporation must be observed.
4. ———. The power conferred upon municipal corporations by their charters to enact ordinances on specified subjects is to be construed strictly, and the exercise of the power must be confined within the general principles of the law applicable to such subjects.
5. ———. A municipal corporation or its corporate authorities have no power to extend its boundaries otherwise than provided for by legislative enactment or constitutional provision. Such power may be validly delegated to municipal corporations by the legislature and when so conferred must be exercised in strict accord with the statute conferring it.

6. ———. The burden is on one who attacks an ordinance, valid on its face and enacted under lawful authority, to prove facts to establish its invalidity.
7. **Municipal Corporations: Injunctions.** Where an attempted annexation of territory to a municipal corporation is illegal, injunction is a proper remedy, and resort to a court of equity is proper either to prevent consummation of the annexation or, if it has been completed, to have the proceedings declared null and void and the corporate authorities restrained from exercising jurisdiction over the territory in question by virtue of the illegal proceedings.

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

Edward F. Fogarty, Edward Sklenicka, Herbert M. Fitle, and *James M. Paxson,* for appellants.

Seymour L. Smith, Clayton H. Shrout, and *Theodore L. Richling,* for appellees.

James F. Green, Amicus Curiae.

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

WENKE, J.

This action was brought in the district court for Douglas County by resident property owners in the area sought to be annexed to the city of Omaha by its ordinance No. 16950. The action seeks to have the ordinance declared invalid and to enjoin the city of Omaha, its officers, agents, and representatives, or any person or persons acting in their behalf, from enforcing it. The trial court decreed the ordinance to be null and void and granted the relief asked. The city filed a motion for new trial. This appeal was perfected from the overruling thereof.

The area sought to be annexed by ordinance No. 16950 is approximately 490 acres. It is located in Sections 21 and 22, Township 75 North, Range 44 West of the 5th P. M., in Douglas County, and is referred to as East Omaha, although it is not and never has been an

incorporated city or village. The area sought to be annexed does not include any of the area lying between the outer edge of the East Omaha Drainage District's right-of-way and the Missouri River.

The questions raised are: Is any part of the area sought to be annexed to the city by ordinance No. 16950 agricultural lands which are rural in character, is the area sought to be annexed contiguous to the city, and is the situation one in which injunctive relief should be granted?

"In 1922, the metropolitan city of Omaha adopted as its home rule charter, chapter 116, Laws of 1921, in toto, under the provisions of article XI, section 5, of the Constitution of the State of Nebraska. The original home rule charter and amendments adopted thereto pursuant to constitutional authority appear in chapter 14, Revised Statutes 1943." Reid v. City of Omaha, 150 Neb. 286, 34 N. W. 2d 375. In this opinion we will refer to the sections as the same appear in the Revised Statutes 1943.

Section 14-117, R. S. 1943, is the authority pursuant to which the city passed the ordinance. It provides, insofar as here material, as follows: "The corporate limits of any city of the metropolitan class shall be fixed and determined by the council of such city by ordinance. The city council of any metropolitan city may at any time extend the corporate limits of such city over any lands, lots, tracts, street or highway, such distance as may be deemed proper in any direction, * * *. This grant of power shall not be construed as conferring power upon the council to extend the limits of a metropolitan city over any agricultural lands which are rural in character."

Annexation of territory under this authority is a legislative matter. However, courts have the power to inquire into and determine whether the conditions exist which authorize the lands to be annexed. Campbell v. Youngson, 80 Neb. 322, 114 N. W. 415; Winkler v. City

of Hastings, 85 Neb. 212, 122 N. W. 858; Witham v. City of Lincoln, 125 Neb. 366, 250 N. W. 247.

"Constitutional and statutory limitations on the nature and extent of the territory which may be annexed to a municipal corporation must be observed." 62 C. J. S., Municipal Corporations, § 46, p. 130.

In doing so it is not for the courts to determine what portions might be properly annexed, for the fixing of boundary lines under this authority is a legislative act. State ex rel. Davis v. City of Largo, 110 Fla. 21, 149 So. 420; City of Houston v. State ex rel. City of West University Place, 142 Tex. 190, 176 S. W. 2d 928.

The home rule charter adopted by the city of Omaha is a grant as distinguished from a limitation of power. Being a grant of power the charter is to be construed according to the same rules as a legislative act containing the same provisions in determining what authority is thereby granted the city government. Consumers Coal Co. v. City of Lincoln, 109 Neb. 51, 189 N. W. 643; Falldorf v. City of Grand Island, 138 Neb. 212, 292 N. W. 598.

"A municipal corporation is a creature of the law established for special purposes, and its corporate acts must be authorized by its charter and other acts applicable thereto. It therefore possesses no power or faculties not conferred upon it, either expressly or by fair implication, by the laws which created it or by other laws, constitutional or statutory, applicable to it.

"The power conferred upon municipal corporations by their charters to enact ordinances on specified subjects is to be construed strictly, and the exercise of the power must be confined within the general principles of the law applicable to such subjects." Reid v. City of Omaha, *supra*. See, also, Interstate Power Co. v. City of Ainsworth, 125 Neb. 419, 250 N. W. 649.

"A municipal corporation or its corporate authorities have no power to extend its boundaries otherwise than provided for by legislative enactment or constitutional

provision. Such power may be validly delegated to municipal corporations by the legislature, and when so conferred must be exercised in strict accord with the statute conferring it." 37 Am. Jur., Municipal Corporations, § 24, p. 640.

As stated in Horbach v. Butler, 135 Neb. 394, 281 N. W. 804: "In the absence of a showing that the city council acted outside of their granted powers, or of a showing that they abused the discretion lodged with them, in the exercise of a granted power, the finding of the city council is conclusive."

The burden of doing so was on appellees. As stated in 6 McQuillin, Municipal Corporations (3d ed.), § 20.08, p. 18: "The burden is on one who attacks an ordinance, valid on its face and enacted under lawful authority, to prove facts to establish its invalidity. The burden of establishing a want of a rational basis for an ordinance and that it is unreasonable and arbitrary is on the one asserting the same. Likewise, the burden of proof to sustain a right to equitable relief against the enforcement of an ordinance on the ground that it is invalid rests upon the complainant; the reason is that the presumption is in favor of the validity of the ordinance."

One of the three questions raised by the appeal is, is the area sought to be annexed contiguous to the city? Appellees contend this question should be, is the area sought to be annexed sufficiently conterminous or adjoining to the city that it can extend its limits over it? The authority granted to the city by section 14-117, R. S. 1943, is: "The city council * * * may at any time extend the corporate limits of such city over any lands, lots, tracts, street or highway, such distance as may be deemed proper in any direction, * * *." It will be observed that the act contains neither the word contiguous or conterminous in relation to what lands, lots, tracts, street or highway the city may extend its boundaries to include. The city's present boundary joins the area sought to be annexed on the north and partially on the

west of the northern part. We find the area sufficiently joins the city so that it could properly extend its boundaries to include the area, provided the nature thereof is of such character that the city has the authority to do so.

In conferring this authority section 14-117, R. S. 1943, expressly provides: "This grant of power shall not be construed as conferring power upon the council to extend the limits of a metropolitan city over any agricultural lands which are rural in character."

" 'Agriculture' is the art or science of cultivating the ground, including harvesting of crops and rearing and management of livestock." 3 C. J. S., Agriculture, § 1, p. 365.

"Rural" means of or pertaining to the country as distinguished from a city or town, whereas "urban" means of or belonging to a city or town. In many of the cities and villages throughout the state there are tracts which are only partially developed as residential areas wherein substantial parts of the land are used for agricultural purposes but which tracts are, in fact, urban in character. It was clearly not the intention of the Legislature, if such an area develops outside the boundaries of a metropolitan city, to prevent such city from annexing it. It was, however, the purpose of the act to prevent annexation by such city of agricultural areas which are rural in character.

The area sought to be annexed lies just inside the outer edge of the right-of-way of the East Omaha Drainage District, on which right-of-way is located a dike or levee which runs along the entire east and south sides of the tract. This dike or levee protects the area from the flood waters of the Missouri River.

The whole area is low. Its water table is very high and is directly affected by the amount of water flowing in the Missouri River. During wet seasons, particularly if the river remains high, the surface ground remains wet and parts of the area become subject to standing water

and cannot be farmed. Ordinarily, however, the area, with some exceptions, is dry and subject to being used by the occupants thereof for whatever purposes they find to be desirable, such as gardening, livestock raising, livestock feeding, farming, etc.

In this area, which contains approximately 490 acres, are some 588 dwellings occupied by an estimated 2,116 people. It also contains a limited retail area in the vicinity of Twenty-third and Locust Streets and also several industries, none of which are very large.

Without setting out the evidence in detail, which the voluminous record makes impractical, we find that a large part of the area sought to be annexed has been platted into blocks and lots. Of this platted area a considerable part is strictly residential and the balance thereof is agricultural land which is urban in character; that is, it is sufficiently occupied by dwellings that it has lost its rural character. There are, however, two unplatted tracts in the area containing somewhere between 90 and 103 acres which are agricultural lands and rural in character.

There was an attempt made to show that the larger of these two tracts is a swamp and not agricultural land. While this tract could not be entirely used for agricultural purposes in 1951, that being an exceptionally wet year, we think the evidence shows that while this tract is somewhat lower than the other lands it is ordinarily available for agricultural purposes.

In the northwest part of the area, just north and south of Locust Street, are two other tracts which are not occupied by residences. The size of these two tracts is not shown. The area north of Locust Street is the larger. It appears to be low and often partly covered with water. It has in some years been used for agricultural purposes. However, it is owned by the city and is intended for park purposes. Its possible use for agricultural purposes is not here material. The smaller area, which is just south of Locust Street, is a swamp

area and cannot be said to be usable for agriculture.

We have come to the conclusion that somewhere between 90 and 103 acres of the area sought to be annexed is unplatted agricultural lands which are rural in character and over which the city did not have authority to extend its boundary.

"It is not for the Court to determine what portions might be properly annexed, for the drawing of boundary lines is a legislative act." State ex rel. Davis v. City of Largo, *supra*. See, also, City of Houston v. State ex rel. City of West University Place, *supra*.

In view of the foregoing we have come to the conclusion that the city, by including these agricultural lands which are rural in character in the area sought to be annexed, exceeded the authority granted it by section 14-117, R. S. 1943. Since we have no authority to revise the boundary line of the city, as extended by the ordinance, we find that its doing so makes the entire ordinance invalid.

Are the appellees entitled to injunctive relief?

Several of the appellees either own or have interests in different tracts located in the unplatted agricultural lands which are rural in character. They are proper parties to maintain this action.

Under the situation here the following is applicable: "Where an attempted annexation of territory to a municipal corporation is illegal, injunction is a proper remedy, and resort to a court of equity is proper either to prevent consummation of the annexation or, if it has been completed, to have the proceedings declared null and void and the corporate authorities restrained from exercising jurisdiction over the territory in question by virtue of the illegal proceedings. A suit to obtain such relief is a direct and not a collateral attack on the annexation proceedings, and may be entertained on suit of a municipality sought to be annexed to another municipality, or at the instance of the voters or property owners in the territory sought to be annexed." 62 C.

J. S., Municipal Corporations, § 65, p. 175. See, also, Best & Co., Inc. v. City of Omaha, 149 Neb. 868, 33 N. W. 2d 150.

Having come to the conclusion that the city, by including some 90 to 103 acres of unplatted agricultural lands which are rural in character in the area sought to be annexed by ordinance No. 16950, exceeded the authority granted it by section 14-117, R. S. 1943, we affirm the action of the trial court.

AFFIRMED.

MABEL V. SACK AND MABEL V. SACK, ADMINISTRATRIX OF THE ESTATE OF WILLIAM T. SACK, DECEASED, APPELLANTS, V. HENRIETTA SACK ET AL., APPELLEES.
55 N. W. 2d 505

Filed November 7, 1952. No. 33196.

1. **Pleading.** When a party affirmatively pleads a fact material to an issue he thereby assumes the burden of proving such fact.
2. **Agency.** A party alleging the existence of an agency relationship assumes the burden of proving the agent's authority and that the acts of the agent, for which liability against the principal is sought, were within the scope of that authority.

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

Moses H. Wittstruck and *Ralph S. Moseley,* for appellants.

R. A. Boehmer, for appellees.

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

YEAGER, J.

This is an action in equity by Mabel V. Sack in person and as administratrix of the estate of William T. Sack, deceased, against Henrietta Sack and others, for specific performance of an alleged written contract claimed

to have been entered into on May 14, 1945, by and between Carl J. Sack and Henrietta Sack, parties of the first part, and William T. Sack, party of the second part, whereby the first parties agreed to sell to the second party Lots 10 and 11, Block 6, Ridgeway, an Addition to Lincoln, Lancaster County, Nebraska, which lots were owned in joint tenancy by the first parties; for damages; and for an accounting.

Prior to the commencement of the action Carl J. Sack as well as William T. Sack had died. The action is prosecuted by Mabel V. Sack as widow of William T. Sack and as administratrix of his estate. She will hereinafter be referred to as plaintiff.

The defendants are Henrietta Sack in person, one of the alleged first parties, and as widow of Carl J. Sack, and other named heirs-at-law of Carl J. Sack, deceased. For the further purposes of this opinion mention of any defendant other than Henrietta Sack will not be required. Henrietta Sack will therefore be referred to as the defendant.

Prior to May 14, 1945, Carl J. Sack and Henrietta Sack were, as already indicated, the owners of the lots described. On each of the lots is a dwelling house used for rental purposes.

The plaintiff alleged that on May 14, 1945, a written contract was entered into whereby Carl J. Sack and Henrietta Sack agreed to sell to William T. Sack the two lots. The purported contract is made a part of the petition. The named consideration is $5,500 of which amount the instrument declared $1,800 was at the time in hand paid. The method and plan for further payments is set forth in the instrument. The method and plan for closure of the transaction on payment of the full purchase price is also included. This included the giving of a warranty deed.

It was alleged that William T. Sack had fully performed and the plaintiff prayed for specific performance in accordance with the terms of the instrument.

As pointed out the action was also for damages and for an accounting. The assignments of error do not relate to these questions. Also there was no evidence relating thereto upon which to base a finding in favor of plaintiff. That phase of the action therefore will receive no further consideration herein.

By answer the defendant denied that either she or Carl J. Sack signed, executed, or delivered the purported contract or agreement described in the petition and she further denied that William T. Sack paid to her or to Carl J. Sack or any person in their behalf $1,800 or any other sum as a part of the purchase price of the lots described.

By this answer she put in issue the existence of the instrument as a valid, binding, and enforceable contract or agreement. The issue was tried to the court. At the conclusion of the trial a decree was entered finding against the plaintiff and dismissing her petition. A motion for new trial was thereupon duly filed which was overruled. From the decree and the order overruling the motion for new trial the plaintiff has appealed.

By the issue made by the pleadings the burden devolved on the plaintiff to prove the execution of the instrument and the consideration. In Fairchild v. Fairchild Clay Products Co., 141 Neb. 356, 3 N. W. 2d 581, it is stated: "The correct rule is that, when a party affirmatively pleads a fact which is material to the issue, he thereby assumes the burden of proving the existence of such fact." See, also, Riley v. Riley, 150 Neb. 176, 33 N. W. 2d 525; Masonic Temple Craft v. Stamm, 152 Neb. 604, 42 N. W. 2d 178; Hammer v. Estate of Hammer, 155 Neb. 303, 51 N. W. 2d 609.

As we interpret, by plaintiff's first assignment of error it is contended that the execution of the instrument was proved and the court erred in finding to the contrary.

Whether or not it was the intention of the district court to turn the decision on this point is not determi-

nable from the decree since there is no finding upon any particular fact or facts. The recital as to findings in the decree is only the following: "* * * the Court finds in favor of defendants and against the plaintiffs and finds that action of plaintiffs be dismissed with prejudice at costs of plaintiffs." It will be assumed however that the finding related to this issue.

Accordingly it becomes necessary to review the evidence on this subject. There is evidence from which it may be reasonably inferred that Carl J. Sack signed the instrument, although there is none that anyone saw him sign. The evidence in this connection is that he brought the instrument and a duplicate thereof to the home of William T. Sack and that the names of Carl J. Sack and Henrietta Sack were appended to each, also that the name of Charles A. Deklotz appeared thereon as a witness, and that he presented it as having been signed and witnessed. The evidence came from witnesses who were in the home of William T. Sack at the time or who came after Carl J. Sack came with the instrument. These witnesses testified that at the time William T. Sack signed and two of them signed as witnesses. They testified substantially, over appropriate objection, that Carl J. Sack said that the name of Henrietta Sack thereon was her signature. This was all the evidence offered by plaintiff to prove that Henrietta Sack had signed the instrument.

From the assignment of error mentioned it appears that plaintiff contends that Henrietta Sack as a witness at the trial admitted that her signature was on the instrument and that the court erred in not finding in accordance with the admission.

From a careful reading of her testimony it cannot be said that she made any such admission. From first to last she denied that she had ever appended her signature to the instrument. The plaintiff interprets testimony on pages 203 and 204 as an admission that her signature was on the instrument. It cannot be so interpreted. The

reference is obviously to the following: "Q- I'm asking you if that is really your signature. Look how the letters are made, how the name is written. * * * A- Well, I think that is our signature. Q- You said that was your signature? A- Yes." It is urged by plaintiff that these questions had reference to the instrument in question here, which is Exhibit No. 2. Immediately following the second answer the attorney for the defendant interpolated the following: "On No. 1 she is referring to." He was referring to Exhibit No. 1 whereon were admitted signatures of Carl J. Sack and Henrietta Sack. There appears no protest as to the accuracy of this protective reference made by the defendant's attorney, and furthermore there is nothing to identify the questions and answers with any instrument.

No finding is possible other than that there was total failure of proof that Henrietta Sack signed or executed the instrument on which plaintiff bases her cause of action unless it may be said that the testimony of third persons as to declarations made by Carl J. Sack was admissible and binding on the defendant.

In this connection the plaintiff advances the theory that Carl J. Sack was the agent of the defendant and therefore she became bound by his declarations.

As to this question this court has said: "The question of agency is one of fact and there is no presumption of its existence. The party alleging the existence of the agency relationship assumes the burden of proving the agent's authority and that the acts of the agent, for which liability against the principal is sought, must be shown to be within the scope of the agent's authority." Meier v. Geldis, 148 Neb. 234, 26 N. W. 2d 813. See, also, Wagoun v. Chicago, B. & Q. R. R., 155 Neb. 132, 50 N. W. 2d 810.

There was no proof adduced or offered that in the present situation Carl J. Sack was or held himself out as agent in any capacity for the defendant. The case was not presented on any theory of agency as regards the instrument. It was presented on the theory that

there was a joinder of the two in its execution.

There is no contention on the part of plaintiff that the instrument would be enforceable in the absence of a valid signature of the defendant thereon. The plaintiff therefore having failed to sustain the burden of proving the execution of the instrument by the defendant it must be said, on this basis, that the finding of the district court was correct.

Even if it be assumed that the plaintiff adduced evidence sufficient prima facie to show that this was a valid instrument validly executed and delivered, still on the weight of evidence as it appears in the bill of exceptions the judgment must be against the plaintiff.

One of the contentions of defendant was that the names of Carl J. Sack and Henrietta Sack thereon as parties and the name of Charles A. Deklotz as a witness were not their signatures, but were forgeries. As to this, as pointed out, Carl J. Sack had died before the commencement of the action. Charles A. Deklotz was dead at the time of the trial. The evidence bearing on the question came from the defendant and other witnesses purporting to have familiarity with the handwriting of these two deceased persons and persons having expert knowledge in the field of handwriting.

Without detailing what appears it will simply be said that the evidence on the contention of the defendant that these names were not the signatures of these three greatly preponderates in her favor. On this basis also the decree of the district court was correct.

In the light of these conclusions the other assignments of error require no consideration herein.

The decree of the district court is affirmed.

AFFIRMED.

MARY LOU SULLIVAN, APPELLANT, V. ARTHUR CHARLES STORZ, JR., APPELLEE.

55 N. W. 2d 499

Filed November 7, 1952. No. 33210.

1. **Trial: Appeal and Error.** An order affecting a substantial right, when made in a special proceeding, is a final order and is appealable, even though it does not terminate the action, nor constitute a final disposition of the case.
2. **Actions.** A special proceeding may be said to include every special statutory remedy which is not in itself an action.
3. **Appeal and Error.** A substantial right is an essential legal right as distinguished from a mere technical one.
4. **Actions.** Where the law confers a right, and authorizes a special application to a court to enforce it, the proceeding is special, within the ordinary meaning of the term "special proceeding."
5. **Appeal and Error: Actions.** A proceeding may be special, within the meaning of the statute governing appeals, although connected with a pending action.
6. **Constitutional Law.** Our Constitution provides: All courts shall be open, and every person, for any injury done him in his lands, goods, person or reputation, shall have a remedy by due course of law, and justice administered without denial or delay. This provision is self-executing and controlling, paramount and mandatory upon all courts of this state.
7. **Continuances: Army and Navy.** Section 521, 50 U. S. C. A., Appendix, of the Soldiers' and Sailors' Civil Relief Act cannot be construed to require a continuance on a mere showing that the defendant was in the military service.
8. ———: ———. The act leaves it to the discretion of the court as to what party must come forward with the facts needed to determine whether or not the ability of a party to present his cause is materially affected by reason of his military service.
9. ———: ———. The power to stay, granted by the act, does not imply a power to stay anticipating that at some future time in the litigation's progress the ability of the service man to prosecute or defend may be materially affected by reason of his military service.
10. ———: ———. The act clearly requires that there be a present and not a mere anticipatory danger.

APPEAL from the district court for Douglas County: JAMES T. ENGLISH, JUDGE. *Reversed and remanded.*

James R. McGreevy and *John C. Mullen*, for appellant.

Munger & Rhodes, for appellee.

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

SIMMONS, C. J.

This is an action based upon alleged breach of promise of marriage and seduction. The trial court granted a continuance under the provisions of the Soldiers' and Sailors' Civil Relief Act, 50 U. S. C. A., Appendix, § 521, p. 545. Plaintiff appeals contending that the granting of the continuance was error. Defendant presents the question that the order made is not appealable. We sustain plaintiff's contention and deny that of defendant.

This action began by the filing of a petition on September 11, 1950. Motions were made and ruled upon. An answer denying generally was filed November 25, 1950, and a reply filed on the same date.

On April 25, 1951, plaintiff filed an application that the case be set for trial to a jury.

On April 27, 1951, the defendant filed an application for stay. It recited that he had been ordered to report for and had entered active military service on March 13, 1951. He attached to the application a copy of his orders to report for duty at Offutt Air Force Base, Omaha. The order indicates that his active duty was to be for a period of 21 months.

He attached also the affidavit of his attorney reciting that it was indispensable that the defendant be present and testify at the trial of this action, and be present to assist in the preparation for trial; that the defendant was subject to orders as a pilot on flying status with the Strategic Air Command which made him unavailable as a party and as a witness in the near future, or during the period of the present emergency; and that he would be materially prejudiced if the stay of proceedings was not granted.

Thereafter on May 8, 1951, the court entered an order staying the proceedings for the period of the active mili-

tary service of the defendant, and for three months thereafter, or until the further order of the court.

On December 3, 1951, the matter was taken up on oral motion to vacate the order for the stay, evidence was taken, and the matter continued for further hearing.

On January 16, 1952, plaintiff filed a written motion to set aside the order staying the trial and to set the case for trial. Plaintiff recited in her motion that defendant was stationed at Offutt Air Force Base in Douglas County, and was living with his family in Omaha, Douglas County. It appears that this motion was actually drawn and a copy served upon defendant's attorney on November 16, 1951. On March 12, 1952, the trial court denied the motion. Motion for new trial and hearing was filed on that date, and overruled on March 18, 1952.

Section 521 of the Soldiers' and Sailors' Civil Relief Act, *supra*, provides: "At any stage thereof any action or proceeding in any court in which a person in military service is involved, either as plaintiff or defendant, during the period of such service or within sixty days thereafter may, in the discretion of the court in which it is pending, on its own motion, and shall, on application to it by such person or some person on his behalf, be stayed as provided in this Act (sections 501-548 and 560-590 of this Appendix), unless, in the opinion of the court, the ability of plaintiff to prosecute the action or the defendant to conduct his defense is not materially affected by reason of his military service."

Section 524 of the Soldiers' and Sailors' Civil Relief Act, 50 U. S. C. A., Appendix, p. 577, provides in part: "Any stay of any action, proceeding, attachment, or execution, ordered by any court under the provisions of this Act (sections 501-548 and 560-590 of this Appendix) may, except as otherwise provided, be ordered for the period of military service and three months thereafter or any part of such period, and subject to such terms as may be just, whether as to payment in installments of

such amounts and at such times as the court may fix or otherwise."

Our section 25-1902, R. R. S. 1943, provides: "An order affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment, and an order affecting a substantial right made in a special proceeding, or upon a summary application in an action after judgment, is a 'final order' which may be vacated, modified or reversed, as provided in this chapter." Section 25-1911, R. R. S. 1943, provides: "A judgment rendered or final order made by the district court may be reversed, vacated or modified by the Supreme Court for errors appearing on the record."

The question then comes: Is the order here involved "an order affecting a substantial right made in a special proceeding" and as such an order from which an appeal may be taken?

We have recently restated the rules construing section 25-1902, *supra*, as follows: An order affecting a substantial right, when made in a special proceeding is a final order and is appealable, even though it does not terminate the action, nor constitute a final disposition of the case. A special proceeding may be said to include every special statutory remedy which is not in itself an action. A substantial right is an essential legal right as distinguished from a mere technical one. Western Smelting & Refining Co. v. First Nat. Bank of Omaha, 150 Neb. 477, 35 N. W. 2d 116.

It has also been held that: "Where the law confers a right, and authorizes a special application to a court to enforce it, the proceeding is special, within the ordinary meaning of the term 'special proceeding.'" Schuster v. Schuster, 84 Minn. 403, 87 N. W. 1014. See, also, Nelson v. Steele, 12 Idaho 762, 88 P. 95; Harryman v. Bowlin, 153 Okl. 202, 4 P. 2d 1011; Deppe v. Ford, 89 Minn. 253, 94 N. W. 679; State v. Rosenwald Bros. Co., 23 N. M. 578, 170 P. 42.

The Supreme Court of Wyoming construing statutes substantially identical with ours held: "* * * a proceeding may be special, within the meaning of the statute governing appeals, although connected with a pending action * * *." Anderson v. Englehart, 18 Wyo. 196, 105 P. 571.

We think it clear that the order here involved is one made in a special proceeding. That it affects a substantial right of the plaintiff is also clear. The right to a trial without unreasonable and unnecessary delay is as old as Magna Charta. Our Constitution, Article I, section 13, provides: "All courts shall be open, and every person, for any injury done him in his lands, goods, person or reputation, shall have a remedy by due course of law, and justice administered without denial or delay." This provision is self executing and controlling, paramount and mandatory upon all courts of this state. Burnham v. Bennison, 121 Neb. 291, 236 N. W. 745. We hold that the order here involved is an appealable order.

This brings us to the issue presented by plaintiff.

It is clear from this record that this suit was commenced and at issue for some time prior to defendant's call to active duty in the military service and that during that time and since, he has had the service of counsel in his home city.

The affidavit made by defendant's counsel as of April 27, 1951, except as to the fact of the defendant's military service, states the mere conclusions of the affiant. This likewise applies to the showing filed March 31, 1952, nunc pro tunc as of November 20, 1951.

The evidence produced by the plaintiff at the hearing of December 3, 1951, shows that the defendant is a Captain in the Air Force in the Strategic Air Command, a rated pilot on flying status and that during the months of March to October, inclusive, he did sufficient flying to maintain efficiency and met the minimum requirements of the Air Force. It showed further that he was on duty at Offutt Field as an adjutant of a Composite

Group; that his general duties were of an office nature with some outdoor duty and some flying; that his normal hours of duty were from 8 a. m. to 5 p. m., with half a day on Saturday; that he was sometimes on overtime and was subject to call at any time during the 24 hours of a day for a seven-day week; and that the Strategic Air Command had been on an emergency status for a number of years. It also shows that he does not live on the base, but does live in Omaha or its suburbs. The defendant's immediate commanding officer testified that it would not be his wishes, at that time, to let the defendant have leave for several days to testify because of the work load and international situation; and also that such leave would have to be approved by higher authority.

Defendant offered no evidence at this hearing. The matter was then left open for further hearing. The bill of exceptions contains no further evidence.

As the matter stood then at the close of the evidence, preserved in the bill of exceptions, the defendant was on duty in the military service and subject to that control; that he was on duty near by and living in the county where this litigation is pending and where his counsel practice law; and there is no showing that he has undertaken to consult counsel or prepare for trial during his off-duty hours, nor is there any showing of inability to prepare for trial. So far as this record discloses, no preparation for trial was made either before or during defendant's military service. Save for the fact of military service, this evidence presents a situation such as would confront any fully employed litigant who is required to prepare for and defend a case in his home county and where his counsel are. Obviously the question of a leave to attend trial would not arise until a trial date had been set. Just as obviously the defendant has not asked for leave nor undertaken to explore that situation. He has prevented the case being set for trial, an obvious preliminary to such a request. He relies

upon the fact that he is in the military service as the basis of preventing this cause coming to trial. The trial court order effectively grants that result during the rather indefinite period of defendant's military service.

The determination of an application such as that presented here depends on the facts and circumstances of each case. The act cannot be construed to require a continuance on a mere showing that the defendant was in the military service. Boone v. Lightner, 319 U. S. 561, 87 L. Ed. 1587, 63 S. Ct. 1223.

Defendant in his brief states: "It is well settled as a matter of law that a defendant who is in active military service is entitled to a stay upon filing his application therefor unless the plaintiff can satisfy the court in which such proceedings are pending that defendant's ability to conduct his defense is not materially affected by his military service."

Defendant would put the burden of the showing upon the plaintiff. There are decisions to that effect. The Supreme Court of the United States decided that question also in Boone v. Lightner, *supra*, wherein it held: "The Act makes no express provision as to who must carry the burden of showing that a party will or will not be prejudiced, in pursuance no doubt of its policy of making the law flexible to meet the great variety of situations no legislator and no court is wise enough to foresee. We, too, refrain from declaring any rigid doctrine of burden of proof in this matter, believing that courts called upon to use discretion will usually have enough sound sense to know from what direction their information should be expected to come. * * * We think the ultimate discretion includes a discretion as to whom the court may ask to come forward with facts needful to a fair judgment."

The conclusions which defendant stated by affidavit and argue here rest upon facts particularly within the knowledge of defendant and his counsel and in part upon acts which defendant alone must initiate. The

defendant should have come forward with those facts needful to a fair judgment. That he did not do.

The decisions which we have examined all hold, and we think properly, that the act here involved is a remedial one to be liberally construed in order that its high purposes may be carried out. However, the power to stay, granted by the act, does not imply a power to stay anticipating that at some future time in the litigation's progress the ability of the service man to prosecute or defend may be materially affected by reason of his military service. The act clearly requires that there be a present and not a mere anticipatory danger. To construe it otherwise would be to nullify the exception of the act. Liberal construction does not permit a court to do that. At best there was but an anticipatory danger when the court entered the order involved here.

In Boone v. Lightner, *supra,* the court held that the stay is not to be withheld on nice calculations as to whether prejudice may result from absence or absence result from the service; that absence when one's rights or liabilities are being adjudged is usually prima facie prejudicial; but absence in some cases may be a policy instead of the result of military service, and that the immunities of the act are not to be put to such unworthy use. We hold that the trial court abused its discretion in the order made.

There is one further showing which we deem it advisable to mention even though defendant does not stress or mention it in his brief here. On the 31st of March, 1952, there was filed an additional showing by the defendant nunc pro tunc as of January 9, 1952. There appears also an order of the court permitting the filing and reciting that the showing was submitted during the hearing before the court, but through inadvertence was not filed with the clerk.

Attached to the showing is a copy of orders of the Offutt Air Force Base, Omaha, Nebraska, dated December 26, 1951, "Subject: Temporary Duty Travel," di-

recting defendant to proceed to Maxwell Air Force Base to report there on January 4, 1952, for approximately nine-weeks' course of instruction and upon completion to return to his proper station. The statement of defendant's counsel, to which the copy of orders is attached, recites that defendant received the orders, and in compliance therewith was then (January 9, 1952) at Maxwell Air Force Base in Alabama; that defendant could not obtain leave, and if the order involved was vacated and the cause set for trial defendant could not be personally present at the trial.

Assuming but not deciding that the showing is for consideration here, and assuming but not deciding that the showing would have been sufficient to stay the trial until defendant returned from his temporary duty in Alabama to his proper station at Offutt Air Force Base and for a reasonable time thereafter, we think it obvious that absence from Omaha on temporary duty did not justify denial of the plaintiff's motion and the continuing in effect of the order of April 8, 1951.

The order of the district court is reversed and the cause remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

CERTAIN-TEED PRODUCTS CORP., A CORPORATION, APPELLANT, V. TURNER M. CARLISLE, DOING BUSINESS AS CARLISLE INSULATION SERVICE, APPELLEE, AND OMAHA INDUSTRIAL HOUSING CORPORATION, GARNISHEE-APPELLEE.

55 N. W. 2d 489

Filed November 7, 1952. No. 33216.

1. **Garnishment.** A judgment creditor's claim in garnishment rises no higher than that of his debtor.
2. ———. In a garnishment proceeding by a judgment creditor an explanation by the garnishee of a credit appearing on its

books in favor of the judgment debtor is a proper and appropriate part of the answer.

3. ———. Where liability of a garnishee to a judgment debtor is wholly dependent on the collection of money from a third person it is contingent and not subject to levy of garnishment.

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

George H. Thompson, for appellant.

Frost, Peasinger & Meyers and *King, Haggart & Kennedy,* for appellees.

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

YEAGER, J.

On January 25, 1952, Certain-teed Products Corp., a corporation, plaintiff and appellant, obtained a judgment against Turner M. Carlisle, doing business as Carlisle Insulation Service, defendant, for $4,268.79 including interest and costs. An execution was thereafter issued on the judgment which was returned unsatisfied. After return of the execution plaintiff's attorney filed an affidavit setting forth that he had reason to and did believe that the Omaha Industrial Housing Corporation had property of and was indebted to the defendant. On the affidavit a summons in garnishment was issued and served upon the Omaha Industrial Housing Corporation as garnishee. William Parkinson, secretary-treasurer of the garnishee, appeared in open court and made answer in response to the summons. Following the answer an order was duly entered discharging the garnishee. From this order the plaintiff has appealed. The garnishee is the appellee herein.

There are numerous assignments of error but the only question for determination is that of whether or not the answer disclosed that the garnishee at the time had money or property of the defendant in its possession or control which in the garnishment proceeding could be

subjected to the payment of the judgment of plaintiff against the defendant. The district court found that it did not.

The answer disclosed that there was a credit on the books of the Omaha Industrial Housing Corporation in favor of the defendant in the amount of $4,151.98. It was explained however that this did not represent a presently enforceable indebtedness, but that it was a liability which depended upon a contingency. As substantially explained by Parkinson, Wright Realty Company was the borrower of money from the Chase National Bank for the construction of housing in Omaha, Nebraska. Wright Realty Company contracted with the garnishee to construct the housing. The defendant was a subcontractor of the garnishee. For performance of the subcontract it was agreed that the defendant was to receive $24,926. Of this amount he did receive $20,774.02 thus leaving a credit balance on the books of the garnishee of $4,151.98. This however did not represent a present indebtedness for the reason that by the subcontract in the following terms it was agreed that the contractor, the garnishee, should not be liable to the defendant for payment in excess of the amount which the contractor receives from the owner, Wright Realty Company, for the subcontractor's work: "XVII. That the Contractor shall not be liable for, nor bound in any respect to the Sub-Contractor for the payment to him on his monthly or final estimates of any moneys in excess of the amount which the Contractor receives from the Owner for the Sub-Contractor's work." The $4,151.98 credit on the books represented the amount which had not been received for the subcontractor's work.

The plaintiff does not in the record question the authenticity of this explanation of Parkinson. Its contention is in substance that the statement as to the credit in favor of defendant on the books of the garnishee should be accepted as the admission of a present unqualified indebtedness and obligation to pay, and that

an explanation of the credit was improper and inadmissible.

This contention is clearly untenable. A judgment creditor's claim in garnishment can rise no higher than that of his debtor, who in this instance is the defendant. Cahn v. Carpless Co., 61 Neb. 512, 85 N. W. 538; Royal Tire Service v. George W. Bell Co., 139 Neb. 238, 297 N. W. 88; Smith v. Brooks, 154 Neb. 93, 47 N. W. 2d 389.

In the very nature of things under this rule of law the character and quality of the claim of the judgment debtor against the garnishee is subject to explanation by the garnishee. Otherwise the rule would have no force and effect.

The answer in garnishment shows that the liability of the garnishee was contingent and dependent upon the collection of money from a third party.

In Salyers Auto Co. v. DeVore, 116 Neb. 317, 217 N. W. 94, 56 A. L. R. 594, it was pointed out that where a future liability to a defendant was wholly dependent on the collection of money from third persons it was contingent and not subject to levy of attachment or garnishment.

The effect of the order of the district court was to say that whatever, if any, liability there was on the part of the garnishee to the defendant was contingent and dependent upon the collection of money from a third party and therefore not the subject of levy of garnishment. It was in nowise in error.

The judgment of the district court is affirmed.

AFFIRMED.

DAROLD E. BUSSELL ET AL., APPELLANTS, V. CLIFTON McCLELLAN ET AL., APPELLEES.
55 N. W. 2d 606

Filed November 21, 1952. No. 33142.

SUPPLEMENTAL OPINION

APPEAL from the district court for Greeley County: WILLIAM F. SPIKES, JUDGE. On oral argument on motion for rehearing. See 155 Neb. 875, 54 N. W. 2d 81, for original opinion. *Opinion modified. Motion for rehearing denied.*

P. J. Barrett and *Blackledge & Sidner,* for appellants.

Davis & Vogeltanz and *Kirkpatrick & Dougherty,* for appellees.

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

YEAGER, J.

The following is substituted for the last paragraph of the opinion which was adopted in this case and with this substitution the motion for rehearing is denied:

The decree is reversed and the cause remanded with directions to the district court to render a decree in favor of plaintiffs and against the defendants enjoining the defendants from collecting and combining the surface waters on their respective lands and as combined discharging them upon the lands of plaintiffs, and from continuing and maintaining the works above the Malottke land the effect of which is to allow the combination of waters above with those on the land of the defendant Malottke and as thus combined to be carried onto the lands of plaintiffs.

OPINION MODIFIED. MOTION FOR REHEARING DENIED.

IRVING SNYDER, DOING BUSINESS UNDER THE FIRM AND STYLE OF DENVER CAR & TRUCK MARKET, APPELLANT, V. HARRY LINCOLN, DOING BUSINESS UNDER THE FIRM AND STYLE OF LIBERTY CAR COMPANY, ET AL., APPELLEES.
55 N. W. 2d 614

Filed November 21, 1952. No. 33180.

1. **Appeal and Error.** When this court determines the law of the case on appeal, the trial court is bound thereby and its judgment in accordance therewith will not ordinarily be disturbed on a subsequent appeal.
2. ———. The decision of an appellate court becomes the law of the case and the legal effect of evidence once determined will not be reconsidered here on a second appeal where there has been no material change in the evidence on the second trial.
3. ———. Findings of the court in a law action in which a jury is waived have the effect of a verdict of a jury and will not be disturbed unless clearly wrong.
4. **Automobiles.** A certificate of title to a motor vehicle, issued pursuant to section 60-105, R. R. S. 1943, provides the exclusive method of conveying title to a motor vehicle, but it is not conclusive of ownership.
5. **Trial: Appeal and Error.** The admission of incompetent evidence in a law case tried to the court without a jury is immaterial if the judgment is supported by sufficient competent evidence.

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

Levin & Brodkey, for appellant.

Wear & Boland, for appellees.

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

CARTER, J.

This is an action in replevin whereby the plaintiff seeks to gain possession of a Chevrolet automobile from the defendants Harry Lincoln, doing business as the Liberty Car Company of Omaha, Nebraska, and Chauncey Eugene Wilson. A jury was waived and the case tried to the court. The trial resulted in a judgment dismissing the petition and a finding that defendant re-

cover from plaintiff the sum of $2,200 plus interest in the amount of $550 and the costs of the action. Plaintiff appeals.

This is a third appeal. The two former appeals were disposed of by opinions of this court. Snyder v. Lincoln, 150 Neb. 580, 35 N. W. 2d 483; Snyder v. Lincoln, 153 Neb. 611, 45 N. W. 2d 749. The general factual situation is recited in those opinions and will not be repeated here except as necessary in dealing with the assignments of error relied upon. The defendant Lincoln was dismissed as a party defendant at the close of the second trial. No appeal was taken from that order. It became final as to him.

Appellant operated the Denver Car & Truck Market in Denver, Colorado. On Saturday, August 30, 1947, a stranger came to appellant's place of business to buy an automobile. After finding one he liked he stated he desired to show it to his wife who was staying at some distant point in the city. The stranger, who gave his name as R. Bryan Owen, gave a check for $2,499, the full purchase price of the car. Owen was then permitted to drive the car away. It was approximately 3 p. m. The banks were closed. Monday was Labor Day and consequently a bank holiday. The car was never returned. The check was worthless, a fact which was discovered when it was presented for payment on September 2, 1947. The details of the transaction, the conflicting stories told by appellant, and his conduct following the loss of the car are meticulously set forth in the opinion on the second appeal. The primary issue is, of course, whether or not the car was sold to R. Bryan Owen with the intention of conveying the title thereto.

There can be no doubt that the law of Colorado is applicable to this part of the transaction. We held in the second appeal of this case that the Colorado law is: "A purchaser of an automobile in that state may acquire title without complying with the law thereof on the subject of the transfer of title of motor vehicles. Non-

compliance may subject the buyer to a penalty, but his title to the vehicle, the subject of the sale, is not affected by his omission or violation." After a rehearing this statement was adhered to by this court. Appellant again challenges the correctness of this holding. This he is not permitted to do. It has become the law of the case under numerous decisions of this court. In re Estate of Shierman, 132 Neb. 45, 270 N. W. 841; De Lair v. De Lair, 148 Neb. 393, 27 N. W. 2d 540; Floyd v. Edwards, 152 Neb. 673, 42 N. W. 2d 292.

Appellant devotes considerable space in his brief to the proposition that his evidence is direct and uncontroverted, and far more worthy of belief than that of appellee. These are questions to be determined by the trier of the facts which in this case was the court, a jury being waived. There is evidence in the case which, if believed, would sustain a finding that appellant sold the car to Owen with intent to convey the title. He accepted Owen's check and permitted him to drive the car away. It is possible that appellant did not consider the sale completed because the details as to a written title had not been completed. This does not preclude a finding under the rules announced in the opinion on the second appeal that appellant intended to pass the title and accepted a check for $2,499 as payment for the car. Appellant attempted to cash the check. If it had been paid could anyone doubt that the sale would have been considered consummated? The conduct of appellant and exhibits offered in evidence tend to sustain appellee's position. It is true that some of this evidence was discredited, as was some that was offered by the appellant. The weighing of the evidence was for the court, and its finding in a jury case will not be interfered with where there is competent evidence to support it. Western Land Roller Co. v. Schumacher, 151 Neb. 166, 36 N. W. 2d 777; Foltz v. Brakhage, 151 Neb. 216, 36 N. W. 2d 768. The evidence was substantially the same on this trial as at the second. On appeal, after the second trial, the judg-

ment was reversed and the cause remanded for a new trial because of errors occurring during the trial to the jury. This is in effect a holding that the case was one for the jury. Kline v. Metcalfe Construction Co., 148 Neb. 357, 27 N. W. 2d 383. In fact it was specifically held in the second appeal as follows: "The challenge of appellant to the sufficiency of the evidence to justify and require the submission of this case to the jury to determine whether he had made a sale of the automobile to Owen, or whether he had come into possession of it as appellant claims by larceny, cannot be sustained." We do not depart from that conclusion. There is evidence to sustain the trial court's findings and, there being a conflict of evidence, we cannot say that the trial court was wrong. Albers v. Ziegler, 151 Neb. 408, 37 N. W. 2d 590.

The appellant contends that, even if this court concludes that the evidence is sufficient to support a finding that appellant had actually sold and delivered the automobile to Owen but was induced to do so by Owen's fraud in giving a "no-account" check in payment of the same, still under the law of Colorado the legal title to the automobile did not pass to Owen. The law of Colorado seems to be that where property is sold to be paid for in cash on delivery and the buyer pays for the same with a bad check, no title to the property passes to the purchaser. First State Bank v. Kohl, 79 Colo. 620, 247 P. 571; Johnston v. First Nat. Bank, 108 Colo. 188, 115 P. 2d 56. Even though this be true, it is still a question of fact as to whether or not the sale was for cash. The evidence shows that appellant's salesman said to Owen that only cash or a certified check would be acceptable as payment. But there is evidence that Owen was permitted to take the car when he left a check that was not certified in payment for the car. There can be little doubt under the evidence adduced that, if the check had been paid when the bank opened on the Tuesday following, the sale would have been considered complete. We think there is evidence to sustain the finding of

the trial court that appellant, or someone acting for him, accepted the check as payment and did not insist upon cash or a certified check before the car was delivered. If this be so, the rule announced in the Colorado cases would not be controlling. But in any event, the question was decided by the former appeal wherein it is said: "If Owen obtained the car from appellant by a sale induced by fraud, and as a result thereof title passed to Owen, and thereafter appellee was an innocent purchaser of and acquired the title thereto, he took it free from any right of appellant to rescind the sale and reclaim the automobile. * * * In other words, if after the seller delivers possession to the buyer pursuant to a sale induced by the buyer's fraud the property has passed into the hands of a bona fide purchaser for value, the right of the original seller to recover the property is lost. Snyder v. Lincoln, *supra;* Uniform Sales Act, § 69-424, R. R. S. 1943; 46 Am. Jur., Sales, § 471, p. 635." Snyder v. Lincoln, 153 Neb. 611, 45 N. W. 2d 749. See, also, Sullivan Co. v. Larson, 149 Neb. 97, 30 N. W. 2d 460. These holdings demonstrate the lack of merit in this contention.

The record shows that the defendant Lincoln obtained a Nebraska certificate of title to the car in question which he later assigned to the defendant Wilson. In this connnection it is argued that Blixt v. Home Mutual Ins. Co., 145 Neb. 717, 18 N. W. 2d 78, stated the then existing rule interpreting section 60-105, R. R. S. 1943, the Nebraska automobile certificate of title law, and that it is quoted with approval in the opinion on the first appeal of the present case to this court. Pending further litigation the case of Loyal's Auto Exchange, Inc. v. Munch, 153 Neb. 628, 45 N. W. 2d 913, was decided by this court in which the court receded from the statutory interpretation announced in the Blixt case. Appellant contends that the pronouncement in the first appeal became the law of the case irrespective of the court's change of position in the Loyal's Auto Exchange case. In support of this contention appellant cites, among

others, the following cases: Gaines v. Rugg, 148 U. S. 228, 13 S. Ct. 611, 37 L. Ed. 432; Anthon State Bank v. Bernard, 198 Ia. 1345, 201 N. W. 59; In re Estate of Wecker, 123 Neb. 504, 243 N. W. 642. We do not think it is necessary to determine this point. In Loyal's Auto Exchange, Inc. v. Munch, *supra*, we said, in effect, that a purchaser who receives possession of an automobile without obtaining a certificate of title thereto, in accordance with the statute, acquires no title or ownership therein. We did not say that the possession of a certificate of title was an absolute muniment of title. A thief with a certificate of title to a stolen automobile does not divest the owner of his right to take it wherever he can find it. A certificate of title is essential to convey the title to an automobile, but it is not conclusive of ownership. It is simply the exclusive method provided by statute for the transfer of title to a motor vehicle. It conveys no greater interest than the grantor actually possesses. Consequently, the point here raised does not become important in the present case. If the rule in the Blixt case is the law of the case, the question for determination becomes one of fact which has been determined adversely to appellant on conflicting evidence. If the rule in the Loyal's Auto Exchange case applies, the right of an owner to recover his stolen automobile remains open to him.

Appellant asserts that appellee Wilson was not an innocent purchaser of the automobile under the evidence because of his knowledge of suspicious facts and circumstances sufficient to put him upon inquiry. No evidence has been pointed out to us that is any different on this question than it was on the second appeal. In the opinion in the second appeal we said: "Appellee was an innocent purchaser of the automobile and the district court correctly instructed the jury to that effect." In the absence of new evidence substantially bearing upon the issue, we hold that this question was determined by the former appeal and cannot again be litigated here.

Bohmont v. Moore, 141 Neb. 91, 2 N. W. 2d 599; Glissmann v Bauermeister, 149 Neb. 131, 30 N. W. 2d 649; Floyd v. Edwards, *supra*.

Appellant contends that the trial court erred in admitting certain exhibits in evidence. We must point out, in this connection, that the case was tried to the court without a jury. It is presumed that if incompetent evidence was received the court disregarded it in evaluating it for the purpose of arriving at its conclusion. The controlling rule is: In an action at law, tried to the court without a jury, the erroneous admission of evidence is immaterial on appeal where the judgment below is sustained by sufficient competent evidence. In re Estate of Black, 125 Neb. 75, 249 N. W. 84; Elmcreek Ditch Co. v. St. John, 127 Neb. 253, 255 N. W. 16; Thomas v. Sheldon Co., 137 Neb. 181, 288 N. W. 546.

The evidence in the present case was presented in great detail. There was new evidence in the record such as that tending to show that Owen and Pearson were one and the same person. But the evidence adduced did not have the effect of changing the issues in the case or our previous holding that the case was one for the jury. We think the case is for affirmance for the reasons herein stated.

AFFIRMED.

ED BORCHERDING, APPELLEE, V. C. EDWIN EKLUND ET AL., APPELLANTS.
55 N. W. 2d 643

Filed November 21, 1952. No. 33195.

1. **Trial.** If a motion for directed verdict, made at the close of the evidence in a case, should have been sustained for want of evidence to support a verdict in favor of the party against whom made it is the duty of the court, on motion for judgment notwithstanding the verdict timely made, to sustain such motion to set aside the verdict and to render judgment pursuant to the motion for directed verdict.

2. ———. 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.

3. **Automobiles: Municipal Corporations.** The duties and obligations which attend a motorist when he approaches a stop sign erected pursuant to city ordinance are the same as those which attend when he approaches one erected pursuant to statute or statutory rules of the road.

4. **Automobiles: Highways.** A driver of a vehicle about to enter a highway protected by stop signs must stop as directed, look in both directions, and permit all vehicles to pass which are at such a distance and traveling at such a speed that it would be obviously dangerous for him to proceed across the intersection.

5. ———: ———. Where the driver of a car approaching a through street or highway stops and looks and sees an approaching vehicle on the favored street or highway but erroneously judges its speed or distance or for some other reason assumes he can proceed with safety and not have a collision, the question of whether or not his conduct in doing so makes him guilty of contributory negligence is usually one for the jury.

6. **Trial.** It is the duty of the court to instruct the jury upon the issues presented by the pleadings and evidence whether requested to do so or not.

7. **Damages.** In an action for damages for personal injuries which are permanent and have impaired the earning capacity, damages for pecuniary loss by reason of decreased earning power are to be based on life expectancy immediately before the injury and for future mental and physical suffering on probable expectancy of life in plaintiff's injured condition.

8. ———. The only future pain and suffering which a jury is entitled to consider in the assessment of damages are such as the evidence shows with reasonable certainty will be experienced.

9. ———. 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.

10. **Damages: Trial.** A jury should be fully and fairly informed as to the various items of damages which it should take into consideration in arriving at its verdict. In this respect it is the duty of the trial court to instruct as to the proper basis upon which damages are to be assessed for each such item.

11. **Case Overruled.** Insofar as our holding in Chambers v. Chicago,

B. & Q. R. R. Co., 138 Neb. 490, 293 N. W. 338, is in conflict with the foregoing the same is overruled.

12. Negligence. The violation of a safety regulation established by statute or ordinance is not negligence as a matter of law, but may be considered in connection with all of the other evidence in the case in deciding the issue of negligence.

APPEAL from the district court for Dodge County: RUSSELL A. ROBINSON, JUDGE. *Reversed and remanded for a new trial.*

Sidner, Lee & Gunderson, George E. Svoboda, and *Shackelford, Spittler & Emmert,* for appellants.

Spear and *Lamme,* for appellee.

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

WENKE, J.

Ed Borcherding brought this action in the district court for Dodge County against C. Edwin Eklund and Theodore L. Wallingford for the purpose of recovering damages for injuries to his person and his car which resulted from an accident involving his and defendant Eklund's cars. The basis on which he claims the right to recover is that defendant Wallingford, while driving the Eklund car, operated it in a manner that was negligent and that such negligent operation was the proximate cause of the accident which resulted in his damages. A jury returned a verdict in favor of plaintiff. The trial court entered a judgment thereon. Defendants thereupon filed an alternative motion asking for either a new trial or judgment notwithstanding the verdict. This motion was overruled and defendants appealed therefrom.

Appellants contend there is not sufficient evidence in the record upon which to base a finding of negligence on their part and that either their motion for directed verdict or for a judgment notwithstanding the verdict should have been sustained.

In this respect the court's instruction No. 1 submitted

the following: "* * * that defendant Eklund's car operated by defendant Wallingford, who was the agent of defendant Eklund and drove with Eklund's consent, was driven northward upon Nye Avenue negligently, carelessly and recklessly, and charges particularly that defendant's car was driven at a high and dangerous rate of speed, greater than was reasonable and proper under the conditions, and in disregard of the safety of other vehicles; in failing to have defendant's car under proper control and in failing to keep a proper lookout for traffic."

In considering this assignment of error the following rules, approved in Pavlicek v. Cacak, 155 Neb. 454, 52 N. W. 2d 310, are applicable:

" 'If a motion for directed verdict made at the close of the evidence in a case should have been sustained for want of evidence to support a verdict in favor of the party against whom made, it is the duty of the court on motion for judgment notwithstanding the verdict timely made to sustain such motion to set aside the verdict and to render judgment pursuant to the motion for directed verdict.' Hamilton v. Omaha & C. B. St. Ry. Co., 152 Neb. 328, 41 N. W. 2d 139.

" '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.' Smith v. Platte Valley Public Power and Irrigation Dist., 151 Neb. 49, 36 N. W. 2d 478."

Admittedly the accident happened on Saturday, April 7, 1951, about 5:15 p. m., in the intersection of Seventeenth Street and Nye Avenue in the city of Fremont, Nebraska. It happened when a 1949 Chevrolet Tudor sedan, owned by Eklund and being driven by his employee Wallingford, ran into a 1942 Chevrolet Tudor sedan owned by appellee. At the time of the accident appellee was driving his car, then occupied by himself

and his wife, east on Seventeenth Street. Appellant Wallingford, while in the performance of his duties as Eklund's employee, was at the same time driving the Eklund car north on Nye Avenue. The collision of the two cars occurred in the southeast quadrant of the intersection. The appellee's car, at the time it was hit, was just south and east of the center of the intersection. The Eklund car ran head-on into the center of the right side of appellee's car. As a result of being hit appellee's car slid sideways stopping in the northeast corner of the intersection with its left-rear wheel over the curb and the front of the car facing generally east but somewhat to the south. The Eklund car stopped about four feet east of the center of the intersection about on a line with the center of Seventeenth Street and facing generally to the east. Both cars remained upright. The right side of appellee's car was badly smashed, the front seat was broken loose from its track, and the left-rear wheel, which was of steel, was badly damaged.

Nye Avenue runs north and south. It has a brick surface extending from curb to curb, which is 36 feet. This brick surface covers the intersection and extends 7 feet 8 inches into Seventeenth Street, which runs east and west. Seventeenth Street has a cement surface from curb to curb which is a distance of 30 feet. Nye Avenue is a through street. There is a stop sign on Seventeenth Street 20.4 feet west of the west curb of Nye Avenue. The distance on Nye Avenue from the south curb of Seventeenth Street to the north curb of Sixteenth Street, which is the first east-west street to the south, is 430 feet. On approaching Nye Avenue from the west on Seventeenth Street the view to the right, or south, is unobstructed, while to the left, or north, there are bushes and shrubs which obstruct the view in that direction. These bushes and shrubs make it necessary to approach almost to the west curb of Nye Avenue in order to see traffic coming from the north.

Appellee, who was 62 years of age, testified that he

and his wife left their home that day to do some shopping; that they drove their car for that purpose; that they proceeded south on Colson Street, on which their home is located, to Seventeenth Street and then east on Seventeenth Street; that Colson Street is just one block west of Nye Avenue; that he was driving the car and was familiar with Seventeenth Street, having often driven thereon; that he knew there was a stop sign on Seventeenth Street just before it intersected Nye Avenue; that at the time it was drizzling, with occasional snow; that the streets were wet but not icy; that he was using his windshield wiper; that as he approached Nye Aveenue and was about one-fourth of a block west of the intersection, he looked to the south and saw a car coming; that the car coming from the south was beyond Sixteenth Street and about two blocks away; that he then approached the stop sign and stopped; that he then again looked to the south and saw this car approaching just beyond Sixteenth Street; that he started up, putting his car in low, and went slowly forward because the bushes and shrubs blocked his view to the north; that when he could see to the north he looked and seeing no traffic again looked to the south; that as he again looked to the south he saw the car coming about a block away; that he continued into the intersection, driving in low, and watching ahead; that he next saw the car coming from the south just as it hit his car; that his car was in low and going between 10 and 15 miles an hour at the time of the accident; and that his car was just east and south of the center of the intersection when it was hit.

We think from these facts the jury could reasonably infer and find that the driver of the Eklund car was guilty of any one or all of the specifications of negligence submitted and therefore the court properly submitted them to the jury. It is true that the evidence of appellants presents quite another picture. However, which of the two versions of how the accident happened

is correct presents an issue of fact and not of law and therefore is a jury question.

As stated in Woracek v. Schuehart, 130 Neb. 260, 264 N. W. 670: "The jury could reasonably infer that the plaintiff stopped at the stop sign before entering the intersection, that the defendant was driving too fast and did not have his car under control because his car hit the right rear wheel of plaintiff's car, overturning it when she was almost across the intersection. Defendant could have seen plaintiff during the entire time she was passing almost the entire distance of the intersection. If he was not driving at an excessive rate of speed and had his car under control, he could have avoided hitting her, and if he did not see her, he must have been driving recklessly and without a due regard for the safety of others. The jury could infer from this evidence that the defendant was negligent and that his negligence was the proximate cause of the accident. An automobile driver should have his car under such control that upon entering an intersection he can avoid a collision with another car which is operated with due care. Thrapp v. Meyers, 114 Neb. 689, 209 N. W. 238; Smith v. Coon, 89 Neb. 776, 132 N. W. 535."

Appellants also contend appellee was guilty of contributory negligence sufficient to bar his recovery as a matter of law. We have already set forth appellee's testimony of what he did on approaching and entering the intersection. The following principles are here applicable:

"The duties and obligations which attend a motorist when he approaches a stop sign erected pursuant to city ordinance are the same as those which attend when he approaches one erected pursuant to statute or statutory rules of the road." Dale v. Omaha & C. B. St. Ry. Co., 154 Neb. 434, 48 N. W. 2d 380.

"A driver of a motor vehicle about to enter a highway protected by stop signs must stop as directed, look in both directions, and permit all vehicles to pass which

are at such a distance and traveling at such a speed that it would be imprudent of him to proceed into the intersection." Simcho v. Omaha & C. B. St. Ry. Co., 150 Neb. 634, 35 N. W. 2d 501.

As stated in 5 Am. Jur., Automobiles, § 303, p. 668: "* * * it is his duty to look both to right and left; and if a vehicle is approaching on the main or arterial highway, it is his duty to wait until such vehicle has passed, unless a prudent person would have reasonable ground to believe that such other vehicle proceeding at a lawful speed is so far distant from the intersection that he could safely cross in advance thereof."

"A driver of a vehicle about to enter a highway protected by stop signs must stop as directed, look in both directions and permit all vehicles to pass which are at such a distance and traveling at such a speed that it would be obviously dangerous for him to proceed across the intersection. See Schrage v. Miller, 123 Neb. 266, 242 N. W. 649. Before one entering such an intersection protected by a stop sign can be held negligent, no statutory violations being shown, it must appear that the approaching car was at a point which, after considering its speed, indicated that it was within the limit of danger and that to proceed would be imprudent." Meyer v. Hartford Bros. Gravel Co., 144 Neb. 808, 14 N. W. 2d 660.

"On authority and reason an ordinance designating a street as an arterial highway and requiring drivers of motor vehicles to stop before entering it from intersecting thoroughfares does not grant an exclusive privilege to drivers on the favored artery or require those crossing it to do so at their peril regardless of the duty of motorists on all public highways to obey traffic regulations and exercise due care to protect the rights of others. Where a motorist on a nonfavored street stops at an intersecting arterial highway when the intersection is clear of traffic, looks to the right and left for approaching vehicles, acting as a reasonably prudent person in the exercise of due care would act in the belief that he has

time and opportunity to safely cross, he is not liable for negligence merely because he attempts to do so." McCulley v. Anderson, 119 Neb. 105, 227 N. W. 321.

It is true that appellants' witnesses testified that appellee did not stop before entering the intersection, and proceeded without any precaution and in such a manner that the driver of the Eklund car was not able to avoid hitting him. Where the driver of a car approaching a through street or highway stops and looks and sees an approaching vehicle on the favored street or highway but erroneously judges its speed or distance or for some other reason assumes he can proceed with safety and not have a collision, the question of whether or not his conduct in doing so makes him guilty of contributory negligence is usually one for the jury. See Whitaker v. Keogh, 144 Neb. 790, 14 N. W. 2d 596. Under the evidence disclosed by the record we think the issue of contributory negligence is one of fact and not of law and was properly submitted to the jury.

Appellants further contend the evidence of appellee is so opposed to the unquestioned laws of nature, is so clearly in conflict with scientific principles as established by the laws of physics and mechanics, and is so opposed to undisputed physical facts that it is unworthy of belief. Appellants cite cases where we have so held. See, Heink v. Lewis, 89 Neb. 705, 131 N. W. 1051; Dodds v. Omaha & C. B. St. Ry. Co., 104 Neb. 692, 178 N. W. 258; Varnum v. Union P. R. R. Co., 112 Neb. 340, 199 N. W. 503.

We said in Scott v. New England Mutual Life Ins. Co., 128 Neb. 867, 260 N. W. 377: "In reviewing a law action, this court does not try the case de novo, and will not concern itself with the question as to whether the jury reached the proper conclusion of fact, where no errors of law were committed in submitting the questions to them. However, there are some exceptions to this rule, such as where it appears that the verdict is clearly wrong; the result of passion or prejudice; or

contrary to the physical facts. For an appellate court to hold that it has the legal authority to set aside the verdict of a jury in all cases where it might disagree with the conclusions of fact reached by such jury would have the indirect effect of abolishing the jury system, and thus deprive the citizen of a highly prized and constitutionally guaranteed right."

We do not think the factual situation here is one to which such principles are applicable and therefore find this contention to be without merit.

The appellants contend the trial court failed to properly instruct the jury on the subject of damages with reference to what items it could consider in measuring the amount thereof. There is evidence in the record to the effect that appellee's spinal cord was injured by the accident; that the injury to his spinal cord immediately temporarily paralyzed his arms, hands, left leg, groin, and kidneys; that he suffered very severe pain therefrom; that he was in the hospital for two weeks; that while in the hospital he suffered intense pain; that while the pain was reduced with the passing of time that he has continued to suffer up to the time of trial, especially while wearing a brace; that he wore a brace from July 24 to October 25, 1951; and that he was suffering from various types of pain at the time of trial which would, with reasonable certainty, continue into the future. There is also evidence in the record that he had, prior to the accident, always been in good health; that at the time of the accident he was working regularly for the Park Department of the city of Fremont; that he had been regularly working 44 hours a week and receiving $1 an hour for his services; that since the accident the only work he has been able to do was to work on this job from June 4 to July 11, 1951; that he is 30 to 35 percent permanently disabled; that he is no longer able to do physical labor, which he has done all of his life; and that he is not qualified to do other work. In this regard the expectancy tables were introduced for a man

of his age. There is also evidence of doctor and hospital bills and the cost of repairing his car.

In an action of this type the burden is on the one seeking to recover to establish by a preponderance of the evidence that the other party is guilty of one or more of the alleged acts of negligence, that if found guilty thereof that such negligence was a proximate cause of the accident, and that damages were caused as a result together with the extent thereof. These are the issues and the court should properly instruct in regard thereto.

Instruction No. 3 given by the court properly placed the burden on appellee to establish, by a preponderance of the evidence, "The amount of damages."

The only other language in the instructions on the subject of damages is the following, also found in instruction No. 3: "If, however, you find plaintiff has proved all of said propositions, by a preponderance of the evidence, and further find that plaintiff was not guilty of negligence which contributed to plaintiff's injuries, then plaintiff will be entitled to recover such damage as he has shown, by a preponderance of the evidence, to have sustained."

By instruction No. 1 the court had advised the jury the appellee claimed: "* * * That as a direct and proximate result of such negligence defendant's car ran into the right side of plaintiff's car with such force and violence as to damage plaintiff's car requiring the repairs described in the evidence, and as a further direct and proximate result of said negligence plaintiff received such physical injuries as to become permanently disabled; that said injuries caused great pain to plaintiff and he will continue to suffer great pain therefrom, all said injuries being described in plaintiff's evidence. For his first cause of action plaintiff prays judgment in the sum of $25,000 for said personal injuries. For his second cause of action he prays for the sum of $412.75 covering medical and hospital expense and $380.95 for repairs to his car; * * *."

We have often said, and it needs no citation of authority, that it is the duty of the court to instruct the jury upon the issues presented by the pleadings and evidence whether requested to do so or not.

As to some of the injuries for which damages are sought the following principles apply:

"In an action for damages for personal injuries which are permanent and have impaired the earning capacity, damages for pecuniary loss by reason of decreased earning power are to be based on life expectancy immediately before the injury and for future mental and physical suffering on probable expectancy of life in plaintiff's injured condition." Crecelius v. Gamble-Skogmo, Inc., 144 Neb. 394, 13 N. W. 2d 627.

"The only future pain and suffering which a jury is entitled to consider in the assessment of damages is such as the evidence shows with reasonable certainty will be experienced." Crecelius v. Gamble-Skogmo, Inc., *supra.*

"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." Schwarting v. Ogram, 123 Neb. 76, 242 N. W. 273, 81 A. L. R. 769.

See, also, Burkamp v. Roberts Sanitary Dairy, 117 Neb. 60, 219 N. W. 805; Jensen v. Omaha & C. B. St. Ry. Co., 128 Neb. 21, 257 N. W. 257; Nelson v. Wiepen, 154 Neb. 458, 48 N. W. 2d 387.

In computing the damages for personal injuries resulting from loss of future earning capacity allowance should be made for the earning power of money and when the loss of future earnings are considered the jury should take into account the present value of the future earnings which it finds the claimant has, by reason of his injuries, been deprived, that is, the damage for future loss of earning power is the amount thereof reduced to its present worth.

"Damages for loss of future earnings or decreased earning capacity should be reduced to their present value, and only the present value thereof should be included in the verdict. The present value of future earnings should be computed on the basis of the plaintiff's age and expectancy of life." 15 Am. Jur., Damages, § 95, p. 505.

We said in Linch v. Hartford Fire Ins. Co., 138 Neb. 110, 292 N. W. 27, 129 A. L. R. 1063: "It is always the duty of the court to instruct the jury as to the proper basis upon which damages are to be estimated. The jury should be fully and fairly informed as to the various items or elements of damage which they should take into consideration in arriving at their verdict, otherwise the jury may be confused and misled."

In Nelson v. Wiepen, *supra,* we said the following principles are applicable:

" 'Where the pleadings and evidence sufficiently raise such issue, the court in a personal injury case should properly instruct the jury concerning damages for loss of time or earnings.' 25 C. J. S., Damages, § 185, p. 890.

" 'Where the issue is duly raised, the court may and should advise the jury that it may award damages for impaired earning capacity, by instruction in proper form and correctly stating applicable rules, * * *.' 25 C. J. S., Damages, § 185, p. 891. See, also, 15 Am. Jur., Damages, §§ 379, 380, p. 818."

See, also, Lund v. Holbrook, 153 Neb. 706, 46 N. W. 2d 130.

Our attention is called to Chambers v. Chicago, B. & Q. R. R. Co., 138 Neb. 490, 293 N. W. 338, wherein it was said: "Ordinarily, this rule (that it is the duty of the trial court to instruct on the issues of the case, whether requested to do so or not) applies to the issues of a case, and an element of the measure of damages is not an issue but a basis of recovery on the issues." (Insertion ours.) However, this statement is not specifically applicable

here because the trial court entirely failed to inform the jury as to just what items it could consider in arriving at the amount of its verdict let alone the basis for assessing the amount thereof. In view of our later holdings, we do not think our holding in Chambers v. Chicago, B. & Q. R. R. Co., *supra,* correctly reflects the true rule and insofar as it conflicts with the rule hereinafter stated the same is overruled.

A jury should be fully and fairly informed as to the various items of damages which it should take into consideration in arriving at its verdict. In this respect it is the duty of the trial court to instruct as to the proper basis upon which damages are to be assessed for each such item.

In this respect we think the instruction on damages, as given by the court, failed to provide any measure by which the jury could determine that issue and consequently it cannot be said that the court performed the duty imposed upon it of instructing the jury upon the issues presented by the pleadings and evidence.

Appellants state that by its instructions Nos. 8 and 9 the court endeavored to inform the jury of the duties of a driver approaching and crossing a through or arterial street or highway but that it failed to fully do so in accordance with our holdings. In that respect they tendered two instructions, numbered 5 and 7, which they claim fully and correctly set forth such duties. They contend the trial court erred in not giving their instructions or instructions of its own to like effect.

Instruction No. 8 given by the trial court advised the jury of the duties imposed upon the drivers of vehicles upon the public streets and highways by the ordinances of the city of Fremont and by the statutes of the State of Nebraska having particular reference to the situation at hand.

In regard to any violation of these duties the instruction advised the jury as follows: "*You are at liberty* to take any violation of these laws, if any there be, into

consideration, along with all the other evidence in the case in determining whether or not the party or the parties so violating the same are chargeable with negligence in and about the accident." (Italics supplied.)

The language italicized is criticized by appellants as not properly advising the jury in regard thereto. We have often said: "The violation of a safety regulation established by statute or ordinance is not negligence as a matter of law, but may be considered in connection with all of the other evidence in the case in deciding the issue of negligence." Armer v. Omaha & C. B. St. Ry. Co., 151 Neb. 431, 37 N. W. 2d 607. See, also, Fimple v. Archer Ballroom Co., 150 Neb. 681, 35 N. W. 2d 680; Mundy v. Davis, 154 Neb. 423, 48 N. W. 2d 394.

In this regard the jury should be advised that if it finds from the evidence that any of the parties violated any of the duties imposed upon them by these ordinances and statutes that the violation thereof is not, in and of itself, negligence as a' matter of law but that such violation is only evidence of negligence which, together with all the other evidence in the case, it should consider in determining whether or not the parties, or any of them, have been guilty of negligence. See Mundy v. Davis, *supra.*

Appellants contend that instructions Nos. 8 and 9 given by the court do not sufficiently set forth the duties of a driver of a motor vehicle on approaching and entering the intersection of a through street as those duties have been defined by this court.

We have hereinbefore set forth the duties of such driver upon approaching a through street and the conditions under which, if he stops, he can proceed without being negligent by quoting from Simcho v. Omaha & C. B. St. Ry. Co., *supra;* 5 Am. Jur., Automobiles, § 303, p. 668; Meyer v. Hartford Bros. Gravel Co., *supra;* and McCulley v. Anderson, *supra.* Upon properly complying with the foregoing duties the driver, upon entering the intersection, does not have an absolute right-of-way

which permits him to proceed without looking but must continue to maintain a proper lookout for the safety of himself and others traveling upon the streets. See Dale v. Omaha & C. B. St. Ry. Co., *supra.*

In the instructions given these duties are not sufficiently set forth.

Appellants are critical of the court's instruction No. 16½, which is as follows: "You are finally instructed that when the term 'highway' is used in any of the foregoing instructions the same refers to street."

This instruction was apparently given to advise the jury that although the court's instructions, particularly Nos. 8 and 9, use both the words streets and highways, the language used applied to the situation involved. It could probably be more concisely stated but certainly it is not in any sense misleading.

In its instruction No. 15 the court defined "intersection" as: "The term 'intersection' includes the area embraced within the prolongation of the lateral boundary lines of two or more highways which join one another at an angle."

Section 39-741, R. R. S. 1943, defines "intersection" as follows: "The term 'intersection' includes the area embraced within the prolongation of the lateral curb lines or, if none, then the lateral boundary lines of two or more highways which join one another at an angle, whether or not one such highway crosses the other."

Under the factual situation here we think the definition relating to "the lateral curb lines" is the one that should have been given.

In view of what we have herein said, it cannot be said that appellants had a fair trial. We therefore reverse the judgment of the lower court and remand the cause for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

RAY PURDY, APPELLANT, V. COUNTY OF MADISON, APPELLEE.
55 N. W. 2d 617

Filed November 21, 1952. No. 33204.

1. **Waters.** Where surface water flows in a well-defined course in a ditch, swale, or draw, in its primitive condition, its flow cannot be lawfully arrested by a landowner to the injury of neighboring proprietors.
2. **Waters: Counties.** What a private landowner may not do neither may a county nor other public authority do, except in the exercise of eminent domain.
3. ———: ———. Where a county wrongfully diverts surface waters flowing in a well-defined watercourse and casts them upon the lands of an adjoining landowner where it was not wont to run in its natural state, injunction affords a proper remedy.
4. ———: ———. Section 39-809, R. R. S. 1943, refers to damages resulting from the construction of bridges, culverts, or highways through the fault, neglect, or oversight of county officers, and has no relation to the unlawful diversion of surface waters flowing in a natural watercourse to the damage of adjoining landowners.

APPEAL from the district court for Madison County: LYLE E. JACKSON, JUDGE. *Reversed and remanded with directions.*

Bernard Ptak, for appellant.

Andrew D. Mapes and *James F. Brogan,* for appellee.

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

CARTER, J.

The plaintiff seeks an injunction against the County of Madison to restrain the defendant from diverting surface waters from a natural drainage course into the north ditch of a county road where it is carried to the east to the damage of the plaintiff. The trial court found against the plaintiff and dismissed the action. Plaintiff appeals.

Plaintiff is the owner of the southeast quarter of Section 2, Township 22 North, Range 1, West of the 6th

P. M., Madison County, Nebraska. The southwest quarter of the section is owned by Carl Goetsch. A county road runs along the south side of these two quarter sections. The quarter section across the road south of plaintiff is owned by Gus Gall and the quarter section south of the Carl Goetsch land belongs to one Kropp. The evidence shows that surface waters from the Goetsch land and from a very small acreage on plaintiff's land formerly drained across the road to the south and east into a drainage course 700 to 800 feet south of the road and running generally to the east and north. The county formerly maintained a culvert across the road about 24 feet west of plaintiff's southwest corner through which the surface waters formerly drained. Plaintiff testifies that the culvert was covered up when the grade of the road was raised in 1948. One of the county commissioners says that he had not seen a culvert at this point for several years prior to 1948. The evidence is quite conclusive, however, that water did not run down the north road ditch prior to 1948. The evidence in this respect shows that there is a ridge approximately two feet higher than the road extending from a point 210 feet east of plaintiff's southwest corner in a northwesterly direction into the Goetsch lands. It was not until the road was constructed and the road ditches were cut through this ridge that water could flow to the east. It is clear from the evidence that the natural course of the surface waters here in question was to the south or southeast and that they crossed under or over the county road at a point about 24 feet west of plaintiff's southwest corner. The question raised, therefore, is whether the county could properly cover up the culvert and dam the natural drainage course where the surface waters were wont to flow in a state of nature. In so doing, the county carried the water in the north road ditch, doing damage to the plaintiff's driveway and to his meadow land on the east side of his quarter. We have held many times that water cannot be so diverted from its natural

drainage course as it existed in a state of nature to the damage of another.

"It is the duty of those who build structures across natural drainways to provide for the natural passage through such obstructions of all waters which may be reasonably anticipated to drain there, and this is a continuing duty." Crummel v. Nemaha County, 118 Neb. 355, 224 N. W. 864.

"Where water, be it surface water, the result of rain or snow, or the water of springs, flows in a well-defined course, be it ditch or swale or draw in its primitive condition, and seeks its discharge in a neighboring stream, its flow cannot be arrested or interfered with by a landowner to the injury of the neighboring proprietors, and what a private proprietor may not do neither can the public authorities, except in the exercise of the right of eminent domain." Roe v. Howard County, 75 Neb. 448, 106 N. W. 587, 5 L. R. A. N. S. 831.

Water flowing in a well-defined watercourse cannot be lawfully diverted and cast upon the lands of others where it was not wont to run in the course of natural drainage. Leaders v. Sarpy County, 134 Neb. 817, 279 N. W. 809; Born v. Keil, 146 Neb. 912, 22 N. W. 2d 175; Andersen v. Town of Maple, 151 Neb. 103, 36 N. W. 2d 620; Jack v. Teegarden, 151 Neb. 309, 37 N. W. 2d 387; Pint v. Hahn, 152 Neb. 127, 40 N. W. 2d 328.

Where a landowner wrongfully diverts waters flowing in a well-defined watercourse and casts them upon the lands of an adjoining landowner where it was not wont to run in its natural state, injunction affords a proper remedy. Pospisil v. Jessen, 153 Neb. 346, 44 N. W. 2d 600; Andersen v. Town of Maple, *supra;* Jack v. Teegarden, *supra.*

Under these holdings it is clear that the lands south of the Goetsch lands were burdened with the surface waters in question. The natural course of drainage was south or southeast, the natural drainage course being across the road about 24 feet west of the southwest

corner of plaintiff's lands. The defendant county asserts that the county has the right to close culverts, extend grades, and make fills as the county deems expedient. We do not question this right when it is necessary to the construction of a suitable road; nor do we question the county's contention that damages resulting from such construction are fixed by statute. § 39-809, R. R. S. 1943. But this is not such a case. Instead of attempting to control the drainage problems generally in this territory by cutting a road ditch of sufficient depth to carry the water and offering to construct culverts and dikes to protect lands along the new course, the county should have constructed a suitable culvert or bridge over the natural drainage course as it existed in its natural state, and left to the landowners the solution of their own drainage problems. Drainage becomes important to a county in the construction of a road only when it is reasonably necessary to the protection of the road.

The plaintiff is entitled to an injunction restraining the defendant from diverting the surface waters in question from their natural course of drainage, to a mandatory injunction directing the county to construct a suitable culvert or bridge across the road at a point approximately 25 feet west of the southwest corner of plaintiff's lands, and for the costs of the action. The trial court is directed to enter a decree in accordance with the foregoing opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

KEITH M. HADDEN, APPELLEE, V. HAROLD L. AITKEN, STATE ENGINEER OF THE STATE OF NEBRASKA AND DIRECTOR OF THE DEPARTMENT OF ROADS AND IRRIGATION, ET AL., APPELLANTS.

55 N. W. 2d 620

Filed November 21, 1952. No. 33214.

1. **Constitutional Law: Statutes.** Article III, section 14, of the

Constitution of the State of Nebraska provides: "No bill shall contain more than one subject, and the same shall be clearly expressed in the title."

2. ———: ———. This constitutional provision does not require that the title be a synopsis of the law.
3. **Automobiles.** The purpose of the Motor Vehicle Safety Responsibility Act is to protect the public on the highways against the operation of motor vehicles by financially irresponsible persons and thus is referable to the police power of the state. This power is inherent in every sovereignty and permits the enactment of laws, within constitutional limits, to promote the general welfare of its citizens. Therefore, in the interests of the public the state may make and enforce regulations reasonably calculated to promote care on the part of all who use its highways.
4. **Automobiles: Constitutional Law.** A license to operate an automobile is not property, but a mere privilege, the suspension of which does not deprive the licensee of his property without due process of law.
5. **Constitutional Law.** The Fourteenth Amendment to the Constitution of the United States provides that no state shall make or enforce any law which shall "deny to any person within its jurisdiction the equal protection of the laws."
6. ———. This equality of the Constitution is the equality of right and not of enjoyment. A law that confers equal rights on all citizens of the state, or subjects them to equal burdens, is an equal law.
7. **Automobiles.** A license to operate an automobile upon the highways of the state is a privilege and not a property right, and the power given the Department of Roads and Irrigation to suspend such operating privileges is an administrative and not a judicial function.

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

Clarence S. Beck, Attorney General, and *Clarence A. H. Meyer,* for appellants.

Leonard Dunker, for appellee.

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

WENKE, J.

Keith M. Hadden filed his petition in the district

court for Lancaster County on November 23, 1951, wherein he made Harold L. Aitken, State Engineer of the State of Nebraska and Director of the Department of Roads and Irrigation, the Department of Roads and Irrigation of the State of Nebraska, and Roy W. Blazek, Division Assistant of the Motor Vehicle Division of the Department of Roads and Irrigation of the State of Nebraska, defendants. The purpose of the action is to permanently enjoin the enforcement of an order of the Motor Vehicle Division of the Department of Roads and Irrigation of the State of Nebraska dated October 30, 1951. This order was issued pursuant to the provisions of the Motor Vehicle Safety Responsibility Act, Laws 1949, c. 178, p. 482, hereinafter called the Act. As a basis for such relief plaintiff contends the Act, now sections 60-501 to 60-569, R. R. S. 1943, is, in several respects, unconstitutional.

Defendants demurred to the petition and, upon the demurrer being overruled, elected to stand thereon. The court thereupon entered judgment for the plaintiff wherein it directed the defendants, and each of them, to suspend the order of October 30, 1951. The court also ordered that the license, registration certificate, and license plates of the plaintiff "be and remain" in full force and effect and that plaintiff have all the privileges evidenced thereby. The defendants have appealed from this decree.

The petition sets forth the following factual situation: That plaintiff is a resident of Lancaster County; that there had been issued to him by the State of Nebraska an operator's or driver's license; that he was the owner of a 1948 Ford automobile; that on August 26, 1951, while operating this car, it became involved in an accident with another car owned and driven by Leona N. McConnell; that the accident happened at or near the intersection of Third and Hereford Streets in West Lincoln; that plaintiff was not responsible for the accident; that plaintiff reported the accident to the Department

of Roads and Irrigation of the State of Nebraska; and that plaintiff did not carry liability insurance or bond for the payment of any damages that might result from the operation of his car.

This report was made pursuant to the following requirements of the Act: "The operator of every motor vehicle which is in any manner involved in an accident within this state, in which any person is killed or injured or in which damage in excess of fifty dollars is sustained to the property of any one person including such operator, shall within ten days report the matter in writing to the department." § 60-505, R. R. S. 1943.

"* * * Department means Department of Roads and Irrigation; * * *." § 60-501, R. R. S. 1943.

The Act provides, when such report is made, that: "Within sixty days after the receipt of a report of a motor vehicle accident within this state which has resulted in bodily injury or death, or damage to the property of any one person in excess of fifty dollars, the department shall suspend (1) the license of each operator and all registrations of each owner of a motor vehicle in any manner involved in such accident, * * * unless such operator, owner or both shall deposit security in a sum which shall be sufficient, in the judgment of the department, to satisfy any judgment or judgments for damages resulting from such accident which may be recovered against such operator or owner; *Provided,* notice of such suspension shall be sent by the department to such operator and owner not less than ten days prior to the effective date of such suspension and shall state the amount required as security." § 60-507, R. R. S. 1943.

In view of the accident being reported and in accordance with the provisions of the Act hereinbefore quoted, appellee not coming within any of the situations enumerated in sections 60-508 and 60-510, R. R. S. 1943, to which the provisions of section 60-507, R. R. S. 1943, are not applicable, the Department of Roads and

Irrigation, through its Motor Vehicle Division, delivered to appellee the order of October 30, 1951. This order notified appellee of the financial security requirements of the Act and advised him that unless he complied therewith his privilege of operating a motor vehicle on the public streets or highways of the state, together with the license evidencing that privilege, and his privilege of using any motor vehicle owned by him on the public streets or highways of the state, together with the registration certificates and plates evidencing such privilege, were being suspended as of November 11, 1951, and would remain suspended until the financial security requirements of the Act had been fully complied with.

It is the enforcement of this order which the appellee seeks to have permanently enjoined. He has not complied with the financial security requirements of the Act or the order.

No question is raised by appellee that the procedures provided by the Act were not followed. It is his claim that, although followed, they are not sufficient to protect his constitutional rights.

Appellants again raise their motion to dismiss the proceedings. This motion we have already denied. The basis for the motion is that appellee did not file his petition during the time within which section 60-503, R. R. S. 1943, provides that appeals must be taken. This section provides: "Any person aggrieved by an order or act of the department, under the provisions of sections 60-501 to 60-569, may, within ten days after notice thereof, file a petition in the district court of the county where the aggrieved person resides * * * for a review thereof; * * *."

If this proceeding is an appeal from the order of October 30, 1951, then it is out of time and the motion should be sustained. See Rhoades v. State Real Estate Commission, 152 Neb. 701, 42 N. W. 2d 610. However, we do not think the petition was for the purpose of per-

fecting an appeal from the order of October 30, 1951, but that it was filed as an original action in equity seeking to permanently enjoin the enforcement of the order of October 30, 1951, on the grounds that the legislation is, in several respects, unconstitutional.

The petition sets forth:

"j). That the Act is broader than its title in violation of the Constitution of the State of Nebraska.

"k). That the Act contains more than one subject and the same is not clearly expressed in the title in violation of Article III of the Constitution of the State of Nebraska."

Insofar as here material the title is as follows: "AN ACT relating to the giving of proof of financial responsibility of owners and operators of motor vehicles; to provide for the cancellation and suspension of motor vehicle registrations and operators' licenses under certain contingencies; to provide a construction and a savings clause; to provide penalties for violation thereof; to provide for the administration of the act; * * *." Laws 1949, c. 178, p. 482.

Article III, section 14, of the Constitution of the State of Nebraska provides: "No bill shall contain more than one subject, and the same shall be clearly expressed in the title."

We have carefully examined the Act as passed by the 1949 Legislature. It consists of 71 sections and its provisions are too numerous to analyze in detail. Appellee's objections to the title do not specifically point out in what respect the Act is broader than its title, contains more than one subject, or the subject is not clearly expressed in the title.

As said in Maher v. State, 144 Neb. 463, 13 N. W. 2d 641, by quoting from Lennox v. Housing Authority of the City of Omaha, 137 Neb. 582, 290 N. W. 451: " 'The constitutional provision does not require that the title be a synopsis of the law.' "

We find the Act has but one general object, that it

contains no matter which is not germane thereto, and that the title fairly expresses the subject of the Act. In view thereof we find no merit in this alleged violation of the constitutional requirements in regard thereto.

The purpose of this Act is to protect the public on the highways against the operation of motor vehicles by financially irresponsible persons and thus is referable to the police power of the state. This power is inherent in every sovereignty and permits the enactment of laws, within constitutional limits, to promote the general welfare of its citizens. Therefore, in the interests of the public the state may make and enforce regulations reasonably calculated to promote care on the part of all who use its highways.

As stated in Escobedo v. State of California, 35 Cal. 2d 870, 222 P. 2d 1: "The state, in the exercise of its police power, could constitutionally have required deposit of security by the owners of all vehicles as a condition to licensing them. (Opinion of the Justices, In re (1925), 81 N. H. 566 [129 A. 117, 39 A. L. R. 1023]; Opinion of the Justices, In re (1925), 251 Mass. 569 [147 N. E. 681]; Brest v. Commissioner of Insurance (1930), 270 Mass. 7 [169 N. E. 657]; Ex parte Poresky (1933), 290 U. S. 30 [54 S. Ct. 3, 78 L. Ed. 152].) Instead, the state chose to allow financially irresponsible licensed operators to drive until they became involved in an accident with the consequences described in sections 419 and 420 of the Vehicle Code and their financial irresponsibility was thus brought to the attention of the department, and then to require suspension of their licenses." See, also, Doyle v. Kahl, 242 Iowa 153, 46 N. W. 2d 52; Rosenblum v. Griffin, 89 N. H. 314, 197 A. 701, 115 A. L. R. 1367.

In his petition appellee claims the suspension order deprives him of his property without due process of law and therefore is in violation of his rights as set forth in Article I, section 3, of the Constitution of Nebraska,

and the Fourteenth Amendment to the Constitution of the United States.

Article I, section 3, of the Constitution of Nebraska provides: "No person shall be deprived of * * * property, without due process of law."

The Fourteenth Amendment to the Constitution of the United States provides, in this respect, as follows: "* * * nor shall any State deprive any person of * * * property, without due process of law; * * *."

A license is a privilege and does not create property in any legal or constitutional sense. As stated in Smith v. State, 124 Neb. 587, 247 N. W. 421: "A license to operate a motor vehicle is issued, not as a contract, but as a mere privilege, with the understanding that such license may be revoked for due cause by the proper authorities."

As stated in Nulter v. State Road Commission, 119 W. Va. 312, 193 S. E. 549: "The operation of a motor vehicle on the public highways is not a natural right, nor is license to do so a contract, or property right, in a constitutional sense. It is merely a conditional privilege which may be suspended or revoked under the police power, even without a notice or an opportunity to be heard. '* * * revocation of license (automobile) by state board of public roads without hearing does not operate so as to deprive of property without due process.' La Plante v. Board, 47 R. I. 258, 131 A. 641. Accord: People v. Harnett, 224 N. Y. S. 97; Burgess v. Mayor, 235 Mass. 95, 126 N. E. 456, 459-460; Babbitt, Motor Vehicle Law (4th Ed.), chapter XI; Berry, Law of Automobiles (7th Ed.), sec. 6.82."

"A license to operate an automobile is not property, but a mere privilege, the suspension of which does not deprive the licensee of his property without due process of law." 5 Am. Jur., Automobiles, § 157, p. 593.

See, also, Commonwealth v. Funk, 323 Pa. 390, 186 A. 65; Sullins v. Butler, 175 Tenn. 468, 135 S. W. 2d 930; Garford Trucking, Inc. v. Hoffman, 114 N. J. Law 522,

177 A. 882; Rawson v. Dept. of Licenses, 15 Wash. 2d 364, 130 P. 2d 876.

As stated in Doyle v. Kahl, *supra:* "Appellant further contends that the suspension of the license without a hearing is depriving him of his property without due process of law. The fallacy of this claim is that his so-called property right is not such in the ordinary sense. It is a privilege granted to him under certain specific conditions, subject to all laws pertaining thereto at the time the same is issued or may be later enacted, if otherwise valid."

We find appellee's claim to be without merit.

Appellee's petition further alleges the Act fails to provide equal protection in accordance with the Fourteenth Amendment to the Constitution of the United States.

The Fourteenth Amendment to the Constitution of the United States provides, in this respect, that no state shall make or enforce any law which shall "deny to any person within its jurisdiction the equal protection of the laws."

Under like or comparable statutes this contention has been passed on many times by other states and all contrary to appellee's contention.

As stated in Rosenblum v. Griffin, *supra:* "So far as classification is here involved, no one is unconstitutionally denied the privilege of the use of the highways with a motor vehicle. The terms and conditions of the privilege are applicable to all who avail themselves of it. They may be unfair and unreasonable, in fact, but they are not invalid. There is equality of treatment. Every licensee takes his license on the condition that if he meets with an accident while operating a car, his further right to operate shall depend upon his having or furnishing security for any liability arising out of the accident or any future accident."

"The equality of the Constitution is the equality of right, and not of enjoyment. A law that confers equal rights on all citizens of the state, or subjects them to

equal burdens, is an equal law. (State v. Griffin, 69 N. H. 1, [76 Am. St. Rep. 139, 41 L. R. A. 177, 39 Atl. 260, 264].) So long as the statute does not permit one to exercise the privilege while refusing it to another of like qualifications, under like conditions and circumstances, it is unobjectionable upon this ground." Watson v. Division of Motor Vehicles, 212 Cal. 279, 298 P. 481.

"Financial responsibility laws such as this do not unconstitutionally discriminate against the poor. (See Watson v. Division of Motor Vehicles (1931), 212 Cal. 279, 284 [298 P. 481]; Rosenblum v. Griffin (1938), 89 N. H. 314, 319 [197 A. 701, 115 A. L. R. 1367].) Those damaged by the negligence of indigent drivers may be indigent also, and as little able as the drivers to bear the cost of such negligence. The fallacy of the argument that the law favored the rich over the poor 'lies in the failure to distinguish between equality of opportunity and ability to take advantage of the opportunity which is offered to all. The equality of the Constitution is the equality of right, and not of enjoyment.' (Watson v. Division of Motor Vehicles (1931), supra, p. 284 of 212 Cal.) Those who cannot afford to possess automobiles are as little able to enjoy the opportunity of driving on the public highways as those who cannot afford insurance or security." Escobedo v. State of California, *supra.*

See, also, Opinion of the Justices, 81 N. H. 566, 129 A. 117, 39 A. L. R. 1023; Surtman v. Secretary of State, 309 Mich. 270, 15 N. W. 2d 471; Doyle v. Kahl, *supra.*

We find the classification made in the Act to come within the principle of these holdings. Consequently, we find this contention of the appellee to be without merit.

Finally appellee alleges the Act confers judicial powers on the Department of Roads and Irrigation in violation of Article II of the Constitution of the State of Nebraska.

"Statutes conferring upon administrative officers and agents quasi-judicial powers and duties, wherein they

have been interpreted by other states, have uniformly been held not to be unconstitutional as encroachments upon the judicial branch of government, and this is especially true where such powers and duties relate to matters which are peculiarly affected with public interest or are subject to regulation under police powers, or where provision is made for appeal from decisions of such agencies to the courts." Department of Banking v. Hedges, 136 Neb. 382, 286 N. W. 277.

"A license to operate an automobile upon the highways of the Commonwealth is a privilege and not a property right, and the power of the Secretary of Revenue to suspend or revoke such operating privileges is an administrative and not a judicial function: * * *." Commonwealth v. Cronin, 336 Pa. 469, 9 A. 2d 408, 125 A. L. R. 1455.

"The power conferred upon the Secretary of Revenue to revoke or suspend operating privileges is an administrative and not a judicial function." Commonwealth v. Funk, *supra.*

"'* * * As a general rule, the jurisdiction for the revocation of a license is vested in the same board, court, or officer who possesses the power to grant licenses.' (Babbitt, The Law Applied to Motor Vehicles (3d Ed.), p. 150, § 233.)" Rawson v. Dept. of Licenses, *supra.*

"In the case of Klafter v. State Board of Examiners of Architects (Supreme Court of Illinois), 102 N. E. Rep. 193 (at p. 195), it is held: '* * * Judicial power does not apply to cases where judgment is exercised as incident to the execution of ministerial power.'" Garford Trucking, Inc. v. Hoffman, *supra.*

We do not think the Act confers any judicial powers upon the Department of Roads and Irrigation by directing it, except under certain situations set forth in the Act, to suspend within sixty days after the receipt of a report of an accident which has resulted in bodily injury or death or damage to the property of any person in excess of fifty dollars the license of each operator

and all registrations of each owner of a motor vehicle involved in any manner in the accident unless security is deposited in an amount which it shall deem sufficient to satisfy any judgment or judgments for damages which may result therefrom.

We have come to the conclusion, in view of what has been herein said, that appellee's contentions as to the Act being unconstitutional in the several respects set forth in his petition are without merit. Consequently, the trial court should have sustained appellants' demurrer. We therefore reverse the action of the district court and remand the cause with directions to the trial court to sustain appellants' demurrer.

REVERSED AND REMANDED WITH DIRECTIONS.

WILLIAM PROPST ET AL., APPELLANTS, V. BOARD OF EDUCATIONAL LANDS AND FUNDS OF THE STATE OF NEBRASKA ET AL., APPELLEES, GRACE GREEN, INTERVENER-APPELLANT.

55 N. W. 2d 653

Filed November 21, 1952. No. 33240.

1. **Public Lands.** A lessee of state school land by virtue of a contract between him and the state, made before the passage and approval of the act of 1947 identified in the opinion, had a right upon the expiration of his contract to a renewal lease of the land provided no other person offered a higher bid and return to the state than the amount the lessee was willing to pay for a renewal lease of the land.
2. ———. The act of 1947 mentioned above attempted to grant a lessee of state school land upon the expiration of his contract an automatic and absolute right to a new lease of the land for a 12-year term if he possessed the statutory qualifications, had performed the covenants of his lease, and was willing to comply with the requirements of law and the regulations of the Board of Educational Lands and Funds.
3. ———. There was sufficient distinction between the situation of persons holding leases on state school lands by virtue of the

statute in force prior to the act of 1947 by the terms of which opportunity had been afforded for the presentation of bids for leases by third parties, and those who applied for and secured renewal leases under the act of 1947 by the provisions of which the making of any bids by third parties was prohibited, to allow the state to treat them as different classes.

4. **Constitutional Law: Public Lands.** The administrative action of the Board of Educational Lands and Funds in declaring renewal leases on state school lands to be void, in offering such lands for releasing at public auction taken pursuant to judicial adjudication that part of the statute under which such renewal leases had been made was invalid, and the fact that such action was taken without notice to the renewal lessees or opportunity for them to be heard did not constitute a violation of the due process requirement of the Constitution of the state.
5. **Constitutional Law.** An unconstitutional statute is, in this state, a nullity, is void from its enactment, and is incapable of creating any right or obligation.
6. **Public Lands: Trusts.** The title to the state school lands was vested in the state upon an express trust for the support of common schools without right or power of the state to use, dispose of, or alienate the lands or any part thereof except as allowed by the Enabling Act and the Constitution.
7. **Equity.** The relief granted in equity is generally what the nature of the case, the facts, and the law require not at the beginning of the litigation but at the time the decree is rendered.
8. **Injunctions.** Equity will not usually issue an injunction after the act complained of has been committed and the injury has been done.
9. ———. A litigant may not complain of the refusal of the court to enjoin acts of his adversary when the litigant has, with knowledge of the facts, participated and assisted in the performance of the acts and is the beneficiary of the result thereof.

APPEAL from the district court for Lancaster County: HARRY A. SPENCER, JUDGE. *Affirmed.*

Bruce K. Lyon, Henry W. Curtis, and *Mathews, Kelly, Fitzgerald & Delehant,* for appellants.

Clarence S. Beck, Attorney General, *Robert A. Nelson,* and *Charles Thone,* for appellees.

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

BOSLAUGH, J.

William Propst, on behalf of himself and the holders of school land leases in the State of Nebraska similarly situated, and the intervener Grace Green, sought an injunction to prevent the Board of Educational Lands and Funds of the State of Nebraska, appellee, from treating as void certain renewal leases of state school lands previously issued by it to William Propst and Grace Green, appellants, and to others alleged to be in the same class; from attempting to offer for the term covered thereby new leases of such lands at public auction; from approving any bid received at the auction; and from executing a lease to any purchaser as the result of such sale proceedings. The district court found for appellees, refused to grant an injunction, and dismissed the action.

A school land lease made before the passage and approval of the act of 1947 relating to the leasing of school lands (Laws 1947, c. 235, p. 743) was for a term of 25 years. The lessee was given the right at the expiration of his contract to apply for and receive a new lease without a public offering of a lease of the land after published notice, if no third party desired to present a bid to the board for the expiring leasehold. If a third party did offer a bid for a less amount than the lessee was willing to pay, he was entitled to a renewal lease for a 25-year term, but if the third party offered a greater amount at the auction of the lease on the land than the lessee the third party got the lease. § 72-233, R. S. 1943. A right of the lessee to a renewal lease upon the expiration of his contract was conditioned that no person offered a higher bid for the leasehold than the lessee did. State v. Platte Valley Public Power & Irr. Dist., 147 Neb. 289, 23 N. W. 2d 300, 166 A. L. R. 1196.

The legislation of 1947, above referred to, granted an existing leaseholder upon the expiration of his contract an automatic right to a new lease for a 12-year term if he was then a qualified lessee, had performed the obligations and covenants of his prior lease, and

agreed to comply with the requirements of law and the regulations of the board. After the enactment of this statute the board declined bids from third parties if the existing leaseholder was qualified and made application for a renewal of his lease. There were bids attempted to be presented by third parties for leases on some of the tracts alleged to be here involved, and inquiries were made to the board as to the openness of other of such tracts. The number of such bids or inquiries is not shown, but the evidence may be said to establish that they were substantial. The advice of the board expressed to all those who inquired in this regard was that the existing leaseholders were by law entitled to a renewal of their leases if they desired and if they could qualify. Many of the tracts on which leases expired after the 1947 act was passed, including that involved in the renewal leases of appellants, were not the subject of express bids by third parties or of an inquiry as to their availability to lease by a non-lessee. There were about 2,300 leases upon separate tracts of school lands which expired after the act of 1947 by its terms became effective and, acting under the provisions thereof, the Board of Educational Lands and Funds renewed the leases to the lessees for 12-year terms. It is these approximately 2,300 persons who are the alleged class which William Propst claims to represent.

The automatic renewal of school land leases for 12-year terms was continued for more than three years before the decision of this court that parts of the act, giving previous leaseholders a special benefit in the school lands in the form of an automatic renewal right without regard to how much or whether others were willing to pay more, were void as being violative of the Constitution of the state. State ex rel. Ebke v. Board of Educational Lands & Funds, 154 Neb. 244, 47 N. W. 2d 520, on rehearing 154 Neb. 596, 47 N. W. 2d 526. Later decisions were to the same effect. Todd v. Board of Educational Lands & Funds, 154 Neb. 606, 48 N. W.

2d 706; Watson Hay Co. v. Board of Educational Lands & Funds, 154 Neb. 613, 48 N. W. 2d 711; Hanna v. Board of Educational Lands & Funds, 154 Neb. 619, 48 N. W. 2d 715.

These decisions, and especially the Ebke case, indicated to the appellee its duty, in the situation which the invalid statute had produced, of putting the land up for releasing at public auction. The appellee without notice to the lessees formally declared that all of the renewal leases issued by it under the 1947 act were void, vacated the proceedings under which the leases were made, and by letter advised the leaseholders that the land would be offered for releasing at public auction. These things were done by the board entirely as expressed in its record because of what this court had held in the cited school land cases. The appellee because of these decisions assumed that all the leases issued by it under the 1947 act were void from the time that they were issued and created no right in anyone. Many leases have been sold and issued after notice and public auction for lands affected by the renewal leases made under the automatic renewal law. This is true as to the land described in the renewal lease automatically secured by William Propst by virtue of that law. A new lease was sold on this land, after public notice, on January 17, 1952, after this case was commenced on December 21, 1951. He was a bidder at the sale, offered the highest and best bonus bid of $6,200 for a 12-year lease of the premises, submitted an application in writing to the appellee for the lease, and paid the amount of his bid and the semiannual rental on the lease. His bid and application were approved, a lease was issued by appellee, and was received, accepted, and retained by appellant. There was no attempt made by him to delay the sale proceedings by restraining order or temporary injunction until this case was tried and determined.

Appellants argue that the validity of the renewal leases issued by appellee after the legislation contain-

ing the automatic renewal provision should be sustained because it is shown that there was no bid for or inquiry concerning a lease on any of the school land covered by the renewal leases made to them respectively by a third party; that there is no proof of any bid or inquiry in reference to any specific lease on any of the lands described in the renewal leases issued to the members of the class represented herein; that the renewal leases complied with the provisions and requirements of the law governing the leasing of school lands in effect at the time of the passage of the act of 1947; and that it should be held to govern the leases of appellants and the others in the same class. The essence of this contention is that the Ebke case does not decide that all the renewal leases issued by virtue of the 1947 legislation were invalid, but only those where a bonus bid was actually offered by a third party to appellee. This is a misconception. The opinion in that case clearly and definitely states that it was a violation of the Constitution for the Legislature to attempt to extend to previous leaseholders a renewal right which prevented the board from receiving and accepting bids from third parties. This the act of 1947 affirmatively did. The record reasonably establishes that appellants, and the others who they properly represent, were sent notices of the expiration of their respective leases by appellee as the act provided; the time within which application must be made for a renewal lease in each instance; the fact that "Before a new twelve year lease is issued" the land would be reappraised and payment of at least six months' rental based upon the new appraised value of the land covered by the lease would be required to be paid; and the new lease would be sent to the county treasurer to be delivered to the lessee upon his compliance with the requirements stated in the notice. Application was made in each instance for issuance of the lease, the requirements of the act were complied with, and a 12-year lease, not a 25-year renewal lease, was issued to each of the

previous lessees. These were applied for, issued, accepted, and retained knowingly under the act of 1947, by all who were in any way interested in and concerned with them. The judicial declaration that the automatic renewal plan of 1947 was invalid effectively disposed of any and all alleged rights of appellants granted by, applied for, and accepted by them under that act. 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. 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.

Appellants contend that they are denied equal protection of the law because they are subjected to the requirement of public auction of the leases on the lands which were the subject of the renewal leases issued under the 1947 act, whereas renewal leases on other school lands, which had been previously issued without public sale proceedings under the statute as it was before the 1947 legislation, are admittedly allowed to continue in force and effect. The situation resulting from the adjudication that the leases under the act of 1947 were invalid was such that it could not be determined what bids by third parties would otherwise have been made to appellee, and the single procedure to do justice to the schools and the interested parties was to require the lands to be put up for leasing at public auction. There was a sufficient distinction between the situation of persons holding leases on state school lands under the statute in force prior to 1947 where opportunity had been afforded for the presentation of bids by third parties, and those who applied for and accepted renewal leases under the act of 1947 where the making of any bids by third parties was barred, to allow the state to treat them as different classes.

It is asserted by appellants that the due process requirement of the Constitution of the state has been

violated by appellee declaring the renewal leases void, and in setting aside the proceedings approving and granting issuance of the renewal leases without notice to them and the opportunity for them to be heard. This postulate is without substance. It was the decision of the court in the Ebke case that gave the renewal leases their status of legal nullity, and not the action of the board in entering the fact upon its records by its declaration or by its vacation of the previous orders concerning the issuance of the leases. There was nothing the board could do or that appellants could have interposed if they had been present at the meeting of the board when this was done that would have affected the invalidity of the leases. The board did not violate rights by its action because no rights in this regard existed. Due process can only be involved when there are existing rights to be defended.

It is said by appellants that the title of the school lands granted to the state was not vested in it in trust but that the state was vested with the legal title thereto with all the ordinary incidents of other titles; that the obligation of the state is in the application of the proceeds of the grant and the state may exercise its discretion in the matter of disposing of them; and that the government of the United States alone may complain of any violation of the Enabling Act. They say that the trial court should have found that appellee was estopped to assert that the renewal leases were invalid. The school lands were received and are held in trust by the State of Nebraska for educational purposes. The state as trustee of the lands and of the income therefrom is required to administer the trust estate under the rules of law applicable to trustees acting in a fiduciary capacity. The title of the lands is not vested in the state with all the ordinary incidents of other titles but the title thereto was granted to and vested in the state upon an express trust for the "support of common schools" with no right or power of the state to use, dispose of, or alienate the

lands or any part thereof, except as allowed by the Enabling Act and the Constitution. Anyone dealing with the school lands must do so with knowledge of and subject to the trust obligation of the state. Enabling Act of Congress, Vol. 2, p. 5, R. R. S. 1943; Art. VII, § 9, Constitution of Nebraska; State ex rel. Ebke v. Board of Educational Lands & Funds, *supra;* State v. Platte Valley Public Power & Irr. Dist., *supra;* State ex rel. Walker v. Board of Commissioners, 141 Neb. 172, 3 N. W. 2d 196; Warren v. County of Stanton, 145 Neb. 220, 15 N. W. 2d 757; State ex rel. Stephan v. Taylor, 44 Idaho 353, 256 P. 953; Murphy v. State, 65 Ariz. 338, 181 P. 2d 336; Annotation, 23 A. L. R. 2d 1419.

This case was commenced on December 21, 1951. A lease on the school land described in the renewal lease automatically secured by William Propst by virtue of the 1947 act was advertised and sold to him as the highest and best bidder at public auction by appellee on January 17, 1952. He made a bonus bid of $6,200. He thereafter made application to appellee for a lease of the land, and paid his bid and the rental for six months. His bid was accepted, and a lease for a 12-year term from January 1, 1952, was issued to, accepted, and retained by him. He made no effort to have the court by order in this case delay or postpone the sale proceedings until the case could be heard and decided. On the contrary he, with full knowledge of all the facts, concurred and assisted in, and became the beneficiary of the sale of the lease on the land, the identical thing he was by this action asking the court to prevent. His conduct was inconsistent to a degree sufficient to defeat the granting by the court of the relief he asked. At the time of the trial of the case he was, as is shown by the evidence, the lessee of the land for a 12-year term commencing on January 1, 1952. The relief granted in an equity case is generally what the facts and law require at the time the decree is rendered. Stocker v. Wells, 150 Neb. 51, 33 N. W. 2d 445; Drake v. Morrow, 140 Neb. 258, 299 N.

W. 545. The remedy by injunction is generally preventive, prohibitory, or protective, and equity will not usually issue an injunction when the act complained of has been committed and the injury has been done. Conrad v. Kaup, 137 Neb. 900, 291 N. W. 687; Elson v. Schmidt, 136 Neb. 778, 287 N. W. 196.

The judgment of the district court should be and it is affirmed.

AFFIRMED.

WINFIELD M. PIERCE, APPELLEE, V. LOGAN FONTENELLE ET AL., APPELLEES, IMPLEADED WITH NETTIE GARCIA ET AL., APPELLANTS, GERALD B. EAGLETON, INTERVENER-APPELLEE.

55 N. W. 2d 658

Filed November 28, 1952. No. 33182.

1. **Appeal and Error.** A party may not predicate error upon or be heard to complain about a ruling which he has procured or has been instrumental in bringing about.
2. **Quieting Title.** In an action quia timet questions of title between the parties may be fully litigated and determined and a decree rendered assigning the title to the real estate or any part of it to the party entitled thereto.
3. **Quieting Title: Mortgages.** In such a case the court may also award such incidental relief as may be proper or necessary to make the main relief complete, such as foreclosure of a deed which has been declared to be a mortgage, and the fact that plaintiff alleges ownership in fee does not preclude the court from granting lesser relief if the pleadings and competent evidence justify it.
4. **Appeal and Error.** In a case tried to the court, either in law or in equity, the presumption obtains that the trial court in arriving at decision considered only such evidence as was competent and relevant, and this court will not reverse a case so tried because other evidence was admitted, if there is sufficient competent and relevant evidence in the record to sustain the judgment.
5. **Deeds.** It is required by statute that consideration shall be set forth in a deed of conveyance of real estate, but when title is attacked on the ground of want of consideration no burden de-

volves upon the grantee to assume the burden of proving consideration.

6. ———. When an attack is made on a deed on the ground of lack of consideration, the general rule is that the statement of consideration is prima facie evidence which may be rebutted and as a general rule a delivered deed passes title even if there is no consideration.

7. ———. Possession of a deed or other instrument of conveyance by a grantee raises a presumption that the instrument was properly delivered and the burden of proof is upon him who disputes it to overcome the presumption.

8. ———. Such a presumption exists in favor of a grantee who is unable to explain how he came into possession of the deed because disqualified from testifying on account of the death of the grantor.

9. ———. The fact that the grantee kept the deed without recording for a number of years, allowed the grantor to remain in possession, and made no claim to the property until after the grantor's death, does not necessarily overcome the presumption of delivery, when the deed, fully executed, is in his possession.

10. **Witnesses: Evidence.** When objection to the admission of evidence as to transactions or conversations with deceased has been properly made by the representative of a deceased person and erroneously overruled, the party making such objection does not waive his rights under the statute by cross-examining the witness on the same matters or offering direct evidence thereon to meet that erroneously admitted.

11. ———: ———. On the other hand, if either on cross-examination or by direct examination the representative goes beyond the scope of the inquiry to which his objection was properly made and as to which it should have been sustained, and introduces evidence of other matters in regard to the original transaction or conversation which is not admissible under the provisions of the statute, then the representative thereby waives the benefit of the statute and any related erroneous rulings of the court.

12. ———: ———. When the representative thus voluntarily opens the door for the purpose of obtaining what he affirmatively desires, he thereby waives the benefit of the statute and gives the interested party the right to further testify in his own behalf and fully explain such transaction or conversation.

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

Ralph M. Anderson and *Moodie & Burke*, for appellants.

Alfred D. Raun, Paul W. Eagleton, and *Van Pelt, Marti & O'Gara,* for intervener-appellee.

William M. Graham and *Ellenberger & Pipher,* for appellees.

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

CHAPPELL, J.

Plaintiff commenced this action to partition described farm lands, alleging that he was and had been the owner in fee simple of an undivided one-ninth interest therein since July 14, 1939. Defendants included the sole heirs at law of Eugene Fontenelle who died January 12, 1944, the executors of his estate, and The Federal Land Bank of Omaha, which at all times here involved concededly had a first mortgage on the premises.

Thereafter Gerald B. Eagleton, hereinafter called intervener, filed a motion in such action seeking permission to intervene upon the ground that he was the owner of the land by virtue of a warranty deed. Such motion was subsequently sustained by consent of all parties.

Thus a petition in intervention was filed denying that plaintiff had any right or interest in the land, and alleging that intervener was the owner of all the land in fee simple, subject to the mortgage aforesaid, by virtue of a warranty deed executed and delivered to him on January 20, 1943, by Eugene Fontenelle, hereinafter called grantor, which deed was duly recorded. He alleged that defendants had no rights or interest except by inheritance from grantor, all of which had been superseded by said deed which passed title to intervener prior to death of grantor. The prayer of such petition was for dismissal of plaintiff's petition and that title to the land should be quieted in intervener.

Thereafter defendants answered such petition in intervention, denying generally and alleging that the purported deed described in intervener's petition was null

and void because obtained by intervener as a result of fraud practiced upon grantor without any consideration paid therefor; that it was never intended by either intervener or grantor that said deed should convey title to the land described therein; and that it conveyed no title or interest to intervener, who had no right, title, or interest in the land. In that connection it alleged that prior to January 20, 1943, date of the alleged execution and delivery of said warranty deed, grantor had conveyed all his interest in the land to two named defendants by quit claim deed of which intervener had actual notice and knowledge, thus grantor then had no interest in the land which could have been conveyed to intervener. It then alleged that said deed to intervener was not recorded until December 27, 1948, during which period he never went into possession of or exercised any right of ownership or dominion over the land, therefore any right of action by virtue of the deed was barred by estoppel and laches. However, the assignments of error and argument here do not present such last-named issues, and they will not be further discussed. The prayer of defendants' answer was for dismissal of intervener's petition and that title to the land should be quieted in them.

Thereafter counsel for intervener filed an amended petition in intervention without intervener's knowledge or consent. Such petition was never signed or verified by intervener or his attorneys then or subsequently, although it was agreed by counsel for the parties that his signature might be affixed thereto prior to trial. Such amended petition alleged that consideration for the deed aforesaid, executed and delivered to intervener by grantor, was an unpaid store account in the sum of $1,581, three notes aggregating $400, and payment of $200 cash at the time said deed was executed and delivered on January 20, 1943. It also alleged that at said time it was orally agreed between intervener and grantor that in event such total of $2,181 with interest

at five percent from such date was repaid by grantor to intervener, he would return said deed to grantor or reconvey the land to him; therefore said instrument, although in form a warranty deed, was in legal effect a mortgage. It alleged that no part of such debt or interest thereon had been paid, and no proceedings at law had been had to recover the same, and that there was then due thereon the sum of $2,181 with interest from January 20, 1943. It prayed that defendants should be foreclosed of all equity of redemption or other interest in the land or that the land be sold according to law and intervener be paid the amount adjudged due him out of the proceeds thereof after payment of liens according to their priority, and for equitable relief.

On the day of the trial, defendants filed answer to such amended petition denying generally, and substantially renewing and repeating the allegations of their answer to intervener's original petition. It further alleged, however, that "said intervener had received full and complete payment of any indebtedness which the said Eugene Fontenelle may have owed to intervener in his lifetime, and that there is nothing due to intervener which might form the basis of a lien on the real estate involved herein." The prayer was for dismissal of the amended petition in intervention, and that the title to the land should be quieted in defendants. At the beginning of the trial, counsel for defendants informed the court that some of the defendants had purchased plaintiff's one-ninth interest and taken an assignment of his cause of action together with a deed to his interest in the land involved, therefore plaintiff's case would not be for trial at that time. In that connection, plaintiff, whose interest was apparently prior to that of intervener, was not a representative of deceased. Therefore, the case actually tried was the controversy between intervener and defendants. In such situation intervener was required to proceed as if he were plaintiff.

Thereat evidence was adduced by intervener and he

rested, whereupon defendants offered no evidence and rested. During the trial at conclusion of intervener's direct evidence his counsel requested leave of court to withdraw his amended petition in intervention and rely upon his original petition, the allegations of which conformed to the evidence then adduced. The trial court answered that he would reserve ruling thereon until conclusion of the case, whereupon defendants moved that intervener be then required to elect upon which theory he was trying the case, that is, whether the deed was absolute or in legal effect a mortgage. Thereupon and in response thereto intervener elected to try the case upon the theory that the deed was absolute as alleged in his original petition, and the court permitted him to do so. The trial thereafter proceeded upon that theory.

On October 23, 1951, decree was rendered finding and adjudging that Eugene Fontenelle, deceased, did during his lifetime on January 20, 1943, execute and deliver to intervener his warranty deed to the land, the consideration for which was $2,181; and that an agreement existed between the grantor and intervener that grantor had the right during his lifetime to redeem the property described in said deed by payment of $2,181 with interest at six percent from the date of the deed. Accordingly, defendants were given 90 days from entry of the decree to redeem upon payment of grantor's debt to intervener as aforesaid, and upon failure thereof defendants' equity of redemption should be foreclosed and intervener's deed become absolute, subject to the mortgage of the Federal Land Bank and plaintiff's one-ninth interest. Intervener was permitted to recover his costs in the amount of $5.25.

Defendants' motion for new trial was overruled and they appealed, assigning substantially that the trial court erred: (1) In permitting intervener during the trial to change his theory and elect to proceed upon the theory presented in his original petition; (2) in decreeing that the warranty deed involved was in legal effect a mort-

gage and decreeing foreclosure when the trial was had upon intervener's theory that it was an absolute conveyance; (3) in permitting intervener to testify concerning transactions and conversations between himself and grantor in violation of section 25-1202, R. R. S. 1943; and (4) in decreeing foreclosure and adjudging that grantor was indebted to intervener in the amount of $2,181 plus interest at six percent from January 20, 1943. We conclude that assignments Nos. 1, 2, and 3 aforesaid have no merit, but that assignment No. 4 should be sustained in part.

With regard to assignment No. 4 we conclude that the trial court was correct when it decreed strict foreclosure and found that grantor was indebted to intervener in the amount of $2,181 with interest from January 20, 1943. However, the record discloses conclusively that the rate of interest thereon should have been five percent and not six percent as allowed by the judgment. Therefore, the judgment is modified to require that the amount of $2,181 shall bear interest at five percent from January 20, 1943, instead of six percent, until the rendition of judgment in district court, after which the judgment shall bear interest at six percent. Otherwise the judgment is affirmed.

We turn back then to the first assignment which is disposed of by the well-established rule that a party may not predicate error upon or be heard to complain about a ruling which he has procured or has been instrumental in bringing about. See, Pahl v. Sprague, 152 Neb. 681, 42 N. W. 2d 367; Chambers v. Chambers, 155 Neb. 160, 51 N. W. 2d 310; Egan v. Bunner, 155 Neb. 611, 52 N. W. 2d 820, and cases cited therein.

In that connection it will be noted that intervener's election and permission to proceed upon the theory alleged in his original petition was invited and brought about by defendants' motion that intervener should be required by the court to elect in order for defendants to appropriately defend. True, thereafter defendants both

in the trial court and here were dissatisfied with the particular election which intervener made and objected thereto, but under the circumstances they cannot complain or predicate error thereon.

The second assignment was predicated upon the premise that the judgment was contrary to the theory upon which the case was tried; in other words, that the findings and judgment were foreign to the issues made by the pleadings. The action was in effect simply a suit to quiet title. In the light of appropriate allegations in their pleadings both parties prayed for such relief. It was also an in rem action. Johnson v. Samuelson, 82 Neb. 201, 117 N. W. 470, 130 Am. S. R. 666; Prudential Insurance Co. v. Zimmerer, 66 F. Supp. 492.

In Hanson v. Hanson, 78 Neb. 584, 111 N. W. 368, this court said: "The original petition filed by plaintiff in the 'title suit' was for the purpose of quieting all conflicting claims of title in the lands between plaintiff and defendant. It was instituted under the code, which, for the purpose of preventing a multiplicity of suits, has enlarged and expanded the general equity jurisdiction of the district courts, so as to permit an action of this nature at the suit of a plaintiff, whether in possession of the disputed lands or not. The plain intent of the statute is to determine in one cause of action all conflicting claims of all parties to the suit to all the lands in dispute between them. And, when the district court takes jurisdiction of such a cause of action, it takes it with power to do whatever is necessary to a full exercise of its jurisdiction, * * *." See, also, Tarnow v. Carmichael, 82 Neb. 1, 116 N. W. 1031; Foree v. Stubbs, 41 Neb. 271, 59 N. W. 798; Dolen v. Black, 48 Neb. 688, 67 N. W. 760. In such last-cited case this court held: "In an action quia timet in this state the question of title between the parties may be fully litigated and determined and a decree rendered assigning the title to the real estate or any part of it to the party entitled thereto."

In Maxwell v. Hamel, 138 Neb. 49, 292 N. W. 38, this

court said: "Statutes authorizing parties to bring action to quiet title are enabling acts (4 Pomeroy, Equity Jurisprudence, 3310, sec. 1397; 51 C. J. 136); where authorizing suit by one out of possession they are intended to enlarge and extend the equitable remedy (51 C. J. 139); and they are not penal, restrictive nor destructive (Armor v. Frey, 253 Mo. 447, 474, 161 S. W. 829)." With regard to the Missouri case therein cited, this court said: "The court * * * pointed out that the proceeding to quiet title is an action wherein the court is asked 'to ascertain and determine, define and adjudge the title, estate and interest of the parties. It does not ask for the recovery of real estate or the possession thereof. It does not ask affirmative relief. It seeks simply an ascertainment of the status quo of the title * * * to the property.' "

In 74 C. J. S., Quieting Title, § 96, p. 146, it is said: "The relief to plaintiff authorized in a suit to quiet title is equitable, and ordinarily consists in a judgment quieting title in him to, or removing a cloud on, the property in dispute, or quieting title to as much thereof as plaintiff shows himself entitled; and the fact that plaintiff alleges ownership in fee does not preclude the court from awarding him an easement. The court may also award such incidental relief as may be proper or necessary to make the main relief complete, such as foreclosure of a deed which has been declared to be a mortgage, or may, in a proper case, grant certain relief to plaintiff on finding the title to be in defendant." See, also, 51 C. J., Quieting Title, § 258, p. 271. In other words, the greater title alleged by intervener in his original petition included a lesser interest, if any, and there is no rule that prevents the court from granting lesser relief than that demanded if the pleadings and competent evidence justify such relief. See, also, Estes v. Lucky, 133 Ark. 97, 201 S. W. 815; Bashore v. Mooney, 4 Cal. App. 276, 87 P. 553.

In Northwestern State Bank v. Hanks, 122 Neb. 262,

240 N. W. 281, plaintiff brought an action to quiet title, alleging that it was the owner in fee simple, yet in the light of competent evidence adduced the trial court decreed that plaintiff's deed, absolute upon its face, was intended as security for an indebtedness of defendant to plaintiff and ordered strict foreclosure. We affirmed the judgment, modifying it only with regard to time allowed for redemption by defendant. In doing so, the opinion said: "In a case where the instrument appears on its face to be an absolute conveyance, or warranty deed, and where the title has passed to the grantee, as this court has held it does, even although the parties intended it as security for a debt, we think under the holdings of this court the grantor has conveyed to the grantee all the interest that he has in the premises, and retains only, by operation of equity, the right to pay the indebtedness to the grantee and receive a reconveyance of the title. * * * The grantor's interest, under such circumstances, is a mere right to tender the amount of money the grantee has paid for the grantor, at the contract rate of interest, and receive a reconveyance of his title. * * * In the event the grantor under the circumstances involved in this case desires to protect himself, he is required to do two things: Pay the debt, and obtain a reconveyance of his title, which, if refused, he could enforce in a court of equity. Applying the doctrines already announced by this court and treating the title as already vested in the grantee, it seems to us that the trial court could have logically rendered no other decree than one in the nature of strict foreclosure." We conclude that the second assignment has no merit.

The third assignment in effect depends upon whether or not the judgment was supported by sufficient competent evidence. We conclude that it was.

In that connection three well-established principles of law are involved and controlling. First, it is elementary that in a case tried to the court, either in law or in equity, the presumption obtains that the trial court

in arriving at decision considered only such evidence as was competent and relevant, and this court will not reverse a case so tried because other evidence was admitted, if there is sufficient competent and relevant evidence in the record to sustain the judgment. Western Smelting & Refining Co. v. First Nat. Bank, 150 Neb. 477, 35 N. W. 2d 116.

Second, this court held in Sampson v. Sissel, 151 Neb. 521, 38 N. W. 2d 341: "By statute it is required that consideration shall be set forth in a deed of conveyance of real estate but when title is attacked on the ground of want of consideration no burden devolves upon the grantee to assume the burden of proving consideration.

"When an attack is made on a deed on the ground of lack of consideration the general rule is that the statement of consideration is prima facie evidence which may be rebutted.

"As a general rule a delivered deed passes title even if there is no consideration.

"The possession of a deed or other instrument of conveyance by a grantee raises a presumption that the instrument was properly delivered and the burden of proof is upon him who disputes it to overcome the presumption."

In Kellner v. Whaley, 148 Neb. 259, 27 N. W. 2d 183, this court held: "Such a presumption exists in favor of a grantee who is unable to explain how he came into possession of the deed because disqualified from testifying on account of the death of the grantor.

"The fact that the grantee kept the deed without recording for a number of years, allowed the grantor to remain in possession, and made no claim to the property until after the grantor's death, does not necessarily overcome the presumption of delivery, when the deed, fully executed, is in his possession."

With regard to the third principle, this court held in In re Estate of House, 145 Neb. 866, 18 N. W. 2d 500, 159 A. L. R. 401: "When objection to the admission of

evidence as to transactions or conversations with deceased has been properly made by the representative of a deceased person and erroneously overruled, the party making such objection does not waive his rights under the statute by cross-examining the witness on the same matters or offering direct evidence thereon to meet that erroneously admitted.

"On the other hand, if either on cross-examination or by direct examination the representative goes beyond the scope of the inquiry to which his objection was properly made and as to which it should have been sustained, and introduces evidence of other matters in regard to the original transaction or conversation which is not admissible under the provisions of the statute, then the representative thereby waives the benefit of the statute and any erroneous rulings of the court."

In the light of such rules we have examined the record. From 1927 until early 1950 intervener and his father as partners operated a store known as Eagleton's Store at Decatur, Nebraska. He had known grantor all of his lifetime. Grantor was a customer of the store from 1927 until his death on January 12, 1944. The instrument involved was in form a warranty deed, absolute upon its face, signed by grantor, witnessed by two witnesses, duly acknowledged by a notary public as required by law, and in intervener's possession. The consideration recited was one dollar and intervener was the grantee therein. In a manner almost identical with that approved in In re Estate of House, *supra*, intervener testified that he knew the signature of grantor, and that the signature upon the deed was grantor's signature. He personally knew the notary public as such who took the acknowledgement, and likewise identified his signature. Likewise intervener identified the signatures of the two witnesses whose names appeared thereon, and without any objection testified that he saw all of them, that is the witnesses and notary, sign the same on January 20, 1943, the date of the deed which had been

in his possession since that time, and that he had recorded the same on December 27, 1948. One of such witnesses and the notary subsequently verified intervener's testimony and testified substantially that it was witnessed, acknowledged, and signed by grantor in the presence of intervener and each of them. The instrument was offered and received in evidence over defendants' objections.

When intervener attempted to establish the consideration actually given for the warranty deed, the trial court sustained defendants' objection that it was a transaction or conversation with deceased within the prohibition of section 25-1202, R. R. S. 1943. When doing so the court said in effect that under the evidence adduced and in the light of the pleadings upon which the case was tried, it was then incumbent upon defendants to go forward with their proof and show that the instrument was procured by fraud and without consideration as alleged in their answer. We said as much in both Sampson v. Sissel, *supra,* and Kellner v. Whaley, *supra.*

The intervener was then taken over for cross-examination by counsel for defendants whereat intervener in response to related questions disavowed authenticity of the amended petition in intervention, never signed or verified by him or his attorneys, and reaffirmed his contention that the instrument was in fact a warranty deed and not a mortgage. Thereupon counsel for intervener asked leave to withdraw such amended petition to conform with the evidence which at that point sustained the allegations of his original petition, whereupon defendants moved that intervener be required to elect. Intervener then elected to proceed upon his original petition. At that point, in the light of Sampson v. Sissel, *supra,* Kellner v. Whaley, *supra,* and section 76-235, R. R. S. 1943, there was ample competent evidence that the instrument, in form a warranty deed and admissible in evidence, was executed and delivered to grantee for valuable consideration.

To meet such contention defendants, having admitted in their answer the execution and delivery of the instrument, abandoned their allegations of fraud or want of consideration therefor or that said defendants had superior title and, by cross-examination of intervener, attempted to and did establish that the warranty deed so executed and delivered was in fact given as security for a debt owing by grantor to intervener, therefore in legal effect a mortgage. They attempted to do so without prejudice to their right to rely upon and avoid a waiver of the provisions of section 25-1202, R. R. S. 1943, so far as transactions and conversations between intervener and grantor pertained to a theory that the warranty deed "was intended as a mortgage," with relation to which no evidence had theretofore been erroneously admitted. We conclude, however, that on cross-examination of intervener, defendants, in order to protect their interests, went beyond the scope of the inquiry to which objection was properly made and was or should have been sustained, and thus introduced other matters in regard to the original transaction not admissible under the statute. Thus they thereby waived the benefit of the statute and any related erroneous rulings of the court. As stated in In re Estate of House, *supra:* "In other words, when the representative thus voluntarily opens the door for the purpose of obtaining what he affirmatively desires, he thereby waives the benefit of the statute and gives the interested party the right to further testify in his own behalf and fully explain such transaction or conversation." Such statement is controlling here.

In that connection defendants, upon cross-examination of intervener, asked the following questions to which the following answers were given: "Q- It was your understanding at the time that you took Exhibit 2, and your agreement with Eugene Fontenelle, was it not, that if he would repay you the money which you claim he owed you that you would give him back the deed, is that right? * * * A- Yes. Q- That he owed you? A- That

was intended, but I had an ordinary discussion with Mr. Fontenelle that if he paid me back for his account, and my notes and my $200.00, why, yes, I would give him back that deed. Q- So that you did not intend that deed to convey absolute title, you intended it as a mortgage, didn't you? A- No, I did not. Q- You did not? A- No. The mortgage on the land wasn't worth what he owed on it. Q- As security for what he owed you? A- Yes, in an indirect way I would say. Q- Your agreement with him was that you would convey it back if he paid you? A- If he paid me." Thereafter, upon redirect examination and in reply to questions to which defendants' objections were properly overruled, it was amply established by competent evidence undenied that the debt owing by grantor to intervener on January 20, 1943, as consideration for the warranty deed, was $2,181, with interest at five percent from that date. Such sum was composed of an unpaid store account of $1,581, three described promissory notes aggregating $400, and $200 paid to grantee in cash when the deed was delivered. The ledger sheets and notes had been placed in an envelope by intervener and surrendered to grantor when the deed was executed, and could not be produced by intervener. Defendants did not produce them or deny intervener's testimony that unless destroyed defendants had them in their possession.

Upon re-cross examination, intervener testified that grantor had an account with the store many years and there was a time after 1927 when he was not indebted to the store. Intervener was not sure when, but he thought it was about 1935 when grantor did not owe anything to the store, after which the store account, $1,581, accumulated, and he thought that grantor always owed the store something after that. For three years, dates not shown, intervener rented 80 acres of land from grantor, and during such time as a rule intervener paid grantor the rent therefor and grantor would pay intervener on the store account when he got the money.

Defendants produced a paid check signed by grantor, dated December 6, 1941, for $54.92, payable to "Gerald B. Eagleton" personally, upon which appeared the notation "Acct in Full." Intervener admitted that he wrote the check himself, except the identified signature of grantor thereon. The check bore the endorsement "Eagleton's Dept. Store," but was not made payable to it. Intervener admitted that such check "could have been" a payment on the store account but no other evidence appears in the record identifying the account which it did pay in full. It will be observed that December 6, 1941, was more than two years before January 20, 1943, when the deed was executed. Such check, assuming for purpose of argument only that it was payment of the store account in full on December 6, 1941, would not establish that the store account was paid in full on January 20, 1943, or that there was not $1,581 owing on that date. Intervener testified that grantor, during the period in which he was a customer, spent thousands of dollars in their store. At most such check could only reflect upon the credibility of intervener's testimony with regard to a time after 1927 when grantor was not indebted to the store.

For the reasons heretofore stated, we conclude that the judgment of the trial court should be and hereby is affirmed, except as modified, allowing intervener to recover five percent interest upon $2,181 from January 20, 1943, to October 23, 1951, the date of the judgment in district court, instead of six percent as allowed by the trial court. Defendants are given six months from the date of the mandate of this court to redeem by making payment of such indebtedness, whereupon intervener shall convey all of his right, title, and interest in the land to defendants. Costs are taxed to defendant appellants.

AFFIRMED AS MODIFIED.

WILLIAM A. RUMSEY, APPELLANT, V. SCHOLLMAN BROS. CO., A CORPORATION, APPELLEE, IMPLEADED WITH DEBUSE BROTHERS, INC., A CORPORATION, APPELLANT.
55 N. W. 2d 668

Filed November 28, 1952. No. 33189.

1. **Master and Servant: Negligence.** Where two or more independent contractors, or a general contractor and one or more subcontractors, are engaged in work on the same premises, it is the duty of each contractor, in prosecuting his work, to use ordinary and reasonable care not to cause injuries to the servants of another contractor, and an employee of one contractor may recover against another contractor for injuries caused by the negligence of the latter contractor, or of his employees acting within the scope of their employment, in the performance of a duty owed by such contractor to the injured employee.
2. ———: ———. The care necessary to avoid injury or harm must be commensurate with the danger of harm involved in the particular case.

APPEAL from the district court for Douglas County: HENRY J. BEAL, JUDGE. *Reversed and remanded.*

Brown, Crossman, West, Barton & Quinlan, for appellant.

Fraser, Connolly, Crofoot & Wenstrand, for appellee.

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

SIMMONS, C. J.

This is an action for damages against the defendant Schollman Bros. Co. based on alleged negligence in the operation of oil-burning salamanders on a construction job. At the close of the trial the court sustained a motion of the defendant for a directed verdict and dismissed the action. Plaintiff appeals. We reverse and remand.

Carl C. Wilson, Inc. was a general contractor, constructing a multiple unit apartment house in Omaha. Schollman Bros. Co., a corporation, was a subcontractor of the plumbing installations and hereinafter is called

defendant. DeBuse Brothers, a corporation, was the subcontractor of carpenter work. Plaintiff was an employee of DeBuse Brothers. DeBuse Brothers is made a defendant for purposes of subrogation under the provisions of section 48-118, R. R. S. 1943, it having paid compensation and hospital bills.

So far as is necessary for the requirements of this opinion, we summarize the evidence in accord with the rule: A motion to dismiss or for a directed verdict admits the truth of all material and relevant evidence adduced by the party against whom the motion is made, and such party is entitled to have such evidence considered in the light most favorable to him and to have the benefit of all inferences reasonably deducible therefrom in testing the validity of the court's action in disposing of the motion. Weisenmiller v. Nestor, 153 Neb. 153, 43 N. W. 2d 568.

The apartment building consisted of a basement and two stories above ground. The plaintiff's cause of action arises as a result of events happening on March 3, 1950. The day was cold. The rooms here involved were an unfinished basement room 50 feet by 30 feet in size and similar sized apartments above on the first and second floors. Studding for partitions was in place, otherwise the basement room and the apartments were all one open space. Above the basement was the rough first floor of the apartment, the boards separated by cracks. The same type of floor was on the second floor apartment, and above that were ventilator openings in the roof. Temporary doors were in place on outside openings and kept closed, and likewise the windows were closed or covered with material to keep out the cold. The ground in the basement was frozen. Defendant was using the salamander stoves to thaw out the necessary area for digging trenches. The operation had been going on for some time.

These salamander stoves have a round tank base, for fuel and the burner, which is from 22 to 24 inches in di-

ameter. Above that is a chimney placed in the center of the base on the top of which is a canopy about the size of the chimney. The top of the salamander is five to six feet above the base. Five salamanders were in use. One of them had a smaller pipe to carry gases to the center of the chimney. Four were not so equipped. None of them were equipped with pipes to carry gases or fumes out of the room. Four, and normally all five, were burning all the time. On the day involved here all five were concentrated in a 10-foot area and about five or six feet apart. Kerosene oil was being used as a fuel. Under normal operation these salamanders gave off an odor of oil and made a buzzing sound, the amount of sound depending on the amount of air going to the burner. These particular burners required refueling once or twice a day, and whenever that was done it was also necessary to clean them and remove carbon deposits from the chimneys to secure normal operation. The evidence is that the use of salamanders is common on construction jobs, and that normally they give an odor of oil and a buzzing sound. The evidence also is that when so used it is not customary to connect them with pipes to carry fumes outside the building, and for the reason that where they require frequent moving, as these did here, it was impractical to do so. There was no notice of the use of salamanders posted in the building in question. There is evidence that such notices were never used.

On the afternoon of March 3, 1950, plaintiff, who theretofore was a man in good health, finished the work he was doing in another unit of the building and between 1:30 p. m. and 2 p. m. moved into the apartment above the basement where the group of salamanders were burning. It was the apartment next in line to be worked upon by him. He began his usual work there. He noticed the usual smell of oil and heard the usual buzzing. About 2 p. m. or shortly thereafter a foreman of defendant came into the room where plaintiff was working. He noticed a "strong odor" of oil, soot on

plaintiff's face and hands, and that plaintiff looked pale. The foreman told plaintiff, "Bill, you better get out of here. This will kill you." Plaintiff answered, "I am beginning to feel it already." The foreman then left. Plaintiff picked up his tools and went outside immediately thereafter. He felt dizzy. The next he remembers, it was 4:20 p. m., and he was then outside near a pile of lumber. He went home, ate a light supper, and went to bed. That night he had pains in his chest, the next day he had developed a fever, was having chills, and a doctor was called.

On March 7 he was taken to a hospital suffering from pneumonia. He was discharged from the hospital on March 14 and was taken home for further treatment. On March 18 the symptoms had recurred and he began to have pain in his left leg. He was taken to the hospital on March 19 where his diagnosis was pneumonia. He was discharged from the hospital on April 10. He returned to work on July 24, 1950. He was paid workmen's compensation by his employer's insurance carrier in a sum about 25 percent of his normal wages. Plaintiff incurred hospital bills which were paid in part by insurance which he carried and in large part by the insurance carrier of the plaintiff's employer. He incurred a considerable physician's bill, which it appears has not been paid. Phlebitis developed in the left leg, resulting in a permanent partial disability.

The expert evidence is that where there is incomplete combustion in burners of this character carbon monoxide is given off; that very seldom are conditions ideal for complete combustion; and that whenever carbon—soot—is produced it indicates that combustion is not complete. Carbon monoxide is odorless, tasteless, and colorless, and is lighter than air. It is extremely poisonous physiologically. One part to 1000 parts of air is injurious and fatal in half an hour and in many cases the person breathing it simply loses consciousness.

Plaintiff's attending physician, following the history

of the fumes, testified that the pneumonia was "Probably an inhalation type"; that "a marked factor in developing the pneumonia was inhalation of the fumes * * * The time element fits in * * * that was the probable cause and possibly was the cause * * * I don't think I could say it was * * * it would look to me like the inhalation was a big factor in the development of it."

As to the phlebitis the evidence is that "anything that retards the blood flow like a person being in bed could be a causative factor * * * being in the hospital and being off his feet could have something to do with it * * * immobility * * * could have been a factor * * *."

Plaintiff pleads that defendant was negligent in three particulars: "(a). In operating five oil burning salamanders within a confined space without giving the plaintiff adequate warning of the operation and presence of said salamanders when the plaintiff entered said apartment in said building. (b). In failing to provide each of said salamanders with an exhaust pipe to carry the noxious gases and fumes from said salamanders outside the building and into the open air. (c). In failing to assist plaintiff from his place of peril when it recognized, or should have recognized the dangerous situation created by said defendant, in which the plaintiff was inhaling noxious gases and fumes given off by said salamanders."

Defendant's motion for an instructed verdict was that the evidence failed to establish negligence on its part; that it established contributory negligence more than slight on the part of the plaintiff; and that it failed to establish that the pneumonia was caused by any negligence on its part.

The initial question presented is what is the duty owing by defendant, a subcontractor, to the employee of another subcontractor under the situation that existed on this construction job.

The rule appears to be well established that "Where two or more independent contractors, or a general con-

tractor and one or more subcontractors, are engaged in work on the same premises, it is the duty of each contractor, in prosecuting his work, to use ordinary and reasonable care not to cause injuries to the servants of another contractor; and an employee of one contractor may recover against another contractor for injuries caused by the negligence of the latter contractor, or of his employees acting within the scope of their employment, in the performance of a duty owed by such contractor to the injured employee." 57 C. J. S., Master and Servant, § 610, p. 382. See, also, Annotation, 38 A. L. R. 471.

Defendant argues here that salamanders are commonly used on construction jobs, such as the one here; that they were in use on this job; that warning signs of their use are never posted; that it is not customary to connect the salamanders with outside vents except in cases of something in the nature of a permanent installation; that plaintiff knew of their use on this job; that when he entered the room here he recognized the odor and noise of the salamanders and had notice of their use at this particular time; that he remained in the room for some time after he knew the ill effects produced and knew or must have known of soot on his hands and face; and that he assumed the risk and was guilty of contributory negligence sufficient to bar recovery. A part of defendant's argument here is based on conclusions from conflicting evidence.

All of this argument misses the crucial fact of this case. Here there was a concentration of five of these salamanders in one closed room. The evidence is ample to sustain a finding that there was incomplete combustion; that carbon monoxide gas was being manufactured by them and other substances such as carbon being thrown off; that carbon monoxide gas is extremely poisonous; that it is odorless, tasteless, colorless, and lighter than air; and that its obvious escape was upward to the room above where plaintiff was working. Those are the

facts upon which plaintiff predicates his action. The defenses advanced by defendant do not meet that situation.

The care necessary to avoid injury or harm must be commensurate with the danger of harm involved in the particular case. 38 Am. Jur., Negligence, § 29, p. 673; 65 C. J. S., Negligence, § 64, p. 555. The evidence here presents, at least, a jury question as to whether or not the defendant exercised the care required under the circumstances of this case.

It also is a jury question, at least, as to whether or not defendant was guilty of contributory negligence under the circumstances admitted to be true by the motion in this case.

Finally defendants contend that the evidence was insufficient to show that the pneumonia was caused by the inhalation of carbon monoxide gas and other matter released by the salamanders. This is directed particularly at the testimony of plaintiff's expert witness. We have heretofore set out the evidence as to plaintiff's good health immediately before his entry into this room. We have also set out his appearance and condition thereafter and the development of this disease. We deem the evidence sufficient to sustain a conclusion of cause and effect. See, Koran v. Cudahy Packing Co., 100 Neb. 693, 161 N. W. 245; Adams v. Lilbourn Grain Co., 226 Mo. App. 1030, 48 S. W. 2d 147.

We do not determine the sufficiency of the evidence to show that plaintiff's phlebitis was the result of the acts of the defendant. That is not argued here. The right of plaintiff to have this cause submitted to a jury does not turn on that question.

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

STATE OF NEBRASKA EX REL. GEORGE L. GLENN, APPELLANT, V. JENNIE BENNETT, COUNTY SUPERINTENDENT OF SHERIDAN COUNTY, NEBRASKA, APPELLEE.
55 N. W. 2d 677

Filed November 28, 1952. No. 33223.

Schools and School Districts. Any signer of a petition to create a new school district from other districts or to change the boundary of any district, under the provisions of section 79-402, R. S. Supp., 1951, may withdraw his signature therefrom at any time before the county superintendent has affirmatively acted upon such petition by authoritatively declaring the district created or change made.

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

Charles A. Fisher, for appellant.

Frank F. Aplan and *John Keriakedes,* for appellee.

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

SIMMONS, C. J.

Relator here seeks a writ of mandamus requiring the respondent, a county superintendent of schools, to create a new school district from an existing school district. The trial court denied the writ. Relator appeals. We affirm.

Relator's action is based on the provisions of section 79-402, R. S. Supp., 1951, which became effective March 24, 1951. So far as material here it 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. * * * 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."

It appears from the evidence that respondent pre-

pared a list of legal voters of the district. Additions to and deletions from this list were made by stipulations at the trial so that it finally showed 185 names. The qualifications of five of these were questioned at the trial, leaving 180 names not questioned. Evidence was offered at the trial that several families of farm laborers moved into the district in the spring of 1951, some of whom had departed therefrom at the time of the trial. Respondent contends that these parties met the qualifications of voters as set out in section 79-427, R. R. S. 1943, and as such, should be counted in determining the total number of legal voters in the district. Relator challenges that contention. We do not decide it. Having reached the conclusion that relator is not entitled to prevail even if his contention is correct, we put aside consideration of the two groups of questioned names and accept, for the purposes of this opinion, the figure of 180 as representing the number of legal voters of the district. Fifty-five percent of 180 is 99.

July 6, 1951, there were presented to the respondent petitions that a "new district be created" from district 30 to consist of lands set out by legal description. At the trial it appears to have been accepted that the petitions contained the names of 105 of the legal voters of the district.

July 10, 1951, three notices were presented to the respondent. These notices recited that upon July 10, 1951, "a petition for the following change in School District Boundaries will be presented to the County Superintendent, to-wit: * * *." This is followed by a description of the land as set out in the petition. They were signed, apparently by the relator, and contained a statement that they were "posted" June 15, 1951, by a legal voter of the district.

July 10, 1951, the relator and others appeared before the respondent, the matter was discussed, and the respondent took the matter under advisement.

July 14, 1951, there were presented to the respondent

"recall petitions" signed by 26 of the 105 signers to the petition whereby they "recall" their names from the petition. It is obvious that "recall" was used here in the sense of "withdraw." Webster's New International Dictionary (2d ed.), p. 2075.

July 16, 1951, there was presented to the respondent an affidavit affirming the time and places of posting the notices.

August 3, 1951, demand was made on respondent that she create the new district in accord with the petition. That demand was refused and this action followed. It is the relator's contention that the statute placed a mandatory duty on the respondent to grant the petition and create the new district, and that the withdrawal petitions came too late and should not have been considered. That question was decided by us in State ex rel. Larson v. Morrison, 155 Neb. 309, 51 N. W. 2d 626. We there construed section 79-402, R. R. S. 1943, as it existed prior to the 1951 amendment, which added the provision above quoted providing that the county superintendent must fix a date for hearing and give all interested parties an opportunity to be heard.

We there held: "Any signer of a petition to create a new school district from other districts or to change the boundary of any district may withdraw his signature therefrom at any time before the county superintendent has affirmatively acted upon such petition by authoritatively declaring the district created or change made." The decision is controlling here.

When this action was brought the petition had on it 79 names of legal voters. That number is insufficient under the statute. The relator has not shown a right to the writ. The judgment of the trial court is affirmed.

AFFIRMED.

DONALD SEGEBART, BY HIS GUARDIAN AND NEXT FRIEND, LOUIS SEGEBART, APPELLANT, V. ODDIE GREGORY, APPELLEE.
55 N. W. 2d 678

Filed December 5, 1952. No. 33207.

1. **Trial.** Where a motion for a directed verdict is made the party against whom it is made is entitled to have his evidence accepted as true by the court and he is further entitled to have all favorable inferences reasonably to be drawn therefrom resolved in his favor.
2. ———. By statute it is required that a motion for a directed verdict shall state the specific grounds of the motion.
3. **Trial: Appeal and Error.** It is error for the court to sustain a motion for a directed verdict unless the motion contains the specific grounds therefor.
4. ———: ———. It is prejudicial error for the court to sustain a motion for a directed verdict which fails to contain the specific grounds of the motion except where from an examination of the entire record it appears that a verdict would lack evidence to support it or, in other words, if a verdict had been returned it would have been the duty of the court to set it aside because it was without support in the evidence.
5. **Pleading.** A variance between a pleading and the evidence adduced to sustain it is not deemed material unless it has misled the adverse party to his prejudice in maintaining his action or defense on the merits.
6. **Pleading: Appeal and Error.** If the matter of variance has not in some appropriate manner been brought to the attention of the trial court, a court of review may decline to consider it.
7. **Negligence: Automobiles.** Where a plaintiff is free from negligence or contributory negligence and two or more parties are guilty of negligence in the operation of automobiles causing or proximately contributing to an accident and injury and damage to the plaintiff, and one being the host of the plaintiff and being free from liability because of the guest statute and the other or others not, the one or ones not being host may be held liable for the entire damage.
8. **Negligence: Highways.** The violation of a statute the design of which is to protect the safety of people in the use of public highways is evidence of negligence.
9. **Negligence: Automobiles.** It is gross negligence to leave an unlighted motor vehicle on a public highway on a dark night without warning to protect approaching travelers.
10. ———: ———. If the minds of reasonable men may reasonably differ on the question of whether or not an act producing

a collision of automobiles was negligence a question is presented for determination by a jury.

APPEAL from the district court for Sheridan County: EARL L. MEYER, JUDGE. *Reversed and remanded.*

Ernest A. Raun, Alfred D. Raun, and *Charles A. Fisher,* for appellant.

Edwin D. Crites, for appellee.

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

YEAGER, J.

This is an action in two causes of action. The first is for damages for personal injuries by Donald Segebart by Louis Segebart, his guardian and next friend, plaintiff and appellant, against Oddie Gregory, defendant and appellee. The second is for loss of earnings of the plaintiff which on account of the minority of plaintiff was an action in favor of Louis Segebart, the father of the plaintiff. It was assigned to himself as guardian and prosecuted on behalf of the plaintiff.

The cause was tried and after both parties rested the defendant moved for a directed verdict in his favor which motion was sustained and accordingly a verdict was returned. A motion for new trial was duly filed and overruled, and judgment was entered on the verdict. From the order overruling the motion for new trial and the judgment the plaintiff has appealed.

There are numerous assignments of error in the brief but all of them do not require consideration herein. The pertinent contentions are that there was sufficient evidence upon which to submit the issues presented by plaintiff to a jury for determination; that there was no material variance between the pleadings and proof; and that the motion for directed verdict was not subject to consideration by the court since it was not in form and substance required by law in that it stated no ground for a directed verdict.

A determination of these assignments depends upon certain elements of the petition and an analysis and application of the evidence adduced at the trial. The only evidence adduced was by the plaintiff. After plaintiff rested the defendant rested without introducing evidence and thereafter made his motion for a directed verdict. The rule is applicable, therefore, that the evidence of plaintiff must be accepted as true and he is entitled to all the favorable inferences reasonably to be drawn therefrom. Roberts v. Carlson, 142 Neb. 851, 8 N. W. 2d 175; Spaulding v. Howard, 148 Neb. 496, 27 N. W. 2d 832; Smith v. Platte Valley Public Power and Irr. Dist., 151 Neb. 49, 36 N. W. 2d 478.

The proved facts are that on the evening of September 9, 1950, plaintiff became a passenger in a Chevrolet automobile which was owned by one Donald Sandoz. Two other boys and two girls became passengers in this automobile. Sandoz with the five others drove about until after midnight when they drove west on what has been designated as "new" highway No. 20 and turned east on what has been designated as "old" highway No. 20. When they arrived at a point about one-fourth mile west of Hay Springs the car was stopped on the right or south side of this old highway No. 20. The automobile remained there until about 1:30 or 2 a. m., September 10, 1950. Sandoz was at the wheel, plaintiff was seated in the middle of the front seat, and one of the girls was to his right or on the outside. At about 1:30 or 2 a. m. Sandoz started the automobile. The lights were on. It was raining and the windshield wipers were operating. On this old highway No. 20 apparently maintenance had been long abandoned and it had chuck holes in it making its use difficult and dangerous. The plaintiff said that visibility ahead was about 100 feet. After Sandoz started the automobile he turned it to the left and over onto the north side of the highway where the front end collided with an automobile owned and operated by the defendant. The plaintiff estimated the speed of the

Sandoz automobile at the time of collision at 20 to 25 miles an hour. The plaintiff did not see the collision. He had turned around and was at the time talking to someone in the rear seat. He did not see the defendant's automobile or any lights on it before the collision. The two girls gave testimony that there were no lights on the defendant's automobile and that they did not see it. It probably was headed west. Sandoz and the two other passengers were in the service at the time of trial and no evidence was obtained from them. There is no evidence as to whether the defendant's automobile was or was not in motion at the time of the collision. The defendant was in and in charge of this automobile at the time of the collision.

The allegations of the petition are that defendant's automobile was parked on the highway without lights and this is the basis of the charge of negligence against him.

In order to ascertain the correct content of the motion for directed verdict it becomes necessary to point out that it was made in part by reference to a previous motion. The plaintiff rested, whereupon the defendant made the following motion: "The plaintiff having rested, the defendant moves the Court peremptorily to instruct the jury to return a verdict in favor of the defendant."

The plaintiff was then allowed to withdraw his rest and adduce additional evidence when he again rested. At that time the defendant renewed his motion in the following terms: "The defendant reiterates his motion and moves the Court peremptorily to instruct the jury to return a verdict in favor of the defendant." This motion was overruled.

The defendant then rested and renewed his motion for a directed verdict in the following terms: "The defendant rests. The defendant having rested, he renews the motion for an instructed verdict in favor of the defendant."

The following appears as the conclusion of the bill of exceptions:

"BY THE COURT: Gentlemen, on further examination of the pleadings and the evidence, I have decided that there is still a fatal lack of proof in the plaintiff's case, and I haven't any choice except to sustain the motion.

"MR. FISHER: May I inquire where we have failed, Your Honor?

"BY THE COURT: Well, the proof doesn't correspond with the pleadings. Gentlemen of the Jury, you are instructed as a matter of law that the plaintiff's evidence is insufficient to support a finding that the defendant was guilty of any of the grounds of negligence alleged in plaintiff's petition, and you will therefore return a verdict for the defendant."

Thus it is observable that the motion does not specify the ground therefor. This is violative of the provision of section 25-1315.01, R. R. S. 1943, as follows: "* * * A motion for a directed verdict shall state the specific grounds therefor."

The ground or grounds on which the motion depends are not made clear. The appellee urges and it is inferable from the quoted statements of the court that it was based on a conclusion that there was variance between the petition and proof and it is also inferable that there was a failure of proof of negligence on the part of the defendant. The theory of the contention of appellee that there was a variance is that the petition charged that the automobile of defendant was parked whereas the proof failed to show whether it was parked or in motion at the time of the collision.

Prior to the enactment of the provision quoted from section 25-1315.01, R. R. S. 1943, a litigant against whom a motion for directed verdict was made was entitled to know either from the motion itself or from the order thereon by the court the ground or grounds upon which the motion was sustained. Rhoads v. Columbia Fire

Underwriters Agency, 128 Neb. 710, 260 N. W. 174. By this provision it has become mandatory that he shall be informed by the motion itself. The reasons why this should be true are well stated in the opinion in Rhoads v. Columbia Fire Underwriters Agency, *supra*.

If the evident intent of the Legislature in the enactment of and the clear purport of the provision quoted is to be given force and effect it must be said that the motion for a directed verdict was defective and that it was error for the court to sustain it as made. We conclude that force and effect should be given to the provision.

It was also error with prejudice unless from an examination of the record it may be said that a verdict in favor of plaintiff lacked evidence to support it, or in other words, if a verdict had been returned in favor of the plaintiff it would have been the duty of the court to set it aside because it was without support in the evidence. Hards v. Platte Valley Improvement Co., 46 Neb. 709, 65 N. W. 781; Burke v. First National Bank of Pender, 61 Neb. 20, 84 N. W. 408, 87 Am. S. R. 447; Kirshenbaum v. Massachusetts Bonding & Ins. Co., 107 Neb. 368, 186 N. W. 325; Rzeszotarski v. American Smelting & Refining Co., 133 Neb. 825, 277 N. W. 334; Hammer v. Estate of Hammer, 155 Neb. 303, 51 N. W. 2d 609.

From an examination of the record we think the evidence of plaintiff, if believed by a jury, was sufficient to sustain a verdict in his favor. We also think that there was no fatal or material variance between the pleading and the proof.

As to variance it is provided by statute as follows: "No variance between the allegation in a pleading and the proof is to be deemed material unless it have actually misled the adverse party to his prejudice, in maintaining his action or defense upon the merits. * * *." § 25-846, R. R. S. 1943.

This court has said: "A variance between an averment of a pleading and the evidence given to sustain it is not to be deemed material unless it has misled the

adverse party to his prejudice in maintaining his action or defense on the merits." Toy v. McHugh, 62 Neb. 820, 87 N. W. 1059. See, also, Barnhart v. Henderson, 147 Neb. 689, 24 N. W. 2d 854.

This court has also said: "Unless the matter of variance has, in some suitable manner, been brought to the attention of the trial court, a court of review may decline to consider it." Westing v. Chicago, B. & Q. Ry. Co., 87 Neb. 655, 127 N. W. 1076. See, also, Smith v. Brooks, 154 Neb. 93, 47 N. W. 2d 389.

It is true that the rule of the two last-cited cases was announced where a losing party was, after verdict and judgment, claiming a variance, but we can see no difference in principle in that from an instance such as this where a winning party claims his victory on a ground which was not called to the attention of the trial court by the motion which gave him that victory.

If it be assumed, as appellee contends, that there was a variance between the petition and proof it was not such as would require a reversal even if proper motion had been made. The pleading that the automobile of defendant was parked at the time of the collision without proof as to whether it was parked or in motion, with proof that it was at the place designated by the pleading occupied and in the control of the defendant, could not be material or operate to mislead the defendant to his prejudice.

In any event it is unlawful to either operate or to park an automobile on a highway at night without appropriate lights. Under section 39-778, R. R. S. 1943, it is required that an automobile on a highway at night shall have two lighted head lamps in front and a rear red light throwing a beam the distance of at least 500 feet. Under section 39-7,112, R. R. S. 1943, it is required that a parked automobile at night shall have at least one white light in front throwing a beam of at least 500 feet and a rear red light throwing a beam the same distance.

Liability therefore could not depend upon whether the automobile of defendant was parked or in motion at the time of the collision but upon whether or not it was lighted as required by statute or the common law relating to the use and operation of automobiles on public highways.

Coming now to the question of whether or not there was evidence of negligence sufficient to submit to a jury, it is to be observed first that plaintiff was a guest in the automobile of Donald Sandoz. There is no evidence that plaintiff was guilty of negligence or contributory negligence. If Sandoz was guilty of negligence that negligence on the record may not be attributed to plaintiff. Therefore if there was evidence that the defendant was guilty of negligence which caused the collision or if he was guilty of negligence which combined with negligence of Sandoz proximately contributed thereto then the court erred in not submitting the case to a jury. Zielinski v. Dolan, 127 Neb. 153, 254 N. W. 695; Rogers v. Brown, 129 Neb. 9, 260 N. W. 794; Bergendahl v. Rabeler, 131 Neb. 538, 268 N. W. 459; Stark v. Turner, 154 Neb. 268, 47 N. W. 2d 569; Kuska v. Nichols Construction Co., 154 Neb. 580, 48 N. W. 2d 682.

The violation of a statute the design of which is to protect the safety of people in the use of public highways is evidence of negligence. Fimple v. Archer Ballroom Co., 150 Neb. 681, 35 N. W. 2d 680; Armer v. Omaha & C. B. St. Ry. Co., 151 Neb. 431, 37 N. W. 2d 607; Mundy v. Davis, 154 Neb. 423, 48 N. W. 2d 394.

In this instance there was evidence that the defendant violated the duty imposed upon him to have his automobile lighted when he had his automobile on a public highway at night.

This court has said that it is gross negligence to leave an unlighted motor vehicle upon the highway on a dark night without warning to protect approaching travelers. Giles v. Welsh, 122 Neb. 164, 239 N. W. 813.

It must then be concluded that there was evidence of

negligence on the part of the defendant. Could it be reasonably inferred or found that this negligence of which there was evidence caused or proximately contributed to the accident in question and plaintiff's injuries?

The primary cause of the collision of course was the driving of the Sandoz automobile into that of the defendant. Whether or not he would have driven into it if it had been lighted is to be determined by the attitude which could reasonably be taken toward the facts and circumstances by reasonable men. If the minds of reasonable men could find that this was negligence which caused or proximately contributed to the collision then there was presented a question for determination by a jury. Fulcher v. Ike, 142 Neb. 418, 6 N. W. 2d 610; Hamblen v. Steckley, 148 Neb. 283, 27 N. W. 2d 178; Kuska v. Nichols Construction Co., *supra*.

We conclude that the question of the negligence of the defendant was one which should have been submitted to a jury and that it was error to sustain the motion for a directed verdict.

The judgment of the district court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

LESLIE ELROD ET AL., APPELLANTS, V. THE HEIRS, DEVISEES, LEGATEES, PERSONAL REPRESENTATIVES AND ALL OTHER PERSONS INTERESTED IN THE ESTATE OF HATTIE GIFFORD, DECEASED, ET AL., APPELLEES.

55 N. W. 2d 673

Filed December 12, 1952. No. 33174.

1. **Deeds: Vendor and Purchaser.** The statutory rule for interpreting a conveyance of real estate requires the court to give effect to the expressed intention of the parties as determined from the instrument as a whole if it is not inconsistent with law.
2. ———: ———. Each word and provision of the conveyance must be given such significance as will make effective the intention of the parties.

3. ———: ———. In ascertaining the intention expressed in such an instrument the court is not confined to a strict or literal interpretation of the language used if to do so would frustrate the intention of the parties thereto as gathered from the whole instrument.
4. ———: ———. A reservation is always something taken back out of that which is demised, the creation by the grant of a new right in the grantor from the subject of the conveyance and something which did not exist as an independent right before the grant was made.
5. ———: ———. An exception excludes from the operation of the conveyance the interest specified and it remains in the grantor unaffected by the conveyance.
6. ———: ———. The legal terms exception and reservation although strictly distinguishable are frequently used interchangeably and indiscriminately. The use of either term is not conclusive and many times is not even significant as to the intention of the parties to the instrument where used or the nature of the provision in which the term appears.

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

Torgeson, Halcomb & O'Brien, for appellants.

Van Steenberg & Myers, for appellees.

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

BOSLAUGH, J.

Hattie Gifford, an unmarried woman and the owner in fee simple of a section of land in Kimball County, sold and conveyed it on May 13, 1943, for a valuable consideration to appellants as joint tenants "subject to and reserving to the grantor herein personally an undivided one-half (½) interest in and to all gas, oil or other minerals in on or under said land herein conveyed," and subject to "an undivided one-half (½) interest in and to the mineral rights as above set forth reserved in the grantor herein." The grantor died intestate in the year 1946.

Appellants sought by this suit to have it determined

that the right or estate reserved by the grantor by virtue of the two provisions of the deed from her to appellants above quoted was personal to Hattie Gifford, terminated at her death, and that her heirs inherited no part of or interest in the real estate. Appellants prayed for a decree quieting an unconditional fee title to the land in them. Appellees claimed that Hattie Gifford excepted from her conveyance to appellants and that she continued until the time of her death to be the unconditional owner of an undivided one-half of the oil, gas, and other minerals in, on, or under the real estate, and that they, as her heirs, became and were the owners thereof. They sought a decree quieting title thereto in them. The district court found against appellants, for appellees, and quieted title in them to an undivided one-half of the oil, gas, and other minerals in the land.

It is conceded by the parties that Hattie Gifford retained an interest in the land by virtue of the provisions of the deed set out herein, but they disagree as to the character and duration of the estate retained by her. The intention of the parties as expressed in the parts of the deed quoted and the effect of the deed must be determined from a consideration only of that instrument. There is an absence of extrinsic evidence to aid in discovering the intent of the parties.

The court in interpreting a conveyance of real estate is by legislative declaration required to carry into effect the true intent of the parties so far as it can be ascertained from the whole instrument, if not inconsistent with law. § 76-205, R. R. S. 1943. Each word and provision in the conveyance must be given such significance as will make effective the intention of the parties. Reuter v. Reuter, 116 Neb. 428, 218 N. W. 86; Dahlke v. Dahlke, 155 Neb. 169, 51 N. W. 2d 266. In ascertaining the intention of such an instrument courts are not confined to a strict or literal interpretation of the language used when to do so would frustrate the intention of the parties thereto as gathered from the whole

instrument. Bear v. Millikin Trust Co., 336 Ill. 366, 168 N. E. 349, 73 A. L. R. 173; 16 Am. Jur., Deeds, § 170, p. 533.

The essence of the argument of appellants is that because the terms of the deed are "reserving to the grantor herein personally" that a reservation was intended and created in the grantor, and that it terminated with her death. Contrary to this appellees claim that the language of the deed excluded from the grant to appellants one-half of the oil, gas, and other mineral rights in the land; that the grantor continued to own them the same as she did before she executed the deed; and that at her death this interest vested in her heirs. Specifically appellees assert the deed created an exception and not a reservation.

A reservation is some new thing issuing out of what is granted. It creates a new right in the grantor from the subject of the conveyance, something which did not exist as an independent right before the grant and which is originated by it. In Eiseley v. Spooner, 23 Neb. 470, 36 N. W. 659, 8 Am. S. R. 128, it is said: "An exception is said to be a withdrawal from the operation of the grant, of some part of the thing granted; while a reservation is of some new thing issuing out of what is granted. Thus, where real estate is granted, a portion thereof may be excepted from the terms of the conveyance, or the trees or woods growing thereon. If the exception be valid, the title to the thing excepted remains in the grantor, the same as if no grant had been made. A reservation, while not affecting the title to the thing granted, may reserve to the grantor a right to the use or enjoyment of a portion thereof, as an easement, the right to pass over, or the like." In Burchard v. Walther, 58 Neb. 539, 78 N. W. 1061, the court said: "But if the clause in each deed should be construed as an exception, and not as a reservation, plaintiff would be in no better situation, for an exception in a deed is nothing more than a qualification, by which some part of the estate is not

conveyed, which would have passed to the grantee but for the exception."

The court in Smith v. Furbish, 68 N. H. 123, 44 A. 398, 47 L. R. A. 226, adopted the language of Tiedeman, Real Property, § 843, p. 684, that " 'The part excepted is already in existence, and is said to remain in the grantor. The grant has no effect upon it. A reservation is the creation, in behalf of the grantor, of some new right issuing out of the thing granted, something which did not exist, as an independent right, before the grant. * * *' " The court then said: "As the reservation in this case does not appear to have been written in a peculiar sense, it is to be taken in its ordinary, natural, and popular signification, which is, that after the conveyance Cross was to have no right that he did not have before. This popular sense is the legal sense, not because an artificial rule has been established by judicial or legislative power, but because the law ascertains the facts of the case and acts upon them; and a peculiar meaning not being proved, the inference of fact is, that Cross and Wilson understood the reservation in a sense that is not peculiar—the ordinary sense in which it would be understood by people in general. Thus understood, it describes proprietary rights that did not pass from the grantor, and consequently is a part of the description of those that did pass. The deed is a mere conveyance from Cross to Wilson, and not a conveyance in that direction supplemented by an implied reconveyance."

In Restatement, Property, § 27, p. 80, it is said concerning an exception that: "The requirement stated in this Section as to the inclusion of words of general inheritance with respect to the conveyee has no application to an exception. The effect of an exception is to exclude from the operation of the conveyance the interest specified and it remains in the conveyor unaffected by the conveyance." This illustration is given: "A owns land in fee simple absolute. He makes an otherwise effective conveyance thereof 'to B, his heirs, and assigns

excepting to myself, a strip ten feet wide along the west side of the land hereby conveyed.' A still owns the strip in fee simple absolute." See, also, Donnell v. Otts (Tex. Civ. App.), 230 S. W. 864; Maynard v. Ratliff, 297 Ky. 127, 179 S. W. 2d 200; De Moss v. Sample, 143 La. 243, 78 So. 482; Stone v. Stone, 141 Iowa 438, 119 N. W. 712, 20 L. R. A. N. S. 221; Barrett v. Kansas & Texas Coal Co., 70 Kan. 649, 79 P. 150; Marias River Syndicate v. Big West Oil Co., 98 Mont. 254, 38 P. 2d 599; 26 C. J. S., Deeds, § 137, p. 439.

The primary rule is that the intention of the parties as determined from the whole instrument shall govern. It is only when the intention is obscure or uncertain that resort may be had to subordinate rules of construction and permissible surrounding circumstances. In this case there is no ambiguity or obscurity in the language used in the deed and the intention of the parties thereto may be said to be quite obvious. The terms exception and reservation are frequently used synonymously, conjunctively, and interchangeably. It is not necessarily conclusive, and many times not even significant, whether the word selected is except or reserve. The intent is the primary matter to be considered. Whether a provision is a reservation or an exception does not depend upon the use of a particular word, but upon the character and effect of the provision itself. In Hicks v. Phillips, 146 Ky. 305, 142 S. W. 394, 47 L. R. A. N. S. 878, the court commented: "However, a reservation is not always created because the word, 'reserves' or 'reserving' is employed. 'Reserving' sometimes has the force of 'saving' or 'excepting' (2 Coke Litt. 413; Whitaker v. Brown, 46 Pa. St. 197; Dee v. King, 77 Vt. 230). In general, a reservation is like an exception, something to be deducted from the thing granted narrowing and limiting what would otherwise pass by the general words of the grant (Dyer v. Sanford, 9 Metc. (Mass.) 395). 'Reserving' and 'excepting,' although strictly distinguishable, are often used interchangeably or indiscriminately,

and the use of either term is not conclusive as to the nature of the provision." The court said in Smith v. Furbish, *supra:* " 'Reserving,' 'excepting,' and 'excluding' are generally used as synonyms. Whether a provision is a reservation or an exception does not depend upon the use of a particular word, 'but upon the nature and effect of the provision itself.' Stockwell v. Couillard, 129 Mass. 231, 233; Fischer v. Laack, 76 Wis. 313, 319, 320; Keeler v. Wood, 30 Vt. 242, 246; Chicago, etc., Railway v. Railroad, 143 U. S. 596, 599, 613, 614. 'A clause of reservation is construed to be an exception, if that will best effect the intent of the parties.' " See, also, Marias River Syndicate v. Big West Oil Co., *supra;* Barrett v. Kansas & Texas Coal Co., *supra;* Trapp v. McCormick, 175 Tenn. 1, 130 S. W. 2d 122; 26 C. J. S., Deeds, § 137, p. 439; 16 Am. Jur., Deeds, § 310, p. 615.

The Legislature enacted the Uniform Property Act to modify and eliminate some common law technicalities and exactions. One of its provisions is: "An otherwise effective reservation of property by the conveyor reserves the interest the conveyor had prior to the conveyance unless an intent to reserve a different interest is effectively manifested." § 76-106, R. R. S. 1943. An intent to reserve a different interest than the grantor had prior to the deed herein involved is not "effectively manifested" by the terms of the deed "reserving to the grantor herein personally." Smith v. Furbish, *supra;* Donnell v. Otts, *supra.*

The office of a reservation is to reserve to the grantor something new out of that which is conveyed and which did not exist before as an independent right. A reservation is always something taken back out of that which is demised. An exception is some part of the estate excluded from the grant and retained by the grantor as if there had been no conveyance made by him to the grantee. The conclusion is inescapable that Hattie Gifford by the terms of her deed to appellants retained a fee simple estate in one-half of the gas, oil, and other

minerals in the land conveyed. The inclusion of the word "personally" in the clause excepting this interest in the grantor cannot change the obvious intent of the parties and the meaning of the exception.

The judgment of the district court should be and it is affirmed.

AFFIRMED.

HARVEY M. DAVIS, ADMINISTRATOR OF THE ESTATE OF DONALD G. DAVIS, DECEASED, APPELLANT, V. DEXTER E. SPINDLER ET AL., APPELLEES.
56 N. W. 2d 107

Filed December 12, 1952. No. 33179.

1. **Trial.** A motion for directed verdict or its equivalent must, for purpose of decision thereon, be treated as an admission of the truth of all competent 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. **Automobiles: Trial.** In those cases where reasonable minds may differ on the question of whether or not the operator of a motor vehicle exercised the care, caution, and prudence required of him under the circumstances of the particular situation the issue of negligence on the part of the operator is one of fact to be determined by a jury.
3. **Trial.** 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.

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

Luebs & Elson, for appellant.

Louis A. Holmes and *Kirkpatrick & Dougherty,* for appellees.

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

CHAPPELL, J.

Plaintiff brought this action to recover for the wrongful death of his minor son resulting from a collision between an International truck-trailer traveling east and a Pontiac four-door sedan traveling west. The collision occurred about one a. m., March 17, 1951, on U. S. highway No. 34, a two-lane paved highway 20 feet wide, at a point other than an intersection thereon, about one-quarter mile east of Aurora, Nebraska.

Admittedly the truck, owned and operated by defendants Dexter E. Spindler and C. James Holm, doing business as a co-partnership under the name of Grand Island Dairy Products Co., was being driven by defendant Donald L. Larson, their employee, who at the time of the accident was acting for them within the course and scope of his employment. Concededly, the truck with trailer attached was approximately 45-feet long, and then carried a cargo of eggs weighing 22,000 pounds. Defendants George W. Butcher and Percy Butcher, doing business as Butcher Bros., were dismissed out of the case upon demurrer from which no appeal was taken. The car was owned by plaintiff's son, Donald G. Davis, hereinafter called decedent, but at the time of the accident it was being driven by another young man while the son was a passenger therein.

At conclusion of plaintiff's evidence, defendants each moved for a directed verdict, or in the alternative for judgment, upon the ground of insufficiency of the evidence to establish any negligence of defendants proximately causing the accident. Such motion was sustained and plaintiff's motion for new trial was overruled, whereupon he appealed, assigning substantially that the trial court erred in so doing. We sustain the assignment.

Insofar as important here, plaintiff substantially alleged in his petition that the driver of defendants' truck was negligent in that: (1) He failed to keep a proper lookout or have the truck under reasonable control; (2) failed to yield the right-of-way and stop or remain

on the right-hand or south side of the highway until the oncoming car, on its right or north side of the highway, in which decedent was riding as a passenger, had passed; and (3) negligently turned from a direct course across the highway into the path of and against such car, when such movement could not be made with reasonable safety, all of which proximately caused the accident and resulting death.

Defendants answered, denying generally and alleging that the damages sustained, if any, were caused and contributed to by the negligence, more than slight, of decedent and the operator of his car, who were engaged in a joint enterprise, thereby imputing the negligence of one to the other. Plaintiff's reply was in form a general denial.

The evidence adduced in plaintiff's behalf disclosed that: On March 16, 1951, decedent and three other young men, all of whom lived in Grand Island, attended a high school basketball tournament in Lincoln. A young lady friend of decedent, whose parents had recently moved to Grand Island, was permitted to ride back in the car with them. At about 10 p. m. she got into the car and they started from Lincoln to Grand Island. They stopped 10 or 15 minutes at a station on the outskirts of Lincoln to refuel the car and get something to eat. After leaving Lincoln decedent sat on the left side of the back seat with another young man on the right side and the young lady between them. Another young man, 19-years old, drove the car while another sat by his side. As they drove along decedent went to sleep and the young lady visited with the other young man on her right until she also slept. She was asleep when the accident occurred, and did not know anything about the details thereof or even that there had been an accident until about two weeks later, after hospitalization. She alone survived. Thus there were no surviving eye witnesses in the car.

After the accident the young man sitting on the

right of the back seat and the young lady were found lying outside the car on the gravel north of the pavement and west of the car. Two young men were still in the front seat, with decedent in the back seat. All three were dead. The young man on the ground was taken to a hospital but also lost his life.

It was a cloudy, dry, dark night. The collision occurred just south and east of a filling station and cafe housed in one building 24-feet long, north of the pavement. The cafe was in the west end and the station in the east. Four gas pumps were located 34 feet north of the north edge of the pavement between the filling station and the pavement. The accident occurred south and a little east of the east pump. There was one lighted visible flood light on the east end of the building and one on the southwest which lighted around the pumps, the front of the station, and out into the highway on a dark night.

At the time of the accident there were four people in the cafe. They did not see the collision but heard the crash and immediately went outside to see what had happened. A car owned by one of them was parked facing west, parallel with the north edge of the pavement just south and east of the east gas pump. The owner and another testified that the car was parked about six or eight feet north of the pavement. A police officer thought it was about 10 or 12 feet, but the sheriff thought it was about 20 feet north of the pavement. In any event, it was parked close enough so that when the car here involved apparently swerved as shown by marks on the gravel north of the pavement, its right back bumper struck and damaged the left front hubcap and fender of such parked car. A truck and trailer unit, owned and operated by defendants but not directly involved in the collision, was also parked six or eight feet north of the pavement facing east with its front about even with the west edge of the cafe. Thus there was an open space just north of the pavement be-

tween such truck and parked car. From the edge of Aurora to the station the highway was level and straight except for a slight curve to the southeast just west of the station. Going east therefrom the highway was straight and slightly upgrade for about four-tenths of a mile to the top of the upgrade. The platform and entrance to the station were about the same level as the pavement, and the view from the station east was unobstructed to the top of the upgrade.

Defendant driver, traveling east, had been previously following quite a ways behind the other truck already parked on the north side of the pavement just west of the cafe. At the time of the collision defendant driver was turning left at 15 miles an hour across the westbound lane of traffic along which decedent's car was traveling, to park in ahead of the truck he had been following; that is, to park in the space between the parked car and the parked truck.

Two persons who were in the cafe testified concerning the positions of the truck and the car right after the accident. Their testimony was verified by several identical photographs offered by both plaintiff and defendants. The truck and car here involved were still in the same positions when a police officer and sheriff arrived a few moments later to investigate the accident. The tractor part of the truck was facing northeast and the car was facing southwest. The front ends of the vehicles were located south and east of the gas pumps a short distance north of the north edge of the pavement. The car was all north of the pavement, on the gravel. The front end of the tractor was off the pavement with its left rear drive-wheels stopped just north of the pavement after sliding 10 feet in a northeasterly direction. The left front of the tractor and the left front of the car had collided and meshed into each other. The left front wheel of the car was apparently pushed backward to the northeast. Its engine was pushed back up into the driving compartment, and the left front

side of the car was practically sheared back to the front of the top. The right front side of the car, up to the fender, was also damaged and there were no lights on the car after the accident. All of the trailer was in the north half of the highway, the right rear wheel thereof being on the center line of it.

The police officer arrived first and directed removal of the parked truck not involved in the collision so that an ambulance could drive in. The sheriff arrived soon thereafter and, after both had investigated the accident, the sheriff prepared a written report which defendants themselves offered in evidence, verifying the testimony of such officers. They testified that there were skid marks 10 feet long running in an easterly or southwest to northeasterly direction back of the tractor drive-wheels. In that connection, the sheriff's report said: "The tractors left rear wheels slid 10 feet after impact, * * *." However, in his direct testimony the sheriff said that they must have slid before the impact.

The sheriff talked to defendant driver that night, at which time the driver said that he "didn't see any lights." The next morning, however, he told the sheriff that he "didn't see the lights until about ten feet before the impact." That "he didn't see it (the car) until about ten feet before the impact."

There is no evidence that such defendant timely looked before turning but did not or could not see any lights or car until about 10 feet before the impact. He only used the language quoted aforesaid. It would be logical to infer therefrom that the lights on the car were theretofore burning but defendant driver did not keep a proper lookout to see them or the car and avoid collision. Whether or not the lights on defendants' truck were burning prior to the collision is not directly established in the evidence. From photographs taken after the accident it would appear that his right headlight was then burning.

Of course, if defendant driver had no lights burning

on the truck before the accident he violated sections 39-778 and 39-780, R. R. S. 1943. We may assume, however, for purpose of argument only that his lights were burning before the accident. In such a situation under the general rule it was defendant driver's duty in driving the truck to keep such a lookout ahead that he would see an obstruction or vehicle as soon as it was illuminated by his lights and it was his duty to have his truck under such control under the driving conditions then existing that he could stop it in time to avoid a collision with any object in the area lighted by his lights. Remmenga v. Selk, 150 Neb. 401, 34 N. W. 2d 757. As stated in that opinion, quoting from Buresh v. George, 149 Neb. 340, 31 N. W. 2d 106: "'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.'"

In Buresh v. George, *supra,* it was 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." As stated in the opinion: "* * * we have made exceptions to this general rule when the nature of the object or its condition, such as color, dirt, et cetera, in relation to the highway or road, affected its immediate visibility or when, because of the lights of oncoming traffic, the driver's attention is distracted or his vision impaired and his opportunity for immediate discernment thereby affected. In such cases we have held that the issue of the driver's negligence, if any, and the degree thereof is for the jury." In that connection, however, the evidence now before us does not bring defendants within any of the recognized exceptions but rather within the general rules heretofore stated.

In reviewing the evidence adduced by plaintiff we have observed the rule that a motion for directed verdict or its equivalent 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.

Stark v. Turner, *supra*, also held: "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. * * *

"The violation of any statutory or valid municipal regulation, established for the purpose of protecting persons or property from injury, is sufficient to prove such a breach of duty as will sustain a private action for negligence, if the other elements of actionable negligence concur.

"Such a violation is evidence of negligence, which the jury is entitled to consider upon the question whether actionable negligence existed."

In Meyer v. Platte Valley Construction Co., 147 Neb. 860, 25 N. W. 2d 412, this court held: "In negligence cases, the burden of proof is upon plaintiff to show by a preponderance of the evidence that an accident was proximately caused by some negligent act charged, directly attributable to defendant, and to support a verdict, negligence must be so established, either by direct proof or by physical facts or circumstances, of sufficient weight from which a reasonable inference of the same may arise.

"If contributory negligence is relied upon by defendant as an affirmative defense, the burden is upon him to prove it by a preponderance of the evidence pertinent to that issue contained in the whole record, except inso-

far as the same may appear in evidence adduced for plaintiff."

In Anderson v. Nincehelser, 152 Neb. 857, 43 N. W. 2d 182, this court held: "Where there is no eyewitness, no direct evidence of the accident causing the injury, the facts and circumstances may be proved by circumstantial evidence, and the presumption is raised by the instinct of self-preservation on behalf of the deceased that he was not guilty of contributory negligence, but was in the exercise of due care and caution for his own safety, unless the contrary is shown.

"Admissions of a party against interest made in court or out of court, with reference to and pertinent to the issues being tried, are admissible in evidence against such party.

"In those cases where reasonable minds may differ on the question of whether or not the operator of an automobile exercised the care, caution, and prudence required of him under the circumstances of the particular situation the issue of negligence on the part of the operator is one of fact to be determined by a jury." See, also, Weisenmiller v. Nestor, 153 Neb. 153, 43 N. W. 2d 568.

The pertinent statutes here involved follow. Section 39-746, R. R. S. 1943, provides: "Upon all highways of sufficient width, except upon one-way streets, the driver of a vehicle shall drive the same upon the right half of the highway and shall drive a slow moving vehicle as closely as possible to the right-hand edge or curb of such highway, unless it is impracticable to travel on such side of the highway and except when overtaking and passing another vehicle, subject to the limitations applicable in overtaking and passing set forth in section 39-748."

Section 39-748, R. R. S. 1943, provides: "Drivers of vehicles proceeding in opposite directions shall pass each other to the right, each giving to the other one half of

the main traveled portion of the roadway as nearly as possible."

Section 39-7,115, R. R. S. 1943, provides: "(a) No person shall turn a vehicle from the direct course upon a highway unless such movement can be made with reasonable safety, and then only after giving a clearly audible signal by sounding the horn if any pedestrian may be affected by such movement, and after giving an appropriate signal in the manner hereinafter provided in the event any other vehicle may be affected by such movement. (b) A signal of intention to turn right or left shall be given continuously during not less than the last fifty feet traveled by the vehicle before turning."

In that connection this court has held: "A party driving an automobile lawfully, upon his proper side of the highway, who observes an approaching car, has a right to assume that the driver of the oncoming car will not violate the law in passing," or "in turning into his lane of travel" as stated in the opinion. Belik v. Warsocki, 126 Neb. 560, 253 N. W. 689. See, also, Callahan v. Prewitt, 141 Neb. 243, 3 N. W. 2d 435; Bainter v. Appel, 124 Neb. 40, 245 N. W. 16.

As recently as Petersen v. Schneider, 153 Neb. 815, 46 N. W. 2d 355, this court held that: "A left-hand turn across a public highway between intersections is fraught with danger, and one making such a movement is required to exercise a degree of care commensurate with the danger."

In the light of such rules, it could reasonably be concluded from the evidence heretofore recited that defendant driver violated such statutes and was otherwise negligent as alleged, which proximately caused or contributed to the collision and resulting death.

Finally, we are concerned with the status of decedent who owned the car but was a passenger therein.

In Petersen v. Schneider, 154 Neb. 303, 47 N. W. 2d 863, a comparable situation, this court said: "The owner of an automobile may in some cases be considered a

guest of the driver so that the driver's negligence will not be imputed to him. * * * The rule in this state is: 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."

In Van Auker v. Steckley's Hybrid Seed Corn Co., 143 Neb. 24, 8 N. W. 2d 451, it was held: "The question of whether a person riding in a motor vehicle is a guest, or engaged in a joint enterprise, or other relationship, is generally one for determination in the individual case. It must be ascertained from facts establishing the identity of the persons advantaged by the carriage, the relationship between the parties, and the purposes to which the transportation is incident.

"If the evidence is undisputed, or such that minds of men could not reasonably arrive at any other conclusion, the question is one for decision by the court as a matter of law; otherwise, it is a question for the jury to decide as other issuable facts in the case."

In that connection, the undisputed evidence as presented at this time establishes as a matter of law that decedent was a guest in his car, and there is yet no evidence from which it could reasonably be concluded that the negligence of the driver thereof, if any, could be imputed to decedent, as alleged by defendants.

Thus, if we assume for the purpose of argument only that decedent's driver was grossly negligent in some manner proximately causing the accident, it would not preclude recovery from defendants if their driver's negligence in some manner as alleged proximately caused or contributed to the accident. In that regard, Stark v. Turner, *supra,* held: "Where the independent tortious acts of two persons combine to produce an injury indivisible in its nature, either tortfeasor may be held for

the entire damage—not because he is responsible for the act of the other, but because his own act is regarded in law as a cause of the injury."

As held in Kuska v. Nichols Construction Co., 154 Neb. 580, 48 N. W. 2d 682: "Where separate independent acts of negligence by different persons combine to produce a single injury, each participant is liable for the resulting damages, although one of them alone might not have caused the injury."

Such case also held: "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."

As the record comes to us at this time, we find no evidence from which it could be concluded that decedent was guilty of any contributory negligence as alleged by defendants.

For the reasons heretofore stated, the judgment of the trial court should be and hereby is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED.

E. L. CANADAY, APPELLANT, V. ELMER J. KRUEGER ET AL., APPELLEES.
56 N. W. 2d 123

Filed December 12, 1952. No. 33186.

1. **Trial.** When a motion is made by a defendant at the close of plaintiff's evidence for a directed verdict or for dismissal for want of sufficient evidence to make a prima facie case every fact alleged which the evidence tends to prove, for the purposes of the motion, will be considered as proved.
2. **Landlord and Tenant.** Ordinarily there is an implied covenant in a lease that the premises shall be open to entry by the lessee at the time fixed in the lease as the beginning of the term.
3. ———. Where the lessor has not fulfilled his obligation to have the building ready for occupancy by the date fixed by the

lease for the commencement of the term, the lessee is not bound to enter on that date.

4. **Tender.** A formal tender is not necessary where a party has shown by act or word that it would not be accepted, if made, since the law does not require a useless formality.
5. **Landlord and Tenant.** The fact that the lessor has sold the premises subject to the lease does not relieve him from liability for damages for failure to deliver possession.
6. ———. An entry for a particular purpose under an agreement with the lessor other than the lease does not amount to taking possession.

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

A. J. Kinnersley and *Lawrence M. Clinton,* for appellant.

Heaton & Connors, Martin & Davis, and *Frank J. Mattoon,* for appellees.

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

MESSMORE, J.

This is an action at law brought by the plaintiff E. L. Canaday in the district court for Cheyenne County against the Thomas Lumber Company, a corporation, and Elmer J. Krueger as defendants to recover damages for the failure and refusal of the lessor, the Thomas Lumber Company, and its grantee, Elmer J. Krueger, to deliver possession of certain premises leased to the plaintiff. At the conclusion of the plaintiff's evidence in chief the defendants each separately moved for a directed verdict.

The motion of the Thomas Lumber Company was upon the grounds (1) that the evidence failed to establish by sufficient weight thereof the cause of action in favor of the plaintiff against the defendant; (2) that the evidence showed possession of the leased premises was given to the plaintiff under the terms of the lease by the defendant Thomas Lumber Company; (3) that the evi-

dence showed the plaintiff failed, neglected, and refused to tender the cash payment under the terms of the lease on October 1, 1950, and failed to keep such tender in full force and effect; and (4) that the evidence was entirely insufficient to warrant a submission to the jury on the question of damages alleged to have been suffered by the plaintiff.

The motion for directed verdict on the part of the defendant Elmer J. Krueger was to the effect that the evidence of the plaintiff disclosed that any possessory rights he had in the leased premises under the lease with the defendant Thomas Lumber Company he voluntarily surrendered; that the plaintiff failed to pay the rental under the terms of the lease which was due on October 1, 1950, and failed to make any legal tender to the defendants E. J. Krueger or the Thomas Lumber Company, and failed to keep a valid offer of any kind of tender for the payment due October 1, 1950; and that the plaintiff failed to sustain the burden of proof by a preponderance of evidence.

The trial court sustained the motions for directed verdict except that according to the terms of the lease the plaintiff was to be credited with $250 for fixtures furnished by him, principally plumbing fixtures for the heating system of the building, for which amount the plaintiff was entitled to recover judgment, together with interest at the rate of 6 percent per annum from November 1, 1950, in the amount of $16.25. The court found that there was insufficient evidence to sustain the balance of the plaintiff's petition. Judgment was entered accordingly. The plaintiff's recovery was fixed in the amount of $266.25.

The plaintiff filed a motion for new trial which was overruled, and the plaintiff perfected appeal to this court.

The plaintiff's amended petition, insofar as necessary to consider here, alleged in substance that on September 7, 1950, the plaintiff and the Thomas Lumber Com-

pany entered into a written lease by the terms of which the plaintiff leased Lot 6, Block 20, Original Town of Sidney, Cheyenne County, Nebraska; that at the time the lease was executed there was in the process of construction on said premises a two-story building with a full basement, which building, when completed, would be suitable for a restaurant, a rooming house, and storage purposes; that the lease provided for certain fixtures to be furnished by the plaintiff in the amount of $250, for which the plaintiff should receive credit; that on or about October 1, 1950, the plaintiff did tender to the Thomas Lumber Company the sum of $150, but the tender was refused; that the building was not ready for occupancy until after November 3, 1950; that the sale of the leased premises by the Thomas Lumber Company to the defendant Krueger occurred on October 3, 1950, by deed which contained the following provision: "Subject to the outstanding lease to E. L. Canaday"; that tender was made to defendant Krueger by the plaintiff on or about November 3, 1950, in the sum of $150, being the balance of the first two months rent; and that defendant Krueger refused to permit the plaintiff to go into possession of the premises, and the Thomas Lumber Company likewise failed to place the plaintiff in possession of the premises. Other allegations of the amended petition relate to items of damages and special damages which need not be set out. The plaintiff prayed for judgment against the defendants in the amount of $3,650 and costs of this action.

The amended answer of the Thomas Lumber Company admitted the lease was entered into for a period of two years; that after the execution of the lease the plaintiff obtained a key to the building and went into possession thereof, subject to the completion of the building; that the plaintiff placed certain property owned by him in the building as provided for by the terms of the lease; and that on the date the defendant Thomas Lumber Company transferred the property by deed to the de-

fendant Elmer J. Krueger, the plaintiff still had the key to the building and free access thereto, and was in possession thereof. The defendant Thomas Lumber Company denied that the plaintiff tendered $150 in currency to it as alleged in the amended petition; alleged that this defendant had in no manner breached the terms of the lease; denied generally the allegations of damages alleged in the petition; and prayed for dismissal of the amended petition.

The answer of the defendant Elmer J. Krueger is in effect a general denial.

The plaintiff's reply to the amended answer of the defendant Thomas Lumber Company and to the answer of the defendant Elmer J. Krueger is a general denial of the allegations of the separate answers of the defendants which are inconsistent with the allegations of the plaintiff's petition.

For convenience we will refer to the parties as originally designated in the district court, referring to E. L. Canaday as plaintiff, the Thomas Lumber Company, a corporation, as Thomas Lumber Company, and the defendant Elmer J. Krueger as Krueger.

The record discloses that in August or September 1950, the plaintiff had a business transaction with the Thomas Lumber Company whereby he entered into a written lease on September 7, 1950, with Roy Thomas, president of the company, to rent a two-story building which was in the process of construction, located on Lot 6, Block 20, Original Town of Sidney, Nebraska, to be used as a restaurant and rooming house. Under the terms of the lease the rent was fixed at $200 per month, payable in advance the first day of the month starting October 1, 1950, the lease to run for a period of two years. The lease provided that the plaintiff should be allowed $250 for certain plumbing fixtures furnished by him for completion of the building, the plaintiff to pay an additional $150 on October 1, 1950, which amount would pay the rental on the premises for the first two months

of the lease. The lease also provided that the plaintiff agreed to pay the Thomas Lumber Company the rent as above specified except when said premises were untenantable by reason of fire, from any other cause than carelessness of the party of the second part or persons in his employ, or by superior force or inevitable necessity.

At the time the lease was signed the building was in the process of completion and not ready for occupancy. The work being done at that time was putting on doors in the upstairs rooms; the lighting fixtures had not been put in place, and the plumbing was not complete.

On October 3, 1950, the Thomas Lumber Company conveyed the premises in question to Elmer J. Krueger by quit claim deed. The deed provided that the conveyance was made "Subject to the outstanding lease thereon to E. L. Canaday."

The plaintiff testified the building was not completed until along in November. On November 1, 1950, the building was still being painted, the floors were being sanded, and the plumbing was being fixed. The plaintiff furnished and delivered to the building in August 1950, certain plumbing fixtures consisting of lavatories, stools, pipe, and radiators which he owned and which, under the terms of the lease, he was required to deliver to the building. He had obtained a key from Roy Thomas, president of the Thomas Lumber Company, for that purpose before the lease was signed. At that time Roy Thomas told the plaintiff he could have the key to put the fixtures in the building where they would be out of the workmen's way. The key was not returned to Mr. Thomas. The plaintiff had a conversation with Mr. Thomas before the deed to Krueger was delivered, in which the plaintiff told Thomas that it looked like Krueger was going to try to hold him out, and he believed he was going to give him the $150. Thomas said Krueger could have it, because Krueger would have the deed. Plaintiff offered to give Thomas $150. He had

already paid $250. He was to pay the $150 on the first of October, or when the building was completed.

It appears from the record that on Saturday, September 30, 1950, before Krueger obtained the deed, the plaintiff had a conversation with Krueger whom he met for the first time. The plaintiff was working on a building that he was demolishing when Krueger and his cousin came to him. Krueger identified himself to the plaintiff and asked for the key to get into the building to put some painters to work. The conversation was in substance as follows: Plaintiff told Krueger that he had obtained the key with the understanding that he was to put some fixtures in the building, and there was some more material to be placed in the building. Krueger said he had lost his key. The plaintiff let him have the key which was to the east door in the front of the building. Apparently there are two doors in the front of the building and one in the rear. About 5:30 p. m., the same day, Krueger returned and walked up to the truck where the plaintiff was standing and said to the plaintiff: "I have got the deed to the building now, and everything paid and straightened out, and I am going to do as I please with it." He further said: "I am going to keep this key." The plaintiff said: "you agreed to bring it back here and turn it over to me at closing time, and I have just got that in trust to put the stuff in, but if you want to take that attitude, go ahead and keep it. * * * I can't take it away from you." He told Krueger he did not believe he had it straightened out because he happened to know that Mr. Thomas was in Lincoln and said he would not be back until Monday. He asked Krueger whom he had seen and was told "his men down there." Plaintiff told Krueger he did not believe he had paid Thomas. The plaintiff determined to go and see Mr. Thomas on Monday morning. He contacted Mr. Thomas the following Monday morning and had a conversation with him in which he told Mr. Thomas about letting Krueger have the key for the purpose of

letting in the painters, and how Krueger came back and refused to give the key to him. Plaintiff also told Mr. Thomas about the conversation he had with Krueger with reference to Krueger having straightened the matter out and paid for the premises. Plaintiff asked Mr. Thomas if that was so. Thomas said no, that Krueger had not paid anything as yet but was going to in a few days.

It appears also from the evidence that the plaintiff met Krueger at different places but had no conversation with him; that Krueger did offer to pay the plaintiff $250 for the rental, which the plaintiff refused and told Krueger he wanted the building. The plaintiff testified that before the building was completed, apparently sometime in November, he had a conversation with Krueger in the presence of two witnesses in which conversation he offered to pay Krueger $150 in currency, counted it out, showed it to him, and asked him for a receipt. Krueger refused to take it and said he did not want it.

With reference to the offer of $150 made to Roy Thomas, the plaintiff testified that this offer was made before Mr. Thomas went to Lincoln. He did not know why Thomas did not take it. He could not make him take it. He was informed by Thomas that Krueger would probably have the deed by the time the building was finished and he should pay the $150 to Krueger.

There is evidence in the record with reference to the rental value of the property and other items constituting damages which the plaintiff claimed to have suffered.

The plaintiff assigns as error, so far as necessary to consider, (1) that the judgment of the trial court is contrary to the evidence and the law; (2) that the court erred in sustaining the separate motions for directed verdict of the defendant Thomas Lumber Company and the defendant Krueger; and (3) that the court erred in determining that under the pleadings and the evidence the plaintiff had to make a formal tender of the rent to

the defendant Thomas Lumber Company on or before October 1, 1950.

The controlling rule when a motion is made by a defendant at the close of plaintiff's evidence for a directed verdict or for dismissal for want of sufficient evidence to make a prima facie case is that every fact alleged which the evidence tends to prove will, for the purposes of the motion, be considered as proved. See, Union Stock Yards Co. v. Conoyer, 38 Neb. 488, 56 N. W. 1081, 41 Am. S. R. 738; Hoerger v. City State Bank, 151 Neb. 321, 37 N. W. 2d 393.

With this rule in mind we proceed to a determination of this appeal.

The case of Herpolsheimer v. Christopher, on rehearing, 76 Neb. 355, 111 N. W. 359, is cited. It is true, the facts are distinguishable from the instant case, however we believe the principle of law announced therein is applicable in the instant case and is the rule in this state. Ordinarily the lessor impliedly covenants with the lessee that the premises leased shall be open to entry by him at the time fixed in the lease as the beginning of the term. See, also, Gregory v. Pribbeno, 143 Neb. 379, 9 N. W. 2d 485; 51 C. J. S., Landlord and Tenant, § 308, p. 969, § 310, p. 971.

There is an implied obligation that the premises shall be completed and ready for occupancy at the commencement of the term. Where the lessor has not fulfilled his obligation to have the building ready for occupancy by the date fixed by the lease for the commencement of the term, the lessee is not bound to enter on that date. See Gibbons v. Hoefeld, 299 Ill. 455, 132 N. E. 425.

On the question of tender, the party alleging tender may prove his averment by showing an offer to pay in bank notes which were not refused on account of the character of the medium; or he may show that when about to produce the money or thing to be tendered, the other party told him it was unnecessary, or that he would not accept it; or any other act or declaration by

which some of the formal requisites of a strict tender were dispensed with. See 62 C. J., Tender, § 86, p. 691.

A formal tender of money is never required where it is disclosed, if it had been made, it would have been fruitless. Graham v. Frazier, 49 Neb. 90, 68 N. W. 367.

The law does not require a useless formality. A formal tender is not necessary where a party has shown by act or word that it would not be accepted, if made. See, Mahnk v. Blanchard, 233 App. Div. 555, 253 N. Y. S. 307; Weinburgh v. Saier, 303 Mich. 640, 6 N. W. 2d 921; Morgan v. Ibberson, 215 Minn. 293, 10 N. W. 2d 222; Hanesworth v. Hendrickson, 320 Mich. 577, 31 N. W. 2d 726; Murdock v. Roe, 186 Mich. 233, 152 N. W. 969.

There is evidence from which a jury might find that the defendant Thomas Lumber Company and defendant Krueger both repudiated the lease prior to October 1, 1950, the date the lease was to be effective, and that the Thomas Lumber Company waived the formal tender by requesting the plaintiff to pay the balance of the rent, $150, to Krueger. There is also evidence that the defendant Krueger was negotiating with another party, who later became his tenant, prior to the time Krueger received the deed. This also goes to the question of tender, or if tender has been waived as heretofore indicated.

The fact that a lessor has sold the land subject to the lease does not relieve him of liability for damages for failure to deliver possession. See, Obermeier v. Mattison, 98 Or. 195, 192 P. 283; 51 C. J. S., Landlord and Tenant, § 308, p. 969.

An entry for a particular purpose under an agreement with the lessor other than the lease does not amount to taking possession. See 51 C. J. S., Landlord and Tenant, § 313, p. 973.

We conclude that under the afore-cited authorities the evidence was sufficient to be submitted to a jury, and the trial court erred in directing a verdict against the plaintiff.

In the light of our holding, other assignments of error need not be discussed.

The judgment of the trial court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

CITY OF WAYNE, NEBRASKA, APPELLEE, V. ARTHUR G. ADAMS ET AL., APPELLEES, CLYDE OMAN (FERNE OMAN GORST, EXECUTRIX), APPELLANT.
56 N. W. 2d 117

Filed December 12, 1952. No. 33220.

1. **Statutes.** If a statute is unambiguous, courts will not by interpretation or construction usurp the functions of the Legislature and give it a meaning not intended or expressed therein.
2. ———. In such cases, it is not the province of courts to read into a statute something not found therein or to give it a meaning not warranted by its legislative language.
3. **Taxation: Actions.** Sections 77-1938 to 77-1941, R. R. S. 1943, are only procedural in character and do not of themselves give or grant any rights.
4. **Judgments.** Where there is a finding of fact in an action in equity or in law, such finding is res judicata in any other action on the same issues of fact between the same parties or their privies whether the action be in equity or law.
5. ———. A party should not be vexed more than once for the same cause of action, and the doctrine of res judicata ordinarily includes not only the things which were determined in the former action but also any other matter properly involved which might have been raised and determined therein.
6. ———. The conclusiveness of a judicial determination is not affected by the kind of proceeding or form of action in which it was made or by a difference in form or object of the litigation in which the adjudication was made and that in which res judicata is pleaded.
7. ———. The private rights of parties which have been vested by the judgment of a court cannot be taken away by subsequent legislation but must be thereafter enforced by the court regardless of such legislation.

APPEAL from the district court for Wayne County: JACKSON B. CHASE, JUDGE. *Affirmed.*

William A. Crossland and *Ginsburg & Ginsburg,* for appellant.

H. D. Addison and *Charles E. McDermott,* for appellee.

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

CHAPPELL, J.

On June 1, 1950, after the opinion of this court in Oman v. City of Wayne, 149 Neb. 303, 30 N. W. 2d 921, and enactment of L. B. 465, Laws of Nebraska, 1949, c. 240, p. 652, Clyde Oman filed an application in the original tax sale certificate foreclosure proceeding wherein a valid decree of foreclosure had been procured on September 25, 1931, but proceedings subsequent thereto were void. Such statute is now designated as sections 77-1938 to 77-1941, R. R. S. 1943. His application prayed for a supplemental decree ordering proper completion of the foreclosure proceedings and adjusting the rights of all parties, subsequent to decree of foreclosure. Applicant sought thereby to have the court adjudge that he had a first lien upon the premises involved because of superior rights arising since entry of the original foreclosure decree through subsequent payment of taxes and special assessments, and placing of improvements on the premises in good faith. He also prayed for an accounting and judgment against the city of Wayne for the fair and reasonable value of property and benefits subsequently received by it which should be included in the first lien sought by him, and for equitable relief.

The city of Wayne, county of Wayne, and State of Nebraska, generally designated hereafter as plaintiffs, answered, denying generally, and alleging that the valid decree of foreclosure, superior to any alleged right of applicant, had never been paid or discharged and was in full force and effect, constituting a first lien on the premises; that all of the matters and things alleged by applicant had been previously determined in the dis-

trict court and this Court in cases wherein applicant also was a party, and are res judicata; that the statutes aforesaid were unconstitutional and void; and that applicant was entitled to no relief thereunder. The prayers thereof were substantially for disallowance of the application, except that the foreclosure proceeding should be properly completed, and for equitable relief. Insofar as important here, applicant's replies thereto were general denials and a plea of estoppel. Clyde Oman died after filing the application, and by consent the proceedings were revived in the name of his executrix.

A hearing was had upon the merits, whereat evidence was adduced by applicant, and plaintiffs rested after appropriate motion to dismiss the application had been denied and the court had been requested to take judicial notice of the opinions of this court in Oman v. City of Wayne, 149 Neb. 303, 30 N. W. 2d 921, and Oman v. City of Wayne, 152 Neb. 341, 40 N. W. 2d 916, a part thereof completing the litigation. Applicant's evidence included "all of the files and records" in said former action, together with judgments on the mandates in both opinions therein. Other relevant evidence adduced was substantially a recapitulation of the identical factual situation recited in such former opinions, and it will not be repeated here. It is sufficient for us to say that the present action was in the same court, between the same parties, and involved the same subject matter under identical relevant facts in an identical cause of action, pleaded in like manner as in Oman v. City of Wayne, 149 Neb. 303, 30 N. W. 2d 921, except that herein applicant claimed to have superior rights subsequently conferred upon him by L. B. 465, Laws of Nebraska, 1949, c. 240, p. 652, hereinafter called the Act. In its decree herein the trial court found and adjudged the issues in favor of plaintiffs and against applicant. It found: "* * * that the Supreme Court of the State of Nebraska, in other cases involving the same subject matter did decide and adjudicate various issues both

factual and legal as are here presented, and did decree and establish certain rights, liabilities and priorities about and concerning which the parties herein are now contending, and that the doctrine of res adjudicata applies herein" and that the statute relied upon by applicant "does not and cannot empower this Court to treat as non-controlling the actions and decisions heretofore taken and decided by the Supreme Court." It found that the tax foreclosure decree was valid, about which there is no dispute, and that applicant had no rights in any part of the real estate involved which were superior to the lien of the foreclosure decree, and denied him any relief which would affect the validity of such decree or the priority of plaintiffs' first lien obtained thereby. It then ordered, as prayed and requested by all parties, that the tax foreclosure proceeding should be properly completed as provided by law, and ordered the clerk of the district court to issue an order of sale in compliance therewith. Costs were taxed to applicant.

Applicant's motion for new trial was overruled, and he appealed, assigning: (1) That the decree of the trial court is erroneous in finding and adjudging that previous litigation between the parties, involving the same subject matter are conclusive and res judicata of this action; (2) that the decree of the trial court is erroneous in finding and adjudging that applicant has no rights or liens upon the real estate involved, paramount, prior or superior to the lien of the plaintiff; and (3) that the judgment was not sustained by but contrary to the evidence and law. We conclude that the assignments have no merit.

As disclosed by its title, the Act was: "AN ACT relating to taxation * * *." Its object was "to provide procedure for the proper completion of proceedings heretofore had for the foreclosure of tax liens or tax sale certificates where a valid decree of foreclosure was rendered, but proceedings subsequent to entry of decree are defective, invalid, or void for any reason; to repeal sec-

tions 77-1919, 77-1920, 77-1921, and 77-1922, Revised Statutes of Nebraska, 1943, and sections 77-1929, 77-1930, 77-1931, and 77-1932, Revised Statutes Supplement, 1947; and to declare an emergency."

Insofar as important here, section 1 of the Act provides that any person who, subsequent to the entry of a valid decree of foreclosure, has acquired any interest in such property by payment of subsequent taxes or erection of improvements on the property involved therein, may file an application to have the tax foreclosure proceeding properly completed and the rights of the parties subsequent to the entry of such decree adjusted by the court.

Section 2 of the Act provides that the application should be filed in the original tax foreclosure proceeding wherein the decree of foreclosure was rendered, and required the application to set forth: (1) The nature of the interest claimed and how it was acquired; (2) the defects rendering proceedings subsequent to the decree of foreclosure void; (3) the taxes or special assessments which have become a lien since entry of the foreclosure decree and the amount thereof if paid by applicant; (4) the improvements, if any, placed upon the property by applicant since decree of foreclosure; and (5) any other facts proper for a court of equity to take into consideration in determining the rights, equities, and liens of the parties in the property, concluding with a request that the court should order the foreclosure proceedings to be properly completed and the rights of all parties arising subsequent to the decree be adjusted and determined.

Section 3 of the Act provides that notice of hearing upon such application should be given to all interested parties by service in the same manner as summons in a civil action, which parties should have 20 days from date of service of notice to answer. It also permitted such service of process upon the State by service upon the Attorney General.

Section 4 of the Act provides that upon hearing the court should enter a supplemental decree directing proper completion of the foreclosure proceeding and determining the rights of all parties that have arisen subsequent to the entry of the decree of foreclosure. It then specifically provides: "The rights adjudicated in the original tax foreclosure proceeding shall be respected and observed, but such adjudication shall not prevent any party from establishing superior rights that may have arisen since the entry of the decree through payment of subsequent taxes and special assessments and the placing of improvements on the premises *in good faith.*" (Italics supplied). It then provides that any municipal corporation or governmental subdivision might be required to account for any consideration received by it as the result of the void proceedings.

The Act is clear and unambiguous, and courts will not by interpretation or construction usurp the function of the Legislature and give it a meaning not intended or expressed therein. In such a case it is not the province of courts to read into a statute something not found therein or to give it a meaning not warranted by its legislative language. Ledwith v. Bankers Life Ins. Co., 156 Neb. 107, 54 N. W. 2d 409.

The object and intent of the Act, as clearly indicated by the title and provisions of the Act, was simply to provide a formalized statutory procedure which could be followed in the original tax foreclosure proceeding by any applicant who could bring himself within its provisions, wherein the original tax foreclosure proceedings should be completed in the manner provided by law and whereby such applicant might obtain service upon all interested parties, including the State, and have adjusted and determined as in equity whether or not he had any "superior rights that may have arisen since the entry of the decree through payment of subsequent taxes and special assessments and the placing of improvements on the premises in good faith." In other words, the Act

is entirely procedural, and, contrary to applicant's contention, does not give or grant an applicant any new rights.

Our opinion in Oman v. City of Wayne, 149 Neb. 303, 30 N. W. 2d 921, was decided upon the merits as an original action in equity. Contrary to applicant's contention, plaintiff therein, who is applicant here, did not fail "in that proceeding because of the want of statutory basis upon which to maintain his action" or for any jurisdictional ground. True, in his brief therein plaintiff suggested that if the decree of the district court could not be sustained, he was entitled to relief under sections 77-1919 to 77-1922, R. S. 1943, and sections 77-1929 to 77-1932, R. S. Supp., 1947, entirely different statutes, subsequently repealed by the Act here involved, and we requested briefs and additional argument upon the question of their applicability. Such was done, and in that regard we simply concluded that such statutes had no application and did not determine any other questions presented with reference thereto. We then reversed the judgment of the trial court, and dismissed plaintiff's petition upon the merits without disturbing the decree as to the cross-petition of another defendant who sought recovery therein against Oman for breach of contract to convey, which was subsequently disposed of adversely to plaintiff by our opinion in Oman v. City of Wayne, 152 Neb. 341, 40 N. W. 2d 916, wherein the force and effect of the first opinion in the Oman case was recognized.

The force and effect of our first opinion in the Oman case, upon a record comparable in every respect with that at bar, was that the entire transaction subsequent to the decree was void as a constructive fraud, both upon the owners of the equity as well as upon the holders, taxpayers, and others interested in the tax liens being foreclosed; that plaintiff, having knowingly dealt directly with the city and its officers for purchase of the property from them, was not an innocent purchaser thereof

in good faith for value without notice; that plaintiff was not entitled to be subrogated to any rights of the city; and that the decree of foreclosure obtained by the city was still an effective, unsatisfied, and valid enforceable first lien upon the property.

In so concluding, the first opinion in the Oman case quoted from and relied upon Taxpayers' League v. Wightman, 139 Neb. 212, 296 N. W. 886, Wightman v. City of Wayne, 146 Neb. 944, 22 N. W. 2d 294, and Wightman v. City of Wayne, 148 Neb. 700, 28 N. W. 2d 575, all comparable cases. With regard thereto, the first opinion in the Oman case said: "The same factual situation exists here as there and it must receive the same treatment as was accorded there." With regard to plaintiff's plea of estoppel against the city, the opinion said: "The rule is that the doctrine of estoppel may never be asserted to uphold crime, fraud, or misdoing of any character. 3 Pomeroy, Equity Jurisprudence (5th ed.), § 813, p. 236; 19 Am. Jur., Estoppel, § 39, p. 638; 31 C. J. S., Estoppel, § 148, p. 437. To sustain the estoppel here would be to sustain and make effective the fraud that voids this transaction from the beginning. It may not properly be done. See Warren v. County of Stanton, 145 Neb. 220, 15 N. W. 2d 757."

In Taxpayers' League v. Wightman, 139 Neb. 212, 296 N. W. 886, we validated a comparable lien obtained by the city of Wayne under a decree of foreclosure at the instance of taxpayers. Also, in Wightman v. City of Wayne, 144 Neb. 871, 15 N. W. 2d 78, we refused to enjoin its enforcement or require the city of Wayne to perform its contract to satisfy it or grant plaintiff general equitable relief. In that opinion we said: "The intervener contends that any claims of plaintiff for general equitable relief are barred under the principles of res adjudicata. In Taxpayers' League v. Wightman, supra, the defendant Wightman filed an answer in which he asked for a dismissal of plaintiff's amended petition and for general equitable relief. Any avail-

able remedy could have been asserted in that case. The issues in that case in effect determined every issue raised by the present case. But whether they were specifically determined or not, every issue in the present case could have been raised in the former suit.

"This court has adopted the following rule on the subject: 'The rule is that a party should not be vexed more than once for the same cause of action, and the doctrine of res adjudicata includes not only the things which were determined in the former suit, but also any other matter properly involved which might have been raised and determined therein.' Shepard v. City of Friend, 141 Neb. 866, 5 N. W. 2d 108."

In Shepard v. City of Friend, 141 Neb. 866, 5 N. W. 2d 108, this court held: "The defense of res adjudicata becomes available when a question of fact has been put directly in issue in an action between the same parties or their privies and an adjudication is had thereon.

"Under the doctrine of res adjudicata, when a question of fact is once determined on the merits, that question is settled, so far as the litigants and those in privity are concerned. Such question when decided cannot be relitigated between the same parties. * * *

"Where there is a finding of fact in an action in equity or in law, such finding is res adjudicata in any other action on the same issues of fact between the same parties or their privies, whether the action be in equity or law."

In Wightman v. City of Wayne, 148 Neb. 700, 28 N. W. 2d 575, plaintiff brought another action under the Declaratory Judgments Act, likewise seeking an adjudication of the rights and interests of the parties in and to the same property and improvements thereon, involved in the former opinion, and for various forms of relief based on unjust enrichment, estoppel, the Occupying Claimants Act, and other equitable remedies. Insofar as important here, it was said in that opinion: "As pointed out the history, as set forth herein, con-

tains the substantial allegations of the petition. The petition contains no substantial allegation not reflected in the opinions of this court in Taxpayers' League v. Wightman, supra, and Wightman v. City of Wayne, supra. The object and purpose of this action as is disclosed by the petition is to obtain on the same facts remedial relief prayed for and denied in the two previous cases and on the same facts remedial relief not prayed for in those actions.

"As to those matters which were adjudicated in the earlier actions there is no question whatever but that here it becomes the duty of the court to say that those adjudications are final and conclusive and that they cannot be overturned by any judgment of the court herein. It is also true that the same rule applies to any remedy which could have been asserted in the former cases."

As stated in 50 C. J. S., Judgments, § 691, p. 150: "The conclusiveness of a judicial determination is not affected by the kind of proceeding or form of action in which it was made, or by a difference in form or object of the litigation in which the adjudication was made and that in which the estoppel is set up."

Such rules have application herein to bar applicant's rights claimed under the procedure provided by the Act. In that connection, the force and effect of the opinions in Oman v. City of Wayne, 149 Neb. 303, 30 N. W. 2d 921, and 152 Neb. 341, 40 N. W. 2d 916, was to conclude as a question of fact that applicant did not pay subsequent taxes and special assessments or place improvements on the premises "in good faith." Thus, accordingly, he could not bring himself within the provisions of section 4 of the Act. Further, we decided in such opinions that the city had a first lien by virtue of the valid foreclosure decree, which rights became vested by the opinions and judgments thereon. In such a situation, the applicable rule is that: "* * * the private rights of parties which have been vested by the judgment

of a court cannot be taken away by subsequent legislation, but must be thereafter enforced by the court regardless of such legislation." Hodges v. Snyder, 261 U. S. 600, 43 S. Ct. 435, 67 L. Ed. 819. Such language was approved and adopted as the holding of this court in Mooney v. Drainage District, 134 Neb. 192, 278 N. W. 368. In that opinion, it was said, quoting from and approving 1 Black, Judgments (2d ed.), § 298, p. 455: " 'The power to open or vacate judgments is essentially judicial. Therefore, on the great constitutional principle of the separation of the powers and functions of the three departments of government, it cannot be exercised by the legislature. While a statute may indeed declare what judgments shall in future be subject to be vacated, or when or how or for what causes, it cannot apply retrospectively to a judgment already rendered and which had become final and unalterable by the court before its passage. Such an act would be unconstitutional and void on two grounds; first, because it would unlawfully impair the fixed and vested rights of the successful litigant; and second, because it would be an unwarranted invasion of the province of the judicial department.' "

Authorities cited and relied upon by applicant are clearly distinguishable upon the facts or character of legislation involved.

Whether or not the Act would be constitutional or applicable to situations incomparable with that presented in the case at bar we need not and do not discuss or decide.

For the reasons heretofore stated, the judgment of the trial court should be and hereby is affirmed.

AFFIRMED.

CLYDE LINCH, APPELLEE, V. CARL H. CARLSON, APPELLANT.
56 N. W. 2d 101

Filed December 19, 1952. No. 33197.

1. **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, and did so rely, and altered his condition because thereof, and suffered damages thereby.
2. ———. It is a general rule that fraud must relate to a present or preexisting fact, and cannot ordinarily be predicated on unfulfilled promises, or statements as to future events.
3. ———. 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.
4. ———. A person is justified in relying upon a representation made to him in all cases where the transaction is a positive statement of fact, and where an investigation would be required to discover the truth.
5. ———. It is generally held that fraud may be predicated on false representations or concealments, although the truth could have been ascertained by an examination of public records.
6. **Vendor and Purchaser: Fraud.** The purpose of the recording acts is to afford protection not to those who make fraudulent misrepresentations but to bona fide purchasers for value. The party to whom false representations are made is not held to constructive notice of a public record which would reveal the true facts.
7. **Evidence.** Generally, communications by telephone are admissible in evidence where otherwise relevant to the fact or facts in issue, provided the identity of the person with whom the witness spoke or the person whom he heard speak is satisfactorily established. However, where it appears the parties to a telephone conversation are not vested with authority to act as attorney or agent by the contracting party in whose behalf information is sought, then such telephone conversation is inadmissible in evidence.

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

Mothersead, Wright & Simmons, for appellant.

McGinley & Lane and *Holtorf & Harris,* for appellee.

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

MESSMORE, J.

This is an action at law brought by Clyde Linch as plaintiff in the district court for Scotts Bluff County, against Carl H. Carlson, defendant, to recover damages for fraud alleged to have been practiced on the plaintiff by the defendant, based on false representations as a material inducement for the plaintiff to enter into a contract with the defendant for the sale of land and assignment of school land leases. The issues were submitted to a jury resulting in a verdict for the plaintiff, fixing his recovery in the amount of $2,894.07, which is the amount of irrigation assessments on the school land leases in Section 36, less $1,000. The defendant filed a motion for new trial which was overruled. From this ruling the defendant appealed.

The defendant assigns as error that (1) the court erred in overruling the motion of the defendant for a directed verdict made at the close of plaintiff's evidence; (2) the court erred in overruling the defendant's motion to set aside the verdict and to enter a judgment in favor of the defendant notwithstanding the verdict; and (3) the court erred in sustaining objections to the testimony of the witness Paul Rhodes and the offers of proof made by the defendant with reference to telephone conversations had between this witness and attorney Sandhouse of Sterling, Colorado, acting for the plaintiff, touching upon delinquent irrigation assessments against the school land leases involved in this action.

The plaintiff's amended petition, insofar as necessary to consider in this appeal, alleges that the plaintiff was induced to enter into a contract for the purchase of the 4-P ranch near Bridgeport, Nebraska, by reason of representations of the defendant and defendant's agent, Calderwood, that a part of the real estate being transferred to the plaintfif was subject to some delinquent

irrigation taxes; that the same would not amount to much, and would not exceed $1,000; further, that the unpaid irrigation taxes were being canceled in any event by the irrigation district as to the land because the land could not be irrigated under the dam; that the representations so made by the defendant were false when made and made with the intention that the plaintiff would rely thereon; and that without the knowledge of the falsity thereof the plaintiff did rely thereon to his damage in the amount of the unpaid irrigation taxes.

The defendant's answer was a general denial.

For convenience we will refer to the parties as designated in the district court. H. M. Calderwood will be referred to as Calderwood, the plaintiff Clyde Linch as Linch, and the defendant Carl H. Carlson as Carlson.

The record discloses that Calderwood, a real estate agent of Sterling, Colorado, was acquainted with Linch and had sold him the Tamarac ranch in 1944. He had heard through a Mr. Johnson that Carlson had a ranch for sale. Johnson and Calderwood went to see Carlson about the ranch. Arrangements were made by Calderwood to represent Carlson as his agent to sell the ranch. This was in the latter part of May 1948. Calderwood knew that Linch was in the market for a ranch. He contacted Linch and they went to the ranch on June 3, 1948. Calderwood priced the ranch at $90,000, and indicated it would be difficult to tell in going over the 6,000-acre ranch in a period of two hours what its value would be. The ranch is described as a prairie ranch with no meadows on it. In addition to the deeded land the ranch consisted of four school land leases in Section 36 which would be assigned under the contract by Carlson to the plaintiff. One of the leases would run 12 years, the second 15 years, the third 16 years from the date of the contract, and the fourth was not involved in this action and not subject to unpaid irrigation assessments. Twenty-five and one-half acres of the school lease land had been leveled and was actually irrigated.

After viewing the ranch Calderwood contacted Carlson in Alliance and informed him he had a buyer, but such buyer did not believe the ranch was worth $90,000. He suggested that Carlson talk the matter over with Linch, which was done, and they arrived at a figure of $87,500 and went over the terms of the sale. Calderwood then asked Carlson if he desired to close the deal in Bridgeport or Colorado. Carlson desired to close it in Colorado, as he did not want Mr. Beltner, from whom he had obtained the ranch by contract, to know he was selling it until the deal was consummated. Linch and Carlson met in Calderwood's office in Sterling, Colorado, and at Calderwood's suggestion they proceeded to the office of attorney Sandhouse who had represented Calderwood for some time. Calderwood had supplied the data for the contract which he had received from Carlson. Sandhouse drafted the contract. Both Linch and Carlson read it and agreed it was satisfactory. It was handed to Linch who signed it, then handed to Carlson who said he would take it home and have his wife look it over before he signed it. At that time no discussion was had about irrigation taxes on the school lease land in Section 36 within the boundaries of the irrigation district. There was some discussion about delinquent irrigation taxes with reference to Sections 24 or 25. Linch did not employ Sandhouse in any manner in writing up the contract or subsequently when a rider was attached to it. Sandhouse was paid by Calderwood for drafting the contract. It was arranged that Calderwood would go to Carlson's home in the evening and pick up the contract. He went to the ranch and contacted Carlson. Carlson said there was something Sandhouse had left out of the contract; and that there was a definite clause in the contract he had with Beltner that Beltner would not be responsible for unpaid water taxes. He said he would have to have that in this contract.

On his way home from Sandhouse's office Carlson had contacted Paul Rhodes, who acted as his attorney, with

reference to a rider to the contract. Rhodes also represented the Northport Irrigation District. The rider to the contract provided that Carlson was not bound by the terms of the contract to pay any delinquent irrigation assessments there might be on school lease land in Section 36, Township 21, Range 50, and the same should not be considered a defect or cloud on the title pursuant to the terms of the contract. The rider then provided: "I am signing this contract providing that Clyde A. Linch of Big Springs Nebr., *W*ill acknowledge this rider *pretaining* to *th* unpaid delinquent *irregation assesse-ments* in Section 36 Township 21 North Range Fifty, West of the Sixth Principal Meridian, in Morrill County, Nebraska, on the School Lease land that is not under cultivation but is under these assessments." The rider was signed by Carlson and witnessed by Calderwood. In addition, the rider provided that if the contract was not signed by Linch it would then be null and void and the check for $2,500 paid down by Linch would be returned to him.

Calderwood informed Carlson he did not believe Linch would sign the contract with the rider attached, but he would try and see what he could do. Carlson then told Calderwood that the taxes would never have to be paid, and they would not amount to much, not to exceed $1,000. He said the ground could not be irrigated, and that these taxes had not been paid for 20 years. Calderwood saw Linch the next day, June 8, 1948, in Ogallala, and told him Carlson would not sign the contract without attaching a rider to it, and Calderwood repeated what Carlson had told him, in substance as follows: That this land probably would not be taxed, and that they had a man down in Washington (it appears that this man was Paul Rhodes who represented the Northport Irrigation District) to try and take this land out of the taxes. The taxes had not been paid for 20 years, and if they did have to pay the taxes it would not be taxed as irrigable land and would probably amount to less

than $1,000. Linch said that nobody could tell whether the ranch was worth $87,500 or $88,500. Calderwood then told Linch that if he did not want to sign the contract to see an attorney. Linch said that an attorney would not know any more about the irrigation assessments than Carlson. Linch signed the rider, but did not acknowledge it before a notary public.

The witness Fred Beltner, who by contract sold the 4-P ranch to Carlson, testified with reference to the unpaid irrigation assessments and the conversation he had with reference thereto with Carlson in 1943, and at other times, and that to his knowledge there was better than $13,000 against the school lease land that was not paid.

Linch testified that he first met Carlson June 3, 1948, at Alliance. Calderwood was present at the meeting. He intended to purchase the 4-P ranch from Carlson and paid down $2,500, and a notation was made of the price. Arrangements were made to meet on June 7, 1948, at Calderwood's office in Sterling, which meeting was held, and Carlson supplied the terms of the contract. At Calderwood's suggestion they proceeded to Sandhouse's office where the contract was drafted. There was some conversation concerning delinquent taxes on irrigation assessments with reference to the deeded land in Section 25. Nothing was said about unpaid irrigation assessments on the school lease land in Section 36. He did not employ Sandhouse nor pay him. Sandhouse had examined the abstracts with reference to the purchase of the 4-P ranch, and that was all. He next saw Calderwood on June 8, 1948, in Ogallala. Calderwood informed him that he had gone to Carlson to pick up the contract and Carlson had attached a rider thereto to conform to the contract Carlson had with Beltner which he felt he had to have before he could make the sale. Calderwood argued to some extent with Carlson to the effect that the contract had already been made and he did not feel that Linch would go through with the deal.

Calderwood then stated to Linch that Carlson said that was more or less immaterial, and Calderwood felt the same way about the transaction, that the school lease land was non-irrigable, it was to be removed from taxation, and in any event the taxes would not amount to more than $1,000. Linch said that was the extent to which he would go in the deal, and he purchased the 4-P ranch, believing that with a ranch of that size it would be difficult to tell whether it would be worth $87,500 or $88,500.

Linch testified further that he had no knowledge of and made no investigation to ascertain information on the unpaid irrigation taxes. He first learned of the same about two weeks after June 4, 1948, when he obtained the information from Fred Beltner. He later made a verification as to the amount of unpaid assessments on the school lease land, Section 36. The taxes existed as a lien on Section 36 and went as far back as 1922. The Northport Irrigation District brought an action against Linch in the district court for Morrill County to foreclose the taxes and obtained a decree of foreclosure for the amount of the irrigation assessments on the school land leases heretofore mentioned. Linch also testified that possibly Sandhouse did talk to Rhodes over the telephone from Sterling to Bridgeport. He did not know, as he did not talk to Sandhouse about the unpaid irrigation taxes on Section 36. He thought the taxes would be taken off completely.

The defendant Carlson testified that Calderwood was his agent for the sale of this land and that he informed Calderwood that there was over $10,000 worth of delinquent irrigation assessments on the school lease land. He did not believe it was worth it, and if he was responsible for this amount he would not go through with the deal. He denied that he ever told Calderwood that these taxes would not exceed, in any event, $1,000. He testified that he had the rider at the house, and that if Linch did not care to sign the rider the deal was off. He

also testified that he remembered testifying in a suit by Fred Beltner in 1950, to recover $6,500 paid to Carlson on the unpaid irrigation assessments on the school land leases. He admitted he knew of the unpaid irrigation assessments on the school land in 1946. He also testified that neither on June 3 nor June 7, 1948, did he tell Linch or Calderwood that there was $10,000 unpaid assessments on Section 36, and that he knew that prior to June 3 the delinquent irrigation assessments on this tract were in excess of $10,000. Further, that he gave information to Sandhouse on the unpaid assessments due with reference to the deeded land, but he did not give any information on the school land leases because he did not think they were important until he talked to Mr. Rhodes and read the contract the second time. He testified that he then told his agent Calderwood to inform Linch about these assessments.

There also appears in evidence the testimony of the witness Rhodes, attorney for the Northport Irrigation District, with reference to telephone conversations had between attorney Sandhouse of Sterling, Colorado, and himself, whereby he identified the voice of Sandhouse. There were two telephone conversations perhaps on the same day or a day apart. Sandhouse was inquiring with reference to whether or not there could be a compromise of the unpaid irrigation assessments on the school land leases in Section 36, and what procedure should be followed to obtain a reduction, intimating that he was calling in behalf of his client Linch and representing him in this matter.

"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, Beltner v. Carlson, 153 Neb. 797, 46 N. W. 2d 153.

"It is a general rule that fraud must relate to a present or preexisting fact, and cannot ordinarily be predicated on unfulfilled promises, or statements as to future events. See Palmetto Bank & Trust Co. v. Grimsley, 134 S. Car. 493, 133 S. E. 437, 51 A. L. R. 42, and notes." Theno v. National Assurance Corporation, 133 Neb. 618, 276 N. W. 375. See, also, Beltner v. Carlson, *supra.*

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. See McNeny v. Campbell, 81 Neb. 754, 116 N. W. 671.

A person is justified in relying upon a representation made to him in all cases where the transaction is a positive statement of fact, and where an investigation would be required to discover the truth. See, Sic v. Loup River Power Dist., 136 Neb. 506, 286 N. W. 700; Foley v. Holtry, 43 Neb. 133, 61 N. W. 120; Perry v. Rogers, 62 Neb. 898, 87 N. W. 1063.

Where a party is induced to his damage to enter into a contract by false and fraudulent representations of the other party, and where such false and fraudulent representations have been relied on as the inducing cause for entering into such contract, and where such representations are of facts peculiarly within the knowledge of the party making them, and not mere expressions of opinion, the party so defrauded may elect whether he will stand by the contract or rescind it. See Perry v. Rogers, *supra.*

We believe, under the evidence and the authorities heretofore cited, the representations as made in the instant case constituted evidence of fraud and related to a present fact, and concerned a matter material to the contract here involved. The telling of the untruth by the defendant Carlson to his agent Calderwood, who made the same representations to Linch at Carlson's direction, was established, Carlson knowing it to be

such, and was such a representation that Linch had a right to rely on it, and did so rely to his damage.

Contention is made that the plaintiff Linch was obligated to examine the public records to ascertain what taxes, if any, were assessed against the land covered by the contract and the school lease lands in Section 36 here involved. In this connection, a party may rely upon a statement as to a fact made to him by another as a basis for a mutual engagement, where the facts are unknown to him but known to the other and are made for the purpose of inducing a reliance thereon, even though the statement is of a fact concerning a matter of public record. See, Crawford v. Armacost, 85 Wash. 622, 149 P. 31; Loverin v. Kuhne, 94 Conn. 219, 108 A. 554, 33 A. L. R. 848.

It is generally held that fraud may be predicated on false representations or concealments, although the truth could have been ascertained by an examination of public records. As otherwise expressed, the general rule is that the mere fact that public records, if examined, would show the representee that representations of fact are false does not preclude his establishing fraud, because he is under no duty to make such examination. See, Loverin v. Kuhne, *supra;* Lynch v. Palmer, 237 Mass. 150, 129 N. E. 374, 33 A. L. R. 842; Hoock v. Bowman, 42 Neb. 80, 60 N. W. 389, 47 Am. S. R. 691.

The purpose of the recording acts is to afford protection not to those who make fraudulent misrepresentations but to bona fide purchasers for value. And the party to whom false representations are made is not held to constructive notice of a public record which would reveal the true facts. See Seeger v. Odell, 18 Cal. 2d 409, 115 P. 2d 977, 136 A. L. R. 1291.

We conclude that the plaintiff Linch was under no obligation under the evidence as heretofore set out to examine the public records as contended for by the defendant Carlson.

Regarding telephone conversations, it is well estab-

lished that communications by telephone are admissible in evidence where otherwise relevant to the fact or facts in issue, provided the identity of the person with whom the witness spoke or the person whom he heard speak is satisfactorily established. See 20 Am. Jur., Evidence, § 365, p. 333, § 368, p. 336.

"The conversations, relating to a contract, had between the parties thereto by telephone may be received in evidence, where the witness testifies positively that he recognized the person, with whom he was talking, by his voice; and the probative force of such evidence is a question for the determination of the court or jury, as the case may be." National Bank of Ashland v. Cooper, 86 Neb. 792, 126 N. W. 656.

The trial court sustained objections to the admissibility of telephone conversations and offers of proof in evidence on the grounds that the same were incompetent, irrelevant, and hearsay. In this connection there is nothing in the record to disclose that attorney Sandhouse who called the witness Rhodes, if such be the fact, represented the plaintiff Linch as attorney or agent with reference to the unpaid irrigation assessments on the school land leases in Section 36. He was employed by Linch only to examine abstracts of title with reference to the 4-P ranch involved in the contract. He had previously examined abstracts of title for Linch on a ranch he purchased in 1944. There is no evidence to disclose that the plaintiff Linch had any knowledge during the time the contract was drafted that there were unpaid irrigation assessments on the school land leases in Section 36, and at the time the telephone conversations were alleged to have been had. The attorney Sandhouse was employed by Calderwood and paid by him to draft the contract between Linch and Carlson. The plaintiff Linch was led to believe, through Carlson's agent Calderwood, that the unpaid irrigation assessments on school land leases on Section 36 would be taken off and canceled, or in any event they would not

exceed $1,000. This Linch agreed to as no one could tell whether the ranch was worth $87,500 or $88,500.

We conclude under the circumstances the trial court properly sustained the objections to the admissibility in evidence of the telephone conversations.

For the reasons given in this opinion the judgment entered on the verdict by the trial court is affirmed.

AFFIRMED.

ARLIN DREWES, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.
56 N. W. 2d 113

Filed December 19, 1952. No. 33222.

1. **Criminal Law.** The failure to give a preliminary examination to a person charged with a crime is not a jurisdictional defect and is waived if not complained of before a plea of not guilty to the charge is made in the district court.
2. **Criminal Law: Evidence.** Impeaching evidence is that which is directed to the question of the credibility of the witness.
3. ———: ———. In a criminal prosecution, any testimony, otherwise competent, which tends to dispute the testimony offered on behalf of the accused as to a material fact, is proper rebuttal testimony.
4. ———: ———. It is within the discretion of the court to permit in rebuttal the introduction of evidence not strictly rebutting.

ERROR to the district court for Seward County: HARRY D. LANDIS, JUDGE. *Affirmed.*

J. A. Hayward and *Herbert W. Baird,* for plaintiff in error.

Clarence S. Beck, Attorney General, and *Homer L. Kyle,* for defendant in error.

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

SIMMONS, C. J.

Plaintiff in error, hereinafter called defendant, was

informed against for the crime of statutory rape. He was tried, found guilty, and sentenced to a period of seven years and ten months in the state reformatory. Defendant appeals. We affirm the judgment of the trial court.

Defendant makes six assignments of error here. We limit our consideration to those errors assigned and discussed. Revised rules of the Supreme Court, Rule 8 a 2 (4).

The first argued assignment is "The Court erred in assuming jurisdiction of the case while it was still pending in the County Court."

Defendant relies upon section 29-1607, R. R. S. 1943, which provides: "No information shall be filed against any person for any offense until such person shall have had a preliminary examination therefor, as provided by law, before a justice of the peace or other examining magistrate or officer, unless such person shall waive his right to such examination; * * *." The transcript shows that on February 9, 1952, information was filed against the defendant in the district court. Endorsed on the information is a statement, signed by the defendant and witnessed, dated February 9, 1952, reciting that all his rights had been explained to him, that he was acquainted with the charge contained in the information and the penalty, that he waived service of a copy of the information and time to plead thereto, and requested that he be arraigned in the district court instanter. Also afterward on the same day there was filed a "Waiver of preliminary hearing," signed by the defendant and witnessed, reciting in part: "I do hereby waive any and all right which I may have to a preliminary hearing and request that I be arraigned before this court instanter."

It also appears that afterward on the same day the defendant appeared in court in person and requested that he be given more time to plead. He was ordered to appear February 12, 1952, for arraignment. February 16, 1952, defendant appeared in court in person and

with his attorney and requested that arraignment be deferred. March 3, 1952, defendant appeared in court in person and with his attorney, was arraigned, and entered a plea of not guilty to the information. The cause was set for trial on April 2, 1952.

March 25, 1952, defendant filed an application to set aside the waiver of preliminary hearing and to quash the information. This motion was overruled April 2, 1952. As a part of the hearing on this application the state offered evidence showing that a complaint had been filed in the county court on February 9, 1952, charging the defendant with the crime here involved; and that a warrant was issued and arrest made on that day. No further proceedings appear in that court. It is on that showing that the defendant now bases his assignment.

The record sustains the conclusion that defendant was fully advised of his rights and knowingly waived a preliminary examination, and later with counsel appeared in the district court, was arraigned, and plead. The failure to give a preliminary examination to a person charged with a crime is not a jurisdictional defect and is waived if not complained of before a plea of not guilty to the charge is made in the district court. Swanson v. Jones, 151 Neb. 767, 39 N. W. 2d 557. There is no merit in the assignment.

The next argued assignment is: "The Court erred in allowing certain excerpts of the defendant's confession to be placed in evidence over his objection." This assignment relates to some forty pages of questions and answers in the bill of exceptions which are referred to in the argument only by the page and line where they begin. The brief states that the objection was that it "was not rebuttal and did not tend to impeach the statements of the accused."

It becomes necessary to recite in some detail how the basis of this assignment arose. The state offered the evidence of the complaining witness and others and then rested. Defendant testified in his own behalf, and

denied the commission of the act charged, admitted being with the complaining witness on the night in question, and gave his own version of the events of that time. On cross-examination he was asked regarding statements made on February 8, 1952, in response to questions asked by the county attorney. He denied making certain statements, evaded others, and generally replied that he did not know or did not remember what he said.

After the defendant rested the state called the shorthand reporter who had taken down that interview and asked him to produce his original shorthand notes, which he did and they were identified as an exhibit. He testified that he had made a transcript of the notes. He was then asked to read the questions asked and the answers given by the defendant. Objection was made that it was incompetent, irrelevant, immaterial, and no sufficient foundation laid, and that the conversations had not been proved to be voluntary. Further testimony was had on the question as to whether or not they were voluntary statements. The defendant participated in that examination. At the close of that the witness was again asked to read the questions and answers. The defendant did not renew his objection as to foundation.

The defendant then objected to the "form of procedure" and stated that if there was a transcribed copy in the courtroom, he would like to have it introduced in evidence; that he did not "want questions and answers read so that there can be no objection"; that he did not agree to the transcript being received in evidence, but wanted "a chance to examine the questions before they are already before the jury"; and that he wanted the "instrument offered, or parts of it offered, * * * so that I can have a chance to object." There was a discussion off the record and the court told the witness to proceed. The witness did, without objection, the defendant asking as to the first question, "What page are you on?" Ten questions and answers were read.

Defendant then objected to the introduction of any

of the statements on the ground that its sole purpose was to impeach the defendant. Defendant observed that a confession was not "admissible at this time"; that it was not timely offered, the prosecution having closed the case. There was no objection made on that basis.

It does not appear that the court ruled directly on the objection. The court directed the witness to proceed. Thereafter, without any objection, the questions and answers were read. On two occasions the defendant asked as to the page from which the witness was reading. No further objections were made. The assignment of error here goes to the questions and answers admitted after the objection last stated was made. It goes to all of them as a unit.

The defendant invited the procedure here followed for the stated purpose of being able to object to questions and answers before they were read to the jury. He did not follow the procedure. He rested his objection on the general ground that the state could not impeach the defendant by using evidence as to questions asked and answers given to the county attorney and, if we include his remarks to the court, that the evidence could not be used in rebuttal. Impeaching evidence is that which is directed to the question of the credibility of the witness. Krull v. Arman, 110 Neb. 70, 192 N. W. 961.

In the evidence so received defendant related the events of the evening in considerable detail, admitted the commission of the act charged, and made statements directly contrary to specific statements made in his direct and cross-examination. The evidence as a whole was impeaching.

It is the established rule that: "In a criminal prosecution, any testimony, otherwise competent, which tends to dispute the testimony offered on behalf of the accused as to a material fact, is proper rebuttal testimony." Brown v. State, 125 Neb. 287, 250 N. W. 67. See, also, Gembler v. City of Seward, 136 Neb. 196, 285 N. W. 542; Ander-

son v. State, 150 Neb. 116, 33 N. W. 2d 362; Turpit v. State, 154 Neb. 385, 48 N. W. 2d 83.

Defendant relies on Jones v. State, 97 Neb. 151, 149 N. W. 327, and in particular the language in the syllabus: "Evidence that defendant has admitted guilt or important facts should not be received for impeachment or rebuttal, but should, if material and competent, be offered in chief." That case is not this case. There the defendant, after arrest, had given a statement in writing to officers. He was asked in cross-examination if he had not made the statement. The statement itself was not offered, but rather was incorporated in the question asked. By that means the statement was gotten to the jury. The case turned on the proposition that there was no evidence of the voluntary character of the confession. Here, as pointed out, there was such evidence. The statement in the opinion, upon which defendant relies, was followed by the statement that "a confession cannot be used as evidence, unless it is first shown that it was voluntarily made" and then the writing itself must be used.

The language relied upon by the defendant is not subject to the construction that it is error under all circumstances to do otherwise. In fact, the statute provides otherwise. Section 29-2016, R. R. S. 1943, states as to trial order of procedure: "* * * (3) the state must first produce its evidence; the defendant will then produce his evidence; (4) the state will then be confined to rebutting evidence, unless the court for good reason in furtherance of justice, shall permit it to offer evidence in chief; * * *."

In Hampton v. State, 148 Neb. 574, 28 N. W. 2d 322, we cited the above statute and held: "Such would be the rule in the absence of statute. While it would have been better practice for the state to have introduced this evidence in its case-in-chief, it is within the discretion of the court to permit in rebuttal the introduc-

tion of evidence not strictly rebutting." Such has long been the rule. Murphey v. State, 43 Neb. 34, 61 N. W. 491; Gembler v. City of Seward, *supra*.

Under the facts appearing here, and applying the rules above cited, we find no merit in this assignment.

The final argued assignment is that the sentence imposed is excessive. Section 29-2308, R. R. S. 1943, provides that this Court "may reduce the sentence rendered by the district court against the accused, when in its opinion the sentence is excessive, and it shall be the duty of the Supreme Court to render such sentence against the accused as in its opinion may be warranted by the evidence."

The complaining witness is a school girl 15 years of age. The defendant is a married man 28 years of age. At the time of this crime he was living with his wife. The wife is a sister of the complaining witness. The complaining witness lived with her parents in a home near that of defendant. The defendant was employed by the father of the complaining witness and worked near the homes of both. He had the normal freedoms in the father's home that that close relationship afforded. The complaining witness frequently, and on the evening in question, was in defendant's home. The sister was home. Defendant suggested that the three go for some ice cream. The wife was busy and did not go. Defendant and complaining witness left in defendant's car to get the ice cream. A ride in the country followed, and the act was consummated. There is evidence that the process of persuasion began prior to that time. Defendant took advantage of the privileges accorded a son-in-law and a brother-in-law. He committed the offense charged. The pregnancy of the complaining witness followed. He undertook, without supporting evidence, to leave the inference that the complaining witness was previously unchaste and that her pregnancy was caused by a young man friend. We find

nothing in this record to sustain an opinion that the sentence rendered is excessive. In our opinion it is warranted by the evidence.

The judgment of the trial court is affirmed.

AFFIRMED.

STATE OF NEBRASKA ET AL., APPELLANTS, V. CECIL GARDNER, APPELLEE.
56 N. W. 2d 135

Filed December 19, 1952. No. 33268.

Constitutional Law: Public Lands. It was the decision of this court in the Ebke case that gave renewal leases on school lands under the act of 1947 their status of legal nullity, and not the action of the Board of Educational Lands and Funds in entering the fact upon its records by its declaration or by its vacation of the previous orders concerning the issuance thereof.

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

Clarence S. Beck, Attorney General, *Robert A. Nelson,* and *Lloyd E. Christiansen,* for appellants.

Bruce K. Lyon and *Henry W. Curtis,* for appellee.

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

WENKE, J.

This is an action originally instituted in the county court of Chase County by the State of Nebraska, Andrew R. Banks, and Herman F. Banks against Cecil Gardner for the unlawful detention of a tract of school land. Trial was had to the court and there was judgment for the defendant. Plaintiffs thereupon filed a petition in error in the district court for Chase County which, after a hearing, that court dismissed. Plaintiffs thereupon

filed a motion for new trial and perfected this appeal from the overruling thereof.

The action involves the north half of Section 16, Township 7, Range 39 West of the 6th P. M., in Chase County, Nebraska. It is a part of the lands granted to the State of Nebraska under section 7 of the Enabling Act of Congress and is dedicated to be used for the support of the common schools of the state. It is under the control and management of the Board of Educational Lands and Funds which will be hereinafter referred to as the board. See section 1, Article VII, Constitution of Nebraska.

George Banks, Sr., obtained a 25-year lease to all of Section 16, Township 7, Range 39 West of the 6th P. M., Chase County, Nebraska. This lease was executed on December 31, 1924, and expired December 31, 1949. On February 7, 1941, the administrator of the estate of George Banks, Sr., assigned to David Banks, Jr., the lease to the extent of the north half of this section. David Banks, Jr., assigned his interest in the lease to Verna Banks and she assigned it to appellee, Cecil Gardner. This latter assignment was dated September 1, 1949, and made in conjunction with and as part of a sale involving 160 acres of deeded land.

This lease provided: "* * * that at the expiration of twenty-five years from and after the first day of January next ensuing after the date of this lease, or sooner, with the consent of the Board of Educational Lands and Funds, he will peaceably and quietly leave, surrender, and yield up all and snigular (singular) the said lands and premises." By reason of this provision appellee's rights to possession of these lands, under the assignment of the lease covering the north half thereof, ceased as of January 1, 1950.

Within the time prescribed by section 72-240, R. R. S. 1943, the appellee, as of September 9, 1949, made application to the board asking it for a new lease pursuant to and under the authority granted it by section 72-240.01, R. R. S. 1943.

In this respect section 72-234, R. R. S. 1943, provides in part: "Leases shall be for periods of twelve years less the period intervening between the date of the execution of the lease and December 31 of the previous year."

In response to the application of appellee, the land having been appraised to fix the rentals of the new lease, the board, as of October 24, 1949, issued to appellee a 12-year lease effective January 1, 1950. Appellee remained in possession of the lands under this lease and paid the rentals for 1950 and 1951 in accordance with the terms thereof.

Sometime between August 24 and September 4, 1951, the board, by letter, notified appellee that because of the holdings of this court it had adopted a motion cancelling and setting aside the lease he held and advised him that a lease on the lands covered by his lease would be offered at public auction after notice had been given as provided by law.

This notice was published in the Imperial Republican in accordance with the provisions of section 72-233, R. R. S. 1943, which provides in part: "The Board of Educational Lands and Funds may, at least once in each year, designate a day and hour for offering, in a public manner at the office of the county treasurer in the respective counties, lease contracts on all the educational lands in each respective county which may be subject to lease at the time of such offering. Said offering shall be announced in a public manner by publishing a notice thereof three weeks preceding said auction in one or more of the legal newspapers published or of general circulation in the county in which said unleased land is located." This notice advised the public that a lease on these lands would be offered at public auction on January 16, 1952, at 1:30 p. m., at the office of the county treasurer of Chase County, in Imperial, Nebraska.

At this sale appellants Andrew R. Banks and Herman F. Banks made the highest bid. They bid the sum of $2,000 as a bonus in addition to the rentals fixed by the

lease. They made application to the board accordingly. In pursuance to their application the board issued them a 12-year lease dated February 11, 1952, but effective as of January 1, 1952. The Bankses have paid the $2,000 plus the rental charges for the first six months of 1952.

In accordance with section 72-240.06, R. R. S. 1943, the improvements of appellee on these lands were appraised by the county commissioners of Chase County. They fixed the value thereof at $930. This amount the Bankses have deposited with the county treasurer of Chase County. However, the appellee refused to accept the amount deposited and has appealed to the district court where the matter is now pending.

Appellee refused to surrender possession to the new lessees, the Bankses. Consequently, on April 17, 1952, appellants caused a three-day notice to vacate to be served on appellee. This action was commenced on April 28, 1952. This case presents, with one exception, an identical situation as was involved in State v. Cooley, *post* p. 330, 56 N. W. 2d 129. In fact the cases were consolidated for briefing. We shall not repeat what we said in that case except to say that it is controlling here insofar as the factual situation is the same.

The only difference is that when appellee purchased the lease from Verna Banks, together with a quarter section of deeded land, there was deposited with the board the sum of $750. This was done in order to get the board to approve the assignment of the lease. See section 72-234.02, R. R. S. 1943.

Appellee contends that since the $750 received by the state was not restored an action based on rescission cannot be maintained. Under our holding in Propst v. Board of Educational Lands and Funds, *ante* p. 226, 55 N. W. 2d 653, the question of rescission is not here involved because, as therein stated: "It was the decision of the court in the Ebke case that gave the renewal leases their status of legal nullity, and not the action of the board in entering the fact upon its records by its

declaration or by its vacation of the previous orders concerning the issuance of the leases."

If the $750 was paid for the assignment of the lease held by Verna Banks to the north half of Section 16, which we think it was, then the payment is of no concern here as that lease expired by its own terms on December 31, 1949. On the other hand, if it was sought to extend the effect of the payment by saying it was to secure the benefit of the automatic renewal privilege of section 72-240.01, R. R. S. 1943, then it was without effect for we have said that a lease issued pursuant to the provisions thereof is a nullity and incapable of creating any rights or obligations. Propst v. Board of Educational Lands and Funds, *supra*.

It may be that under our holdings in Todd v. Board of Educational Lands and Funds, 154 Neb. 606, 48 N. W. 2d 706, the state had no right to the $750 but that fact does not give appellee any right to possession of the land herein involved. There are procedures which appellee or Verna Banks, depending upon who has the right to these funds, may use for the purpose of trying to regain them but that is not of concern here.

Under the facts disclosed by the record we find appellee, as a matter of law, was unlawfully holding possession of the premises and that judgment should have been entered for appellants. We therefore reverse the judgment of the lower court and remand the cause with directions to enter judgment for the appellants in accordance with the prayer of their petition.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA ET AL., APPELLANTS, V. WILBER E. COOLEY ET AL., APPELLEES.
56 N. W. 2d 129

Filed December 19, 1952. No. 33273.

1. **Constitutional Law.** An unconstitutional statute is a nullity, is

void from its enactment, and is incapable of creating any rights or obligations.

2. **Constitutional Law: Public Lands.** It was the decision of this court in the Ebke case that gave renewal leases on school lands under the act of 1947 their status of legal nullity, and not the action of the Board of Educational Lands and Funds in entering the fact upon its records by its declaration or by its vacation of the previous orders concerning the issuance thereof. The board did not violate rights by its action because no rights in this regard existed. Due process can only be involved when there are existing rights to be defended.

3. **Public Lands: Trusts.** The title of school lands is not vested in the state with all the ordinary incidents of other titles but the title thereto was granted to and vested in the state upon an express trust for the support of common schools with no right or power of the state to use, dispose of, or alienate the lands or any part thereof, except as allowed by the Enabling Act and the Constitution.

4. ———: ———. The school lands were received and are held in trust by the state for educational purposes. The state as trustee of the lands and of the income therefrom is required to administer the trust estate under the rules of law applicable to trustees acting in a fiduciary capacity.

5. ———: ———. Anyone dealing with the school lands must be held to do so with knowledge of and subject to the trust obligations of the state and the legislative grant of power to the Board of Educational Lands and Funds as to the terms and conditions of the lease.

6. **Public Lands.** By the provisions of section 1, Article VII, of the Constitution of Nebraska, the Board of Commissioners there named, under the direction of the Legislature, has the power to lease said lands.

7. ———. The action of the Board of Educational Lands and Funds in leasing the school lands is subject to and limited by the terms imposed by the Legislature.

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

Clarence S. Beck, Attorney General, *Robert A. Nelson, Lloyd E. Christiansen,* and *Hines & Hines,* for appellants.

Bruce K. Lyon and *Henry W. Curtis,* for appellees.

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

WENKE, J.

This is an action originally instituted in the county court of Dundy County by the State of Nebraska, Claude O. Frasier, and Alma C. Frasier against Wilber E. Cooley and J. Louise Cooley for the unlawful detention of a section of school land. Trial was had to a jury and it found the defendants "not guilty of unlawful detention." Judgment was entered on the verdict for the defendants.

Plaintiffs thereupon filed a petition in error in the district court for Dundy County, which, after a hearing, that court dismissed. Plaintiffs thereupon filed a motion for new trial and have perfected this appeal from the overruling thereof.

The action involves all of Section 16, Township 4, Range 38 West of the 6th P. M., in Dundy County, Nebraska. It is a part of the lands granted to the State of Nebraska under section 7 of the Enabling Act of Congress and is dedicated to be used for the support of the common schools of the state. It is under the control and management of the Board of Educational Lands and Funds which will hereinafter be referred to as the board.

William L. Cooley obtained a 25-year lease to these lands dated December 31, 1924, and expiring December 31, 1949. On September 18, 1942, the administrator of William L. Cooley's estate assigned this lease to the appellees. This lease provided: "* * * that at the expiration of twenty-five years from and after the first day of January next ensuing after the date of this lease, or sooner, with the consent of the Board of Educational Lands and Funds, he will peaceably and quietly leave, surrender, and yield up all and snigular (singular) the said lands and premises." By reason of these provisions

appellees' rights to possession of these lands under this 25-year lease ceased as of January 1, 1950.

Within the time provided by section 72-240, R. R. S. 1943, the appellees, as of August 2, 1949, each made application to the board asking it for a new lease pursuant to the authority granted it by section 72-240.01, R. R. S. 1943.

In this respect section 72-234, R. R. S. 1943, provides in part: "Leases shall be for periods of twelve years less the period intervening between the date of the execution of the lease and December 31 of the previous year."

In response to the applications of appellees, the land having been appraised to fix the rentals of the new lease, the board, as of November 14, 1949, issued to appellees a 12-year lease effective January 1, 1950. Appellees remained in possession of the lands under this lease and paid rentals for 1950 and 1951 in accordance with the terms therein provided.

Sometime between August 24 and September 4, 1951, the board, by letter, notified appellees that because of the holdings of this court it had adopted a motion cancelling and setting aside the lease they held and advised them that a lease on the lands covered by their lease would be offered at public auction after notice thereof had been given as provided by law. This notice was published in the Benkelman Post in accordance with the provisions of section 72-233, R. R. S. 1943, which provides in part: "The Board of Educational Lands and Funds may, at least once in each year, designate a day and hour for offering, in a public manner at the office of the county treasurer in the respective counties, lease contracts on all the educational lands in each respective county which may be subject to lease at the time of such offering. Said offering shall be announced in a public manner by publishing a notice thereof three weeks preceding said auction in one or more of the legal newspapers published or of general circulation in

the county in which said unleased land is located." This notice advised the public that a lease on these lands would be offered at public auction on September 27, 1951, at 9:30 a. m., at the office of the county treasurer of Dundy County in Benkelman, Nebraska.

At this sale appellants Claude O. Frasier and Alma C. Frasier made the highest bid. They bid the sum of $4,100 as a bonus in addition to the rentals fixed by the lease and made application to the board accordingly. In pursuance to their application the board issued them a 12-year lease dated October 8, 1951, but effective on January 1, 1952. They have paid the $4,100 plus the rental charges for the first six months of 1952.

In accordance with section 72-240.06, R. R. S. 1943, the improvements of appellees on these lands were appraised by the county commissioners of Dundy County. They fixed the value thereof at $1,425. This amount the Frasiers have deposited with the county treasurer. However, the appellees refused to accept the amount deposited and have appealed to the district court where the matter is now pending.

Appellees refused to surrender possession to the new lessees, the Frasiers. Consequently, on April 11, 1952, appellants caused a three-day notice to vacate to be served on appellees. This action was commenced on April 23, 1952.

Most of the contentions made here by appellees were raised and determined in Propst v. Board of Educational Lands and Funds, *ante* p. 226, 55 N. W. 2d 653. In fact the appellees' contentions in this case are mostly supported by referring to parts of appellants' brief in the former case. We will not repeat all of these contentions but only cite the holdings in the Propst case which are controlling thereof. In Propst v. Board of Educational Lands and Funds, *supra,* we held:

"Application was made in each instance for issuance of the lease, the requirements of the act were complied with, and a 12-year lease, not a 25-year renewal lease,

was issued to each of the previous lessees. These were applied for, issued, accepted, and retained knowingly under the act of 1947, by all who were in any way interested in and concerned with them. The judicial declaration that the automatic renewal plan of 1947 was invalid effectively disposed of any and all alleged rights of appellants granted by, applied for, and accepted by them under that act. 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. 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.

"* * * There was a sufficient distinction between the situation of persons holding leases on state school lands under the statute in force prior to 1947 where opportunity had been afforded for the presentation of bids by third parties, and those who applied for and accepted renewal leases under the act of 1947 where the making of any bids by third parties was barred, to allow the state to treat them as different classes.

"* * * It was the decision of the court in the Ebke case that gave the renewal leases their status of legal nullity, and not the action of the board in entering the fact upon its records by its declaration or by its vacation of the previous orders concerning the issuance of the leases. There was nothing the board could do or that appellants could have interposed if they had been present at the meeting of the board when this was done that would have affected the invalidity of the leases. The board did not violate rights by its action because no rights in this regard existed. Due process can only be involved when there are existing rights to be defended."

The principal questions remaining are the character of appellees' rights by virtue of their remaining in possession of the premises after the 25-year lease expired and what was required before they could be dispossessed.

In this regard the district court found, and appellees here contend, that they have a tenancy from year to year and that consequently a six-months' notice was necessary to bring about a termination thereof. See Critchfield v. Remaley, 21 Neb. 178, 31 N. W. 687.

"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.' "

Appellees' right to possession of the premises under the 25-year lease terminated on January 1, 1950, by the terms thereof. It is self-evident that no attempt was made to hold over under the terms of the 25-year lease as appellees, prior to January 1, 1950, applied for and obtained a 12-year lease commencing with that date. The possession of appellees, commencing with January 1,

1950, was under the 12-year lease and the rents paid by them for the years of 1950 and 1951 were under the terms thereof. As has already been said that lease was void and incapable of creating any rights.

There is another reason why appellees did not obtain a tenancy from year to year. We have often held: "The school lands were received and are held in trust by the State of Nebraska for educational purposes. The state as trustee of the lands and of the income therefrom is required to administer the trust estate under the rules of law applicable to trustees acting in a fiduciary capacity. The title of the lands is not vested in the state with all the ordinary incidents of other titles but the title thereto was granted to and vested in the state upon an express trust for the 'support of common schools' with no right or power of the state to use, dispose of, or alienate the lands or any part thereof, except as allowed by the Enabling Act and the Constitution. Anyone dealing with the school lands must do so with knowledge of and subject to the trust obligation of the state. Enabling Act of Congress, Vol. 2, p. 5, R. R. S. 1943; Art. VII, § 9, Constitution of Nebraska; State ex rel. Ebke v. Board of Educational Lands & Funds, *supra;* State v. Platte Valley Public Power & Irr. Dist., *supra;* State ex rel. Walker v. Board of Commissioners, 141 Neb. 172, 3 N. W. 2d 196; Warren v. County of Stanton, 145 Neb. 220, 15 N. W. 2d 757; State ex rel. Stephan v. Taylor, 44 Idaho 353, 256 P. 953; Murphy v. State, 65 Ariz. 338, 181 P. 2d 336; Annotation, 23 A. L. R. 2d 1419." Propst v. Board of Educational Lands and Funds, *supra.*

Article VII, section 1, Constitution of Nebraska, provides: "The Governor, Secretary of State, Treasurer, Attorney General, and Superintendent of Public Instruction shall, under the direction of the Legislature, constitute a board of commissioners, *for the* sale, *leasing, and general management of all lands* and funds *set apart for educational purposes,* and for the investment of

school funds, *in such manner as may be prescribed by law.*" (Italics supplied.)

"By the provisions of section 1, article VII, of the Constitution, the Board of Commissioners there named, under the direction of the Legislature, has the power to lease said lands. They will be herein referred to as the board. Legislative direction, as to the terms under which the school lands shall be leased, is subject to and limited by the obligation to preserve the trust property inviolate. Likewise, the action of the board in leasing the school lands is subject to and limited by the terms imposed by the Legislature. Their power to lease exists only insofar as it is directed or permitted by the Legislature. State v. Central Nebraska Public Power and Irrigation District, 143 Neb. 153, 8 N. W. 2d 841. Anyone dealing with the school lands must be held to do so with knowledge of and subject to the trust obligations of the state and the legislative grant of power to the board as to the terms and conditions of the lease. The law enters into and becomes a part of the contract. Stanser v. Cather, 85 Neb. 305, 313, 123 N. W. 316, 124 N. W. 102." State v. Platte Valley Public Power & Irr. Dist., 147 Neb. 289, 23 N. W. 2d 300, 166 A. L. R. 1196. See, also, State ex rel. Ebke v. Board of Educational Lands and Funds, 154 Neb. 244, 47 N. W. 2d 520.

"* * * the Legislature has the power to provide the method of administering the public school lands of the state as a trust is not subject to question. But the method provided must be one which is within the law governing the administration of trust estates. The designation of these lands as a trust in the Constitution has the effect of incorporating into the constitutional provision the rules of law regulating the administration of trusts and the conduct and duties of trustees." State ex rel. Ebke v. Board of Educational Lands and Funds, *supra.*

"Upon the termination of a lease, however, the interests of the beneficiaries of the trust can be protected to

some extent, at least, by placing the lease up at public auction as provided by section 72-233, R. R. S. 1943, or by some other method to be provided by statute consonant with the rules of law applicable to trustees acting in a fiduciary capacity." State ex rel. Ebke v. Board of Educational Lands and Funds, *supra*.

"The Board of Educational Lands and Funds in leasing school land is limited by the authority granted it by the Legislature. It has no other power." Todd v. Board of Educational Lands and Funds, 154 Neb. 606, 48 N. W. 2d 706.

As above stated, the Legislature has the power to provide the method for administering the public school lands of the state. However, anyone dealing with the leasing of school lands does so subject to the trust obligations of the state and the legislative grant of power to the board as to terms and conditions of the lease, for the board, in leasing school land, is limited by the authority granted it by the Legislature. It has no other power.

We find no statutory authority, and none has been cited, authorizing the board to create year to year tenancies in school lands. In the absence thereof no such tenancies can be created.

Under this situation the appellees held only a tenancy at sufferance, (see 51 C. J. S., Landlord and Tenant, § 175, p. 779, and § 177, p. 782,) and were not entitled to a notice to terminate, (see 51 C. J. S., Landlord and Tenant, § 183, p. 785,) except the three-day notice to vacate required by section 27-1404, R. R. S. 1943, which was given prior to the commencement of this action.

Appraisal of appellees' improvements was made as required by section 72-240.06, R. R. S. 1943, and, within the time therein provided, appellees appealed therefrom to the district court where the action is now pending. The fact that they have appealed from such appraisal in no way affects the appellants' right to maintain this action.

Under the facts disclosed by the record we find ap-

pellees, as a matter of law, were unlawfully holding possession of the premises and that judgment should have been entered for appellants. We therefore reverse the judgment of the lower court and remand the cause with directions to enter judgment for the appellants in accordance with the prayer of their petition.

REVERSED AND REMANDED WITH DIRECTIONS.

CHARLES SEDLACEK, APPELLANT, V. HERBERT H. HANN, APPELLEE.
56 N. W. 2d 138

Filed December 19, 1952. No. 33283.

1. **Habeas Corpus.** The sufficiency of the statements of the petition of relator to justify a writ of habeas corpus allowed by virtue thereof may be tested before making return thereto by a motion to quash the writ.
2. ———. A motion to quash admits ultimate facts well pleaded in the petition of relator as distinguished from conclusions of law stated therein. When thus tested if it is ascertained that the petition is not sufficient to entitle relator to be discharged the motion should be granted and the writ vacated.
3. ———. The remedy of habeas corpus is not demandable of course, but legal cause must be shown to entitle a petitioner to the benefit of it.
4. ———. Habeas corpus is a collateral, not a direct proceeding when regarded as a method of attack of a judgment imposing sentence for a crime, and facts, as distinguished from legal conclusions, are required to be alleged to negative the legal force and effect of the judicial record.
5. **Criminal Law: Habeas Corpus.** Insanity of a person accused of a crime existing at the time of the commission of the offense may be shown in defense of the accused at the trial of the charge made against him. It is not available as a ground of habeas corpus after conviction, sentence, and commitment of the accused.
6. ———: ———. Generally, insanity as a bar to the imposition of sentence is a factual issue for the determination of the court having jurisdiction of the offense. A judgment of sentence by a court of competent jurisdiction may not be collaterally attacked on that issue in a habeas corpus proceeding.

7. **Habeas Corpus.** Habeas corpus is not available to discharge a prisoner from a sentence of penal servitude if the court imposing it had jurisdiction of the offense and of the person charged with the crime, and the sentence was within the power of the court.
8. ———. The judgment of a court of record in a criminal case, when challenged by habeas corpus, is presumed to be regular and valid.
9. ———. The petition in a habeas corpus proceeding must state facts sufficient to show illegal detention of the relator. A statement therein of the reasons that the detention of relator is illegal in the form of conclusions is not sufficient to justify the allowance of a writ.

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

L. R. Doyle, for appellant.

Clarence S. Beck, Attorney General, and *Clarence A. H. Meyer,* for appellee.

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

BOSLAUGH, J.

The district court sustained the motion of appellee made before return day of the writ of habeas corpus to quash it on the ground that the petition for the writ did not state facts sufficient to justify its allowance. The writ was dissolved. This appeal is from that adjudication.

The sufficiency of the petition of the relator to support a writ of habeas corpus allowed by virtue thereof may be tested before making return thereto by a motion to quash. It is the right and duty of the court to set aside the writ, if the facts well pleaded therein when accepted as true are insufficient to entitle the relator to the relief sought. In re Application of Dunn, 150 Neb. 669, 35 N. W. 2d 673; Sedlacek v. Greenholtz, 152 Neb. 386, 41 N. W. 2d 154.

Appellant states in his petition that his imprisonment and restraint are because of a judgment and sentence

rendered by and entered in the district court for Saline County on February 21, 1947, to the effect that he be confined in the State Penitentiary for a period of 10 years as punishment for the crime of burglary. There is no claim of defect in the jurisdiction of the court over the person of appellant or of the subject matter of the case in which he was convicted of the crime of burglary and in which the sentence was imposed by virtue of which he is now detained in prison. It is asserted that the judgment and sentence are void because in the period between the conviction and the time when sentence was imposed appellant became insane, and at the time the judgment was rendered he was mentally and physically incapacitated. Section 29-1822, R. R. S. 1943, provides: "* * * If, after the verdict of guilty, and before judgment pronounced, such person becomes lunatic or insane, then no judgment shall be given while such lunacy or insanity shall continue * * *." It was recently decided in a case to which appellant was a party that this provision of the statute imposes a duty on but does not go to and does not affect the jurisdiction of the court; that the mental status of an accused at the time of sentence is a question of fact for the consideration and determination of the court having jurisdiction of the offense; and that the judgment of the court may not be collaterally attacked on that issue in a habeas corpus proceeding. Sedlacek v. Greenholtz, *supra*.

It was also pleaded that the judgment, because of which appellant is confined in custody, is void for the reason that it is based on a crime claimed to have been committed by him when he was mentally incompetent to commit the crime. Insanity is recognized as a defense in this state in a criminal case, if at the time of the commission of the offense the accused does not know right from wrong with respect to the particular act involved in the offense. Evidence of insanity existing at the time of the offense may be presented in defense of the accused at the trial of the offense charged. It is not

available as a ground of habeas corpus, after conviction, for discharge of the accused from the sentence for the obvious reason that it would be the substitution of the remedy of habeas corpus for error proceedings. In re Carbino, 117 Neb. 107, 219 N. W. 846; McAvoy v. Jones, 149 Neb. 613, 31 N. W. 2d 740.

Each of the specifications in the petition of invalidity of the sentence of the accused—that the district court for Saline County was biased and prejudiced against appellant, refused him a change of venue for the trial of the offense charged against him, conducted the trial in a county "seething with prejudice and passion" against him, ordered him held under arrest at the trial for burglary; that the information under which he was tried did not charge an offense under the laws of Nebraska; and that the form of the sentence is contrary to law—would have been proper for review and determination in an error proceeding in this court. They may not be considered by this court in this proceeding. It has frequently been determined, and recently repeated by this court, that habeas corpus is a collateral and not a direct proceeding when regarded as a method of attack of a judgment imposing a sentence for crime; that facts as distinguished from legal conclusions are required to negative the legal force and effect of a judicial record of a court of general jurisdiction; that the remedy of habeas corpus may not be substituted for error proceedings; and that release from confinement in accordance with a sentence in a criminal case may be had by habeas corpus only when the judgment is void. Swanson v. Jones, 151 Neb. 767, 39 N. W. 2d 557; Truman v. Hann, 154 Neb. 501, 48 N. W. 2d 418.

The conclusions in the petition—that appellant is unlawfully imprisoned and restrained of his liberty by appellee; that his confinement in the State Penitentiary violates the provisions of the federal Constitution prohibiting the deprivation of liberty without due process of law and guaranteeing equal protection of the laws;

and that the courts of Nebraska have not accorded him a full and fair "adjudication of the Federal questions raised"—are immaterial in this case. An individual convicted of a crime for which he is committed is excepted from those entitled to the benefit of a statute on the subject of habeas corpus. § 29-2801, R. R. S. 1943. Such writ is not demandable of course but legal cause therefore must be shown as a prerequisite of judicial action favorable to the relator. Swanson v. Jones, *supra*. The judgment of a court of record in a criminal case imposing sentence on an accused if challenged by habeas corpus has the presumption of regularity and validity. McAvoy v. Jones, *supra*. A statement in a petition of the reason that the detention of a relator is illegal in the form of conclusions is not sufficient to justify the allowance of a writ of habeas corpus. The petition must state facts sufficient to show illegal detention. Stapleman v. Hann, 155 Neb. 410, 51 N. W. 2d 891.

Appellant alleges in his petition that after he was committed and was detained in the State Penitentiary he was found to be insane by the prison physician, the medical board thereof, and the insanity commission, and that he was sent to one of the Nebraska state hospitals. This is not important in this case. The remedy of habeas corpus is not available in the absence of a statute authorizing it for the purpose of inquiring into the legality of a particular form, manner, or place of confinement executively or administratively imposed upon a prisoner lawfully in custody in an authorized place under a valid sentence and commitment. Swanson v. Jones, *supra*.

The petition recites that the record of the trial resulting in the conviction of appellant of burglary was destroyed and that he could not since his conviction secure a transcript thereof. He also complains that the district court for Lancaster County refused his application to grant and fix bail in this proceeding permitting him to have his liberty during the pendency of the habeas corpus case. The record does not show that the

trial court considered or acted upon the application for bail. Neither of these matters is discussed in the brief of appellant. They do not merit further consideration. Sedlacek v. Greenholtz, *supra*.

Appellant has failed to allege any fact impeaching the jurisdiction of the district court for Saline County of the offense for which he was convicted or the jurisdiction of that court over his person or that the sentence imposed was without the power of the court.

The judgment of the district court should be and it is affirmed.

AFFIRMED.

E. MELVIN KENNEDY, ADMINISTRATOR OF THE ESTATE OF HAZEL GRUBB, DECEASED, APPELLANT, V. CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY, A CORPORATION, ET AL., APPELLEES.

56 N. W. 2d 446

Filed January 2, 1953. No. 33193.

1. **Railroads: Negligence.** The violation of a safety regulation that a locomotive engine shall ring a bell of a prescribed weight or sound a whistle thereon while traveling a given distance from where the railroad crosses any road or street is not negligence as a matter of law but must be considered with all the other evidence in the case in deciding the issue of negligence.
2. **Trial.** A litigant has a right to have his theory of a case presented to the jury by proper instruction only if it is pleaded and there is evidence to sustain it.
3. **Railroads: Negligence.** Beyond the limits of cities, villages, and towns no rate of speed of a train is generally in itself unlawful or evidence of negligence.
4. **Automobiles: Negligence.** If the operator of a motor vehicle is familiar with a railroad crossing and the surrounding conditions, it is his duty in approaching it to look and listen at a time and place where looking and listening will be effective even though vision of the railroad track is restricted.
5. ———: ———. It is the duty of the driver of an automobile to have it under such control that when he arrives at a place

while traveling toward a railroad crossing where it is possible to see and to hear an approaching train he can stop and avoid a collision with it.

6. **Negligence.** Negligence which is the moving and effective cause of a happening is the proximate cause thereof.

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

Joseph V. Benesch and *Emmet L. Murphy,* for appellant.

Chambers, Holland & Groth, for appellees.

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

BOSLAUGH, J.

The death of Hazel Grubb was caused by injuries inflicted upon her by a collision in the nighttime of a passenger train of the Chicago, Rock Island & Pacific Railroad Company and a motor vehicle in which she was riding as a guest at a place where the railroad intersected and crossed the public highway on which she was traveling. Appellant sought to recover damages from the railroad company and Roy Ensign, the engineer of the train, on the claim that her death was wrongfully caused by their negligence. A verdict for appellees was the result of the trial in the district court.

The deceased, a resident of Demopolis, Alabama, was at Murdock in October 1950, for a visit with her sister Harriet B. Zabel, and her brother-in-law William H. Zabel. They made a trip to Omaha on October 9, 1950. The return from there to the place of the accident was in the evening, and was made in the automobile owned and operated by Mr. Zabel. He was the only occupant of the front seat. Mrs. Zabel was in the back seat directly behind her husband, and Mrs. Grubb was to her right. The night was clear, calm, and comfortable. The temperature was moderate enough that the glass in each of the front windows was lowered about one-half

its length. The automobile was without defects and operated satisfactorily in all respects. The front glass was cleaned at the start of the return trip and visibility through it was unobstructed. The car was operated on the return journey at a speed generally of 40 to 45 miles an hour.

Mr. Zabel was 64 years of age, had good vision with or without glasses, and had operated a grocery store at Murdock, a village of 225 population, for 16 years. He was familiar with the roads, the intersection of the roads, the railroad, its crossing of highways, the trains of the railroad, and the locations and situations generally in and around Murdock.

There was a north-south highway on or near the east side of the village, and an east-west highway on or near the north side of it. They intersected near the northeast corner but outside of the village. The right-of-way and the track of the railroad company approached and crossed the intersection of the highways at an angle from the northeast to the southwest. The Zabel car approached the intersection of the highways and the railroad crossing from the east traveling on the east-west highway. It was a graveled road of uniform grade for at least one-half mile east of the intersection and railroad crossing, and was in good condition. The train involved in the collision was traveling southwest. The view of a traveler on the east-west highway east of the railroad crossing was to some extent obstructed by a cornfield, trees, posts, and weeds between the highway and the right-of-way of the railroad. But a train on the track moving from the northeast toward the crossing could be seen by a traveler on the highway if he looked towards the north at a point as much as 300 feet east of the crossing, and continuously thereafter as the train proceeded toward the crossing. The rails of the railroad track were visible to a traveler on the highway 75 feet east of the railroad crossing. There was an unobstructed view from 50 feet east of the east rail of the railroad

track to the northeast for a distance of more than 300 feet, and an unobstructed view from 25 feet east of the east rail of the track to the northeast a distance of more than 363 feet.

The driver of the automobile knew that he was approaching the railroad track. About 100 feet from it he reduced the speed of the car and looked in the direction of the railroad track as he approached the crossing. It was then about 11:30 p. m. He knew there was a train scheduled for arrival about that time. He finally reduced his speed to 5 or 10 miles an hour before going upon the crossing. There was nothing to divert his attention and no noise to interfere with his hearing except that made by the operation of his car as it was in motion. He looked two or three times to see that there was no train on the track approaching the crossing while he was traveling from 50 feet east of the crossing until he was within 5 or 10 feet of the railroad track. When he was within 20 or 25 feet of the east rail of the track his speed was such that he could have stopped his car before it traveled more than 2 feet. He did not see or hear the train or any light from it or any signal by bell or whistle. About one-half the length of the automobile was across the northwest rail of the railroad track when the engine struck the right rear part of the car. The speed of the train at the time of the collision was 40 to 45 miles an hour. It had been previously not more than 50 miles an hour. Mrs. Grubb received serious injuries which after some delay resulted in her death.

There was no proof by appellant that his specification of negligence concerning disrepair and the incomplete condition of the crossing-warning sign near the place of the accident contributed to or proximately caused the accident, or that appellees knew or should have known that the automobile in which the decedent was riding was in a position of great distress and peril in time to have by any means avoided the collision. The action of the court in refraining from presenting either of these

charges of negligence to the jury was proper.

The district court correctly submitted two specifications of negligence: (1) That appellees negligently failed to give a signal of the approach of the train to the crossing of the highway by it as the law provides; and (2) that the railroad company negligently failed to equip and maintain the engine of the train with a headlight of the power and in the manner required by law. The applicable provisions of the statute concerning the giving of signals at crossings and for locomotive engine headlights were set out by quotation. §§ 74-573 and 74-583, R. R. S. 1943. The jury was also advised that a violation of any of the provisions thereof was not negligence as a matter of law but was evidence of negligence which the jury should consider with all the other evidence in the case to determine whether or not the appellees or either of them was guilty of negligence. Appellant claims this was error. He asserts that the statute on the subject of giving signals of the approach of a railroad train to a crossing of a highway (§ 74-573, R. R. S. 1943) is a mandatory duty for the protection of human life and that a violation of it is negligence per se. The violation of this kind of a safety regulation established by statute is not negligence as a matter of law but may be considered in connection with all the other evidence in the case in deciding the issue of negligence. Eggeling v. Chicago, R. I. & P. Ry. Co., 119 Neb. 229, 228 N. W. 361; Armer v. Omaha & C. B. St. Ry. Co., 151 Neb. 431, 37 N. W. 2d 607.

The distinction between statutes of this kind and statutes of the class involved in the case of Johnson v. Weborg, 142 Neb. 516, 7 N. W. 2d 65, relied upon by appellant, is clearly made in Stevens v. Luther, 105 Neb. 184, 180 N. W. 87: "Statutes requiring protective devices to be placed upon machinery, upon barbed-wire fences, scaffolding statutes, railroad fencing statutes, fire escape statutes, and other statutes of like nature, impose a mandatory and affirmative duty upon

the owners of such property, and even in states where the violation of speed statutes is held to be only evidence from which negligence may be inferred, the courts generally hold that a failure to perform a mandatory duty so enjoined is negligence per se, and if any person to whom the duty is owed, or for whose protection the statute is enacted, is injured in consequence of such violation, a case is made."

Appellant complains because the district court omitted from its instructions the last sentence of the statute that "Such corporation shall also be liable for all damages which shall be sustained by any person by reason of such neglect." § 74-573, R. R. S. 1943. It is argued that it was the duty of the court to include this and its omission was prejudicial to appellant. The case of Vanderveer v. Moran, 79 Neb. 431, 112 N. W. 581, is relied upon to sustain the position of appellant. Too much is claimed for that case. There was no issue there or objection considered testing the correctness of or the error in the action of the court because it was stated in an instruction that the statute relied upon by the plaintiff provided that any person violating it should be liable for all damages that may accrue to the party damaged because of the violation. The basis of that action was a statute of a class different from the one requiring railroad trains to give signals of their approach to and crossing of a road or street. This distinction has been stated above. The trial court fully and clearly informed the jury of the elements and measure of damage in this case in the event the verdict was favorable to appellant. It was not required to do more in this respect.

It was pleaded that the speed of the train was excessive and negligent because the view of the railroad track was obstructed by unharvested corn, weeds, and posts, and that the crossing involved was near the limits of a village. The district court withdrew this from the consideration of the jury and informed it that

speed of 50 miles an hour of this train was not negligence. Appellant construed this to be a violation of his right to have his theory of the case submitted to the jury. The law assures a litigant the right to have his theory of his case presented to the jury by proper instruction if, and only if, it is pleaded and there is evidence to sustain it. McKain v. Platte Valley Public Power & Irr. Dist., 151 Neb. 497, 37 N. W. 2d 923. The court observed its duty in this regard in this case to the extent that the theory of appellant had evidence to sustain it. There was no evidence of the claim that the speed of the train contributed to or caused the collision. The train was moving at a moderate speed, not more than 50 miles an hour in the open country, and 40 to 45 miles an hour as it came near to and upon the crossing. It is an interesting coincidence that the train and the automobile were operating at the identical speed when about 100 feet from the place of the accident. The contact of the train and the motor vehicle was in the open country. It is generally said that outside the limits of cities, villages, and towns no rate of speed of a train is in itself unlawful or evidence of negligence. Missouri P. Ry. Co. v. Hansen, 48 Neb. 232, 66 N. W. 1105; Omaha & R. V. Ry. Co. v. Krayenbuhl, 48 Neb. 553, 67 N. W. 447; Omaha & R. V. Ry. Co. v. Talbot, 48 Neb. 627, 67 N. W. 599; White v. Chicago, B. & Q. R. R. Co., 93 Neb. 736, 141 N. W. 1038; Lake Shore & M. S. Ry. Co. v. Barnes, 166 Ind. 7, 76 N. E. 629, 3 L. R. A. N. S. 778; Note, 5 L. R. A. N. S. 197.

The ability of a traveler proceeding west towards the crossing involved to see a train approaching the crossing from the northeast was to some extent restricted. But it was shown that a train on the track at any place at least 300 feet east of the crossing could have been seen by a west-bound traveler on the highway. A view of the track to the northeast whence the train was approaching was unobstructed from 50 feet east of the east rail of the track and the driver of the automobile had the

ability when he reached that point, and at any time thereafter until he came to the track, to have stopped his car almost instantly. If the operator of a motor vehicle is familiar with a railroad crossing and the surroundings, it is his duty to look and listen at a time and place where looking and listening will be effective even though vision of the track is restricted. A failure to do so is less than the exercise of due or ordinary care and no recovery can be had for damages resulting from collision with a passing train. In Lewis v. Union Pacific R. R. Co., 118 Neb. 705, 226 N. W. 318, a building less than 25 feet from the crossing involved obstructed the view of the railroad track. Between the track and the building the view was unobstructed. This court said: "* * * It is the duty of the driver of the automobile to have his car under such control that, when he comes to a place where it is possible to see and to hear an approaching train, he can stop it to avoid a collision. Failure to do so is negligence more than slight in comparison with that of the defendant, and will defeat a recovery, even though the whistle was not blown and the bell not rung, or the speed may have been excessive." See, also, Loudy v. Union Pacific R. R. Co., 146 Neb. 676, 21 N. W. 2d 431.

Ordinarily negligence which is the moving or effective cause of a happening is the proximate cause thereof. Loudy v. Union Pacific R. R. Co., *supra*. There was no causal connection between the speed of the train and the injuries to the deceased. Omaha & R. V. Ry. Co. v. Talbot, *supra*. The speed of the train did not contribute to the collision and was in this case immaterial and liability could not be predicated thereon. The speed of the train was not involved in the failure of the operator of the automobile to see the train and stop his automobile before the collision. There is no evidence from which it can be inferred that he was in any way misled by the speed of the train or that he would not have driven his automobile in front of the oncoming train at whatever speed it was traveling. Whatever might

have happened if it had been going more slowly is pure speculation. De Wildt v. Thomson, 241 Wis. 352, 6 N. W. 2d 173; O'Malley v. Eagan, 43 Wyo. 233, 2 P. 2d 1063, 77 A. L. R. 582; Burlie v. Stephens, 113 Wash. 182, 193 P. 684; Seaboard Airline R. R. Co. v. Crowder, 191 Va. 635, 62 S. E. 2d 227. Implicit in the verdict is the conclusion that the collision of the train and the automobile did not happen because of the absence of a signal of the approach of the train or because the headlight of the train was not in operation. The finding of the jury adverse to appellant is conclusive of these matters. The effect of the verdict is that a crossing warning was given by the train and the headlight thereon complied with and was operating as required by law, and that the train could have been seen and the collision avoided by the least vigilance and attention by the driver of the automobile. He cannot be heard to say he gave attention and looked but did not hear the warning or see what was in plain sight. Armer v. Omaha & C. B. St. Ry. Co., *supra*. The record sustains the verdict for appellees.

The argument of appellant that the issue of contributory negligence was presented to the jury without evidence to support it is contradicted by the record. The trial court informed the jury that any negligence of William H. Zabel, the driver of the car in which Hazel Grubb was riding, was not imputed to her, and that she was not guilty of any contributory negligence in this case.

The judgment of the district court should be and it is affirmed.

AFFIRMED.

WENKE, J., concurring in the result.

SIMMONS, C. J., dissenting.

I dissent, particularly disagreeing with the rule stated, and applied by the court that: "* * * outside the limits of cities, villages, and towns no rate of speed of a train is in itself unlawful or evidence of negligence." The corollary of the stated rule would be that inside the

limits of cities, villages, and towns the rate of speed of a train generally and in itself could be evidence of negligence.

A contention that the rate of speed was made unlawful by ordinance or statute is not involved here.

The court by this rule makes the question of whether or not speed "in itself" is evidence of negligence depend on the sole circumstance of whether or not the train is on one side or the other of the legal line that marks the limit of a city or village corporate boundary.

It is a matter of common knowledge that there are cities and villages in this state whose corporate boundaries are in part in fact out in undeveloped and "open country." It is also a matter of common knowledge that there are many of our cities whose growth has been such that the urban development in fact extends well beyond the legal boundaries. In such cities the corporate line makes no distinction in fact in the areas traversed by a railroad so far as questions of negligent operation are concerned.

The rule now adopted has no logical basis. It is an impractical, if not an artificial, rule.

The fault of the rule, as to the issue of negligence, is that it first states an immaterial circumstance to be considered, and then by the word "itself" eliminates from consideration all other circumstances, material or otherwise, except speed. By that process all the circumstances of an accident which go to establish negligence can be put aside one by one. That result has followed in this case.

Speed cannot be separated and set apart from all the other circumstances of an accident such as is involved here. It is difficult to conceive a case where there are no circumstances other than speed and location within or without corporate limits. The decisions cited by the court and those in this dissent illustrate that fact. They deal with "dangerous rate" of speed; "failure to give warning of approach"; "failure to obey the signal"; "ordi-

nary highway crossing"; crossings "in the open country"; "sparsely-settled country"; "thickly settled neighborhood"; "thickly inhabited neighborhood"; "in that locality"; "obscure crossings"; a "clear day"; a "bright still day"; "snow," "wind," and "cuts"; "under the conditions obtaining at the crossing"; and "persons accustomed to walk upon the tracks."

Courts and juries are now to be asked on which side of a legal line did the accident happen. If the location of an accident happens to be a short distance on one side of the legal line, speed "by itself" may be evidence of negligence and if a short distance on the other, speed "by itself" is not evidence of negligence, and that settles the issue of speed as evidence of negligence.

Heretofore the question has been determined on consideration of all the material relevant circumstances. Here plaintiff claims, and specifically recites, other circumstances which it claims should have been, with speed, submitted to the jury for consideration to determine whether "under the circumstances" negligence was shown. The court applies the rule first to take speed out of the case, and then having removed that element, with which the other circumstances are associated, ignores all other circumstances. It is at least an effective rule in this instance.

The trial court instructed the jury: "You are instructed that the plaintiff has failed to prove that defendants were guilty of any negligence in connection with the speed of the train, and therefore the charge of negligence in that particular should be disregarded by you. Speed of fifty miles per hour of this train was not a negligent speed." Plaintiff assigns the giving of the instruction as error, and advances this proposition of law: "The whole question as to whether under all the circumstances the speed of the train was such as to constitute negligence on the part of the defendants should have been submitted to the jury under proper instructions."

The plaintiff set out 10 "circumstances surrounding this accident" which it contends the trial court ignored and which it argues should have been considered with speed. Plaintiff contends here that these circumstances must be considered along with the speed fact. I do not find consideration of those circumstances in the opinion of the court.

Defendant advanced the proposition that: "Unless the speed of the train was a proximate cause it should not be submitted to the jury." It argues that speed was not a proximate cause.

All emphases in this dissent are mine.

The court's opinion on this point cites first Missouri P. Ry. Co. v. Hansen, 48 Neb. 232, 66 N. W. 1105. We there held it was error to fail to instruct " '* * * that no rate of speed is of itself negligence, except where the rate of speed is prescribed or specified by some law or ordinance, and * * * that the defendant company, in the operation of its trains over its tracks outside of any city, or in the absence of any express law to the contrary, has the right to operate its trains at any rate of speed consistent for the safe and proper conduct of its business; and in this case, unless you find the defendant guilty of some negligence alleged in the petition other than the operation of its train at the rate of twenty-five miles per hour, your verdict must be for the defendant.' " The syllabus says: "That a passenger train was run at the rate of twenty-five miles per hour outside the limits of a city or town, *even* in a thickly settled neighborhood *and* at a point where some persons were accustomed to walk upon the tracks, is not in itself and *alone* sufficient evidence of negligence." We there considered the other circumstances. In the body of the opinion it is said: "It has been held that outside the limits of cities and towns no rate of speed is in itself unlawful or negligent. (Burlington & M. R. R. Co. v. Wendt, 12 Neb., 76; Chicago, B. & Q. R. Co. v. Grablin, 38 Neb., 90.)"

The Wendt case in 12 Neb. 76, 10 N. W. 546, was decided in 1881. There a cow was killed *in city limits.* Witnesses fixed the speed of the train at from 8 to 18 miles per hour. We there said in the body of the opinion: "In this sort of action, whether the injury be done *within or without a city,* doubtless the rate of speed may be of great importance in determining whether there *was in fact negligence* on the part of those in charge of the train, and responsible for its movements; but speed alone, *unconnected with any other fact or circumstance,* and more especially where it is not shown to have been *unusual,* has never, that we are aware of, been held sufficient to show gross negligence. Besides, it must be apparent upon the slightest reflection that no arbitrary rule as to the rate of speed at which a train of cars may not be run, with due regard for the safety of persons and property, can be applicable to all portions of a town or city alike. Evidently a rate which in one portion, *or under certain circumstances* might be entirely reasonable, in another and more thickly inhabited portion, *or under different circumstances,* would very justly be deemed unwarrantable, and evince a most *reckless disregard* for the rights, both of persons and property." It will be noted that we did not say speed, as a matter of law, should be detached and considered separately from the other circumstances, but when "unconnected with any other fact or circumstance" it is insufficient to show "gross negligence." We further said: "As showing that speed *alone,* even although it be at an unlawful rate, is not sufficient to fix a liability for an injury, the case of Brown, Admr. v. The Buffalo and State line R. R. Co., 22 N. Y., 191, is in point." This is the beginning of the rule here involved.

Brown v. Buffalo and State Line R. R. Co., 22 N. Y. 191, was an "in city" case where the rate of speed was prohibited by city ordinance. The question was whether the violation of the ordinance was *alone* evidence of negligence sufficient to charge the defendant with the

consequences of the collision provided the injury would not have occurred except for such violation. In the body of the opinion it is said: "* * * and except for the ordinance, it was not, per se, unlawful for the defendants to run their trains at any speed, *provided no actual want of care could be imputed to them.* Whether there is negligence *in fact usually depends upon a number of circumstances,* and *not unfrequently the rate of speed becomes quite material in determining the question.* Under one class of circumstances, twenty miles would not be deemed unreasonable, while in another five miles or less would be regarded as culpable carelessness." It was held that the running of the train at a speed greater than six miles per hour *"unconnected with any actual negligence,"* involved the defendant in no other consequences than the payment of the penalty.

The New York case (Brown v. Buffalo and State Line R. R. Co., *supra,*) cited in the Wendt case, *supra,* was directly overruled in Beisegel v. New York Central R. R. Co., 14 Abbott's Practice Reports (N. S.) p. 29, in 1870, eleven years before we cited it. That was an "in city" case. The basis of the overruling was the limitation to the payment of the penalty. That is pointed out in Massoth v. Delaware and Hudson Canal Co., 64 N. Y. 524 (decided in 1876, five years before we decided the Wendt case). That was an "in city" case. The court said: "Irrespective of any ordinance or law regulating the speed of railroad trains, it was a *question of fact* whether the rate was excessive or dangerous *in that locality,* and if so found by the jury, and such excessive rate of speed caused the collision, the defendant was liable for the consequences."

The next case cited in Missouri P. Ry. Co. v. Hansen, *supra,* is Chicago, B. & Q. R. R. Co. v. Grablin, 38 Neb. 90, 56 N. W. 796. That was an "in the country" case. The speed of the train was from 17 to 35 miles an hour. The question of the use of air brakes was involved. We held that the failure to have air brakes did not con-

tribute to the death unless the speed of the train was negligent. We said in the body of the opinion: "We are not prepared to say that ordinarily any rate of speed of a train, however high, outside of the limits of cities, towns, and villages is of itself negligence." However, in the syllabus we said: "Outside the limits of cities, villages, and towns *negligence cannot be imputed* to a railroad company *solely* by reason of the speed of its train, however great. *Whether under the circumstances the rate of speed is negligence is a question of fact.*"

The second case cited as authority in the court's opinion is Omaha & R. V. R. Co. v. Krayenbuhl, 48 Neb. 553, 67 N. W. 447. This was written by the same judge who wrote the Hansen case and was filed during the same term in 1896. That was an "in the country" case. There was snow and wind, and cuts, and a speed estimated at from 18 to 45 miles per hour. There was evidence not only of running the train at a dangerous rate of speed but also of failure to give warning of approach and disregard of a signal. We there said: "The point where the accident occurred was not within any town or city, and it has been repeatedly held that no rate of speed is of itself negligence *under such circumstances.*"

The next case cited in the court's opinion is Omaha & R. V. Ry. Co. v. Talbot, 48 Neb. 627, 67 N. W. 599. We said: "The negligence charged by Talbot to the Valley Company was that the train which injured him was behind schedule time; that it was running with great speed, and that no signal was given of its approach to the crossing. It is not possible that a train should always be on schedule time, and we do not think that the running of a train behind its schedule time is evidence which tends to prove negligence; and outside the limits of cities, villages, and towns no rate of speed of a railroad train, however great, is evidence of negligence." We considered all the circumstances. We cited the Grablin and Hansen cases. We then explained our views by saying: "Railroad companies are organized and rail-

roads are built and operated for speed. Commerce, business, and the busy world are in haste. The civilization and genius of the age demand haste, demand speed, and to require railroad companies to move their trains at so slow a rate of speed that they could be *easily stopped* when *approaching ordinary highway crossings in the country* would be to seriously impair their usefulness as carriers and take a step backwards towards the sailboat and the stage coach." We considered the other circumstances.

The syllabus point is: "Outside the limits of cities, villages, and towns, negligence *cannot be imputed* to a railroad company *solely* by reason of the speed of its train, however great."

The next case cited in the opinion is White v. Chicago, B. & Q. R. R. Co., 93 Neb. 736, 141 N. W. 1038. That was an "in the open country" case involving a crossing which could be seen at a considerable distance in the direction from which the train was approaching. The train was going at least 50 miles an hour. We held: "*In the open country,* outside of cities, villages and towns, *where there are no obscure crossings,* negligence cannot be imputed to a railroad company solely by reason of the speed of its train." It is noted that here again the other circumstances were considered. There we cited the Talbot case and Brown v. Chicago, B. & Q. Ry. Co., 88 Neb. 604, 130 N. W. 265. The syllabus in White v. Chicago, B. & Q. R. R. Co., *supra,* is: "It is not negligence for a railway company to operate a passenger train at the rate of *50 miles an hour,* during a *clear day,* in the *open country,* where there are no *obscure* crossings." The Brown case involved a contention that the train should have been operated so that it could have been stopped to avoid the collision. The syllabus is: "It is not negligence for a railway company to operate a passenger train at the rate of 45 or 50 miles an hour during a *bright, still day,* in the *open country* where there are

no obscure crossings." Again note that the other circumstances were considered.

The court's opinion then cites the case of Lake Shore & M. S. Ry. Co. v. Barnes, 166 Ind. 7, 76 N. E. 629, 3 L. R. A. N. S. 778. The Indiana court did not state any broad general rule such as this court adopts. They said in the syllabus of the state report: "It is not *negligence per se* to run a train over an ordinary country highway crossing at the speed of fifty miles an hour." However, the same court, citing this case, said: "* * * this court held that it was not *negligence per se* to run a train over an *ordinary country highway crossing* at any speed consistent with the safety of the persons and things being carried. It is generally held that, in the absence of statutory regulations, a railway company may use its discretion in establishing the speed of its trains. 33 Cyc. 971. *This does not excuse it from the common-law duty of exercising care for the safety of persons traveling on highways crossing its tracks; and the rate of speed to be used in a given case depends on the nature of the crossing, and other cimcumstances surrounding the alleged injury.*" The jury has the "right to determine whether defendant exercised reasonable care and prudence, under the *particular circumstances* of the case * * *." Brooks v. Muncie & Portland Traction Co., 176 Ind. 298, 95 N. E. 1006. The same court has said: "* * * the rate of speed of a train, *in connection with other circumstances,* may be considered in determining the issue of negligence * * *." Terre Haute & Indianapolis R. R. Co. v. Clark, 73 Ind. 168.

I refer now to some of our opinions dealing with the same subject matter which the court's opinion ignores.

Chicago, B. & Q. R. R. Co. v. Clark, 26 Neb. 645, 42 N. W. 703, was decided in 1889. There the court instructed the jury that it was negligence to run a train at "full speed" over a track known to be frequented by cattle "unless that part of the track is properly guarded." We held the requirement above quoted was error. The

opinion turned on that question. We said: "There is no doubt but that it would have been competent to instruct the jury that while running over that part of the track a *greater degree of care* should be taken than while passing over the other portions of the road, perhaps; but we know of no rule which would require the track to be guarded. Any other kind of care which would have secured safety, would have been sufficient. Furthermore, *the question of negligence was for the jury to decide under all the facts and circumstances proven.*" Earlier in the decision we held that evidence as to the *bad condition of the track* was competent for the purpose of showing negligence as to the dangerous *rate of speed* of the train.

Chicago, R. I. & P. Ry. Co. v. Sporer, 69 Neb. 8, 94 N. W. 991, was an accident case "in the country" on the carrier that is defendant here and about a mile from where this accident happened. The running of a train at a high rate of speed was alleged and proved. There the trial court instructed the jury that: "* * * if you find from the evidence that at the time of the accident, defendants passenger train was running at a rapid rate of speed, then you may consider this fact, if it be a fact, in connection with all other facts proved upon the trial in determining whether or not defendant Railroad Company was negligent." The carrier in its brief stated: "The speed at which the train was being run should have been considered by the jury in connection with all the other facts, but the court should not have selected it from the other facts and given it such great and undue prominence." Subsequently in a reply brief the carrier (*this* carrier) stated: "The place of the accident was an ordinary country crossing and the rate of speed of a train passing a country crossing is not per se negligence." It cited for that rule the Grablin, Talbot, Hansen, Krayenbuhl, and Wendt cases. Defendant contended it was entitled to a directed verdict. We said in the opinion: "Railway crossings are always places of danger. * * *

Under these conditions it can not be said that the speed at which the train was running might not of itself render it impossible for one crossing the track at this point to avoid such an accident. *The whole question as to whether under all the circumstances the speed of the train was such as to constitute negligence on the part of the defendant should have been submitted to the jury under proper instructions.* The court therefore did not err in refusing to direct a verdict for the defendant."

The syllabus is: "In this case it was for the jury to determine the rate of speed at which defendant's train was running at the time of the accident, and whether, *under the conditions obtaining at the crossing,* the company was negligent in running its train at such rate of speed."

In Kafka v. Union Stock Yards Co., 87 Neb. 331, 127 N. W. 129, an "in city" case, we said: " 'The first question is as to the negligence of defendant; Two witnesses for defendant swore the engine was going 6 miles an hour, a witness for plaintiff said 12 miles, and another witness swore that one of defendant's witnesses had stated on one occasion that the rate of speed was 12 miles an hour. In this state of the record there is sufficient evidence to warrant a finding either way, and in support of the verdict we must assume the jury found the higher rate. It was *for the jury* to say whether or not, *under all the circumstances,* such rate was negligence.' "

Craig v. Chicago, St. P., M. & O. R. R. Co., 97 Neb. 426, 150 N. W. 374, was decided in 1914. It has not been changed, modified, or overruled.

This was an "in city" case.

Defendant carrier contended that speed alone is not evidence of negligence. In its brief it asserted that "it is the settled rule in this state, and in other jurisdictions, that the rate of speed alone cannot be said to be evidence of negligence in the event of an accident at a crossing." To sustain that rule they cited the Wendt

case, the Grablin case, the Hansen case, the Krayenbuhl case, and the Brown case. We answered that contention in this language: "It is insisted that a fast rate of speed cannot of itself be negligence, citing cases, and quoting the opinion of Judge Lake in Burlington & M. R. R. Co. v. Wendt, 12 Neb. 76, to the effect that 'speed alone, unconnected with any other fact or circumstance, and more especially where it is not shown to have been unusual, has never, that we are aware of, been held sufficient to show gross negligence.' This opinion, however, also states that a *rate of speed* entirely reasonable at *some places* and *under some circumstances* might evince a reckless disregard for the rights of persons and property at *another*. The latter principle is also stated by Judge Lake in his opinion in Meyer v. Midland P. R. Co., 2 Neb. 319, 335. The Nebraska cases cited in support of the theory that the rate of speed is no evidence of negligence show that in *each case* the facts were that the trains were running *in the open country* outside of the limits of any city or village, *and the language used applies to such conditions.* * * * *The true principle* is that a railroad company must use such care and precaution as ordinary prudence indicates. They must exercise greater care and greater vigilance in cities or towns where crossings are frequently used by large numbers of people than *at ordinary crossings in the open country. The degree of care which the law requires to be exercised must be commensurate with the probability of danger.* In some instances in cities and villages, ordinary care and prudence demand that gates be erected or flagmen stationed or electric bells or signals installed, while in other cases all that would be necessary would be to lessen the speed of the train, or give continuous signals of its approach, or both. Grand Truck R. Co. v. Ives, 144 U. S. 408." We there held that a finding that the rate of speed considered in connection with *all the other* circumstances was a negligent one, was upheld by the evidence, and that the practice of running

the train at the speed shown "over this dangerous crossing" did "not justify the lack of ordinary care."

The case of Meyer v. Midland P. R. R. Co., 2 Neb. 319, cited in the Craig case, was an "in city" case. There we said: "It is doubtless true, even in the absence of a statutory regulation upon the rate of speed upon railroads within the thickly-settled portion of cities and villages, that a reasonable rate must be observed, which is to be determined from a due consideration *of all the circumstances.* A proper regard for the safety of the inhabitants and their property imperatively requires that this should be so. It is but an application of the same wholesome rule to railroad companies in running their trains that would govern an individual in driving a team of horses along a public thoroughfare. Here it is quite clear that a rate of speed that would be entirely justifiable *in the open and sparsely-settled country,* might, in the crowded streets of a city, be considered as criminal carelessness."

Craig v. Chicago, St. P., M. & O. Ry. Co., 97 Neb. 586, 150 N. W. 648, was a companion case arising out of the same accident as that just discussed. There the defendant carrier made the same contention, citing the same cases as it did in the previous case. We there held: "It will be unnecessary, therefore, to consider the claim of defendant that the evidence does not support a finding that it was guilty of negligence, that point having been decided adversely to its contention in the former case."

C. J. S. states the rule as follows: "In the absence of any statute or ordinance on the subject, no particular rate of speed in running a train is *negligence per se,* although the rate of speed may be considered in connection *with other circumstances* in determining the issue of negligence." 74 C. J. S., Railroads, § 691, p. 1287.

"In actions for injuries to person or property at railroad crossings, ordinarily it is a question for the jury to determine at what rate of speed the train was running at the time of the accident, as, for example, whether

the train causing the injury was running at a rate of speed in excess of that fixed by statute or ordinance. *In addition,* it is a question for the jury to determine whether or not, under all *the circumstances existing at the time and place where the injury occurred,* the rate of *speed was negligent.* This is so although the rate of speed was *not* fixed by statute or ordinance, * * *." 75 C. J. S., Railroads, § 870, p. 202.

Am. Jur. states the rule as follows: "The general rule is that in the absence of a prohibitory statute or ordinance a railroad company may run its trains at such speed as it sees fit, and that a charge of negligence cannot be predicated on the rate of speed at which a train is run unless *there are attendant circumstances* which make such speed negligence. *A rate of speed that would be entirely safe under some conditions may, however, be recklessly dangerous under other conditions.*" 44 Am. Jur., Railroads, § 456, p. 684.

I submit that the proposed rule is not correct. I submit further that the defendant does not contend for such a rule but says that the speed of its train was not the proximate cause of the accident. Its opening sentence in the argument is: "There are of course cases where the speed of a train might be a proximate cause of a crossing collision. This is not such a case."

NEBRASKA TRACTOR & EQUIPMENT COMPANY, A CORPORATION, APPELLEE, V. GREAT LAKES PIPE LINE COMPANY, A CORPORATION, ET AL., APPELLANTS.
56 N. W. 2d 288

Filed January 2, 1953. No. 33217

1. **Principal and Agent.** The question of agency is one of fact and there is no presumption of its existence.
2. ———. A party alleging the existence of an agency relationship assumes the burden of proving the agent's authority and

that the acts of the agent, for which liability against the principal is sought, were within the scope of that authority.

3. ———. An apparent or ostensible agent is one whom the principal, either intentionally or by want of ordinary care, induces third persons to believe to be his agent, although he has not, either expressly or by implication, conferred authority upon him.

4. ———. Where a principal has, by his voluntary act, placed an agent in such a situation that a person of ordinary prudence, conversant with business usages and the nature of the particular business, is justified in presuming that such agent has authority to perform a particular act, and therefore deals with the agent, the principal is estopped as against such third person from denying the agent's authority.

5. ———. A person dealing with a known agent is not authorized under any circumstances blindly to trust an agent's statements as to the extent of his powers; such person must not act negligently, but must use reasonable diligence and prudence to ascertain whether the agent acts within the scope of his powers.

6. ———. A person dealing with an agent assumes the risk of lack of authority in the agent and such person cannot charge the principal by relying upon the agent's assumption of authority which proves to be unfounded.

7. ———. A principal may act on the presumption that third persons dealing with his agent will not be negligent in failing to ascertain the extent of the agent's authority and the existence of his agency.

APPEAL from the district court for Douglas County: CARROLL O. STAUFFER, JUDGE. *Reversed and remanded with directions.*

Smith & Smith, for appellants.

Leo Eisenstatt and *Kennedy, Holland, DeLacy & Svoboda*, for appellee.

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

YEAGER, J.

This is an action by Nebraska Tractor & Equipment Company, a corporation, plaintiff and appellee, against Great Lakes Pipe Line Company, a corporation, and W. J. Lank, Jr., named defendants. The action appears

not to have been prosecuted against the defendant Lank, hence for the purposes of this opinion Great Lakes Pipe Line Company will be referred to as defendant and appellant.

The petition contains two causes of action both of which are on contract. For the first cause of action the plaintiff alleged there was due it from the defendant $5,041 for rent for the use of a Caterpillar Model D-8 Crawler Tractor and for incidental expenses under the terms of an equipment lease contract entered into on or about August 8, 1950. This equipment will, for convenience, be hereinafter referred to as the tractor. For the second cause of action plaintiff alleged that there was due it from the defendant $400 for rent for the use of a Semi-Trailer Transport also under the terms of an equipment lease contract entered into on or about July 6, 1950. For convenience this equipment will be referred to as the trailer.

The cause was tried to a jury and a verdict was returned in favor of the plaintiff for $2,620.50 on the first cause of action and for $400 on the second. Judgment was duly entered on the verdict.

At the conclusion of plaintiff's evidence in chief and at the conclusion of all of the evidence the defendant moved in the alternative for a directed verdict or for dismissal separately as to the two causes of action. These motions were overruled. At the conclusion of all of the evidence the plaintiff moved in the alternative for a directed verdict or judgment in its favor separately on the two causes of action. This motion was overruled. After verdict the defendant moved for judgment notwithstanding the verdict in its favor or for a new trial as to both causes of action. The plaintiff moved for judgment notwithstanding the verdict as to the first cause of action. These motions were overruled.

From the judgment and the order overruling its motion for judgment notwithstanding the verdict or for a new trial the defendant has appealed. From the judg-

ment as to the first cause of action and from the order overruling the motion for judgment notwithstanding the verdict as to it the plaintiff has cross-appealed.

In order to comprehensively consider and delineate the factual situations involved it appears advisable to consider the two causes of action in reverse order of their appearance in the petition. This permits consideration of pertinent events in sequence.

The pleadings and the record disclose that during the period under consideration here the plaintiff was engaged in the business of selling and leasing equipment such as is involved in the two causes of action. The defendant is engaged in the business of transportation of petroleum and petroleum products and the operation and maintenance of pipe lines, pipe line terminals, distribution centers, and facilities. One of its facilities and terminals is in the vicinity of Omaha, Nebraska, partly in Nebraska and partly in Iowa. During the times in question it was enlarging and extending this terminal and these facilities. The work of construction was being performed under contracts with contractors. The construction material which was necessary to be brought in was shipped in by the defendant and stored. The contractors removed it from storage when it became necessary for them to use it in construction. None of the work of construction was performed by the defendant.

W. J. Lank, Jr., was employed by the defendant as its resident engineer. In general his duties were to supervise for the defendant the work of the contractors as it was being performed; inspect and estimate the amount or amounts of performance under the contracts, and report to his superiors who were in Kansas City, Missouri; and inspect, advise, and direct as to work performance and qualities of the employees of the contractors.

Apparently on July 6, 1950, a written lease agreement was prepared and signed by the terms of which the plaintiff leased the trailer in question to the defendant

for a period of four months beginning July 17, 1950. The stated monthly rental was $400. The agreement contained an option to purchase and an agreement that the value of the trailer was $4,186. The agreement was signed, "Nebraska Tractor & Equipment Company By Bernie Tapelt" and "Great Lakes Pipe Line Company By W. J. Lank, Jr." It was approved July 20, 1950, by M. L. Greer, sales manager for the plaintiff. It was never approved by any officer or employee of the defendant superior in authority to Lank. None of these had any knowledge of the transaction.

Delivery of the trailer was made at Cedar Rapids, Iowa, on or about July 18, 1950. To whom delivery was actually made does not clearly appear but it reasonably appears that it was made under the direction of Lank. It was however without the knowledge or sanction of any officer or employee of the defendant superior to Lank.

The trailer was brought to the property of the defendant. To what extent it was used thereon does not clearly appear. No payment for any of the rental specified in the agreement was ever made, although the agreement provided for payment monthly in advance.

Lank notified the plaintiff that the defendant had no further use for the trailer and on or about August 8, 1950, he purchased the trailer under conditional sales contract from the plaintiff for the Valley Coal Company.

It was on account of this transaction that the claim and second cause of action against the defendant is for rental for one month or $400 instead of for four months or $1,600.

As to the first cause of action, Lank on August 8, 1950, without knowledge of or authority from any officer of the defendant or of any employee thereof superior to him, in the name of the defendant, entered into a lease agreement for the tractor. The agreement contained an option to purchase. The lease period was for four months beginning August 8, 1950, and the agreed

rental was $1,190.25 a month. The agreed value of the tractor was $13,500. The agreement was signed, "Nebraska Tractor & Equipment Company By W. R. Reisser" and "Great Lakes Pipe Line Company By W. J. Lank, Jr." The use on behalf of the defendant does not clearly appear. No payment was ever made pursuant to the agreement. This agreement also provided for payment monthly in advance. The cause of action is for rental for four months plus expense for reconditioning the tractor.

The reason given by the plaintiff for failure to exact payment in advance as provided in the agreements was that Lank represented that it was the policy of the defendant not to make monthly payments on lease equipment in advance but after monthly use. This explanation and arrangement was acceptable to the plaintiff. The defendant was billed but at the direction of Lank the bills were not sent to the home office of the defendant from which payment must come but to the office at East Omaha, that being the station of Lank.

The defendant had no knowledge of either of the agreements or of any of the transactions carried on thereunder or of the receipt or use of the trailer and tractor, unless it may be said that the knowledge of Lank was attributable to it, until about August 23, 1950. At this time the defendant obtained information that Lank was negotiating for the purchase of other machinery. An investigation was immediately instituted. During the progress of the investigation M. L. Greer, sales manager for the plaintiff, saw the tractor in question near Waterloo, Nebraska, and knowing that the defendant had no facilities at that location became concerned and on September 7 or 8, 1950, called and talked to the construction superintendent of the defendant at Kansas City. As a result of this investigation the agreements were discovered. Lank was promptly discharged. About September 11, 1950, plaintiff regained possession of the trailer and thereafter retained it. The tractor

was repossessed probably between September 8 and 20, 1950.

The two causes of action as pleaded are predicated upon the proposition that Lank as managing engineer of the defendant had authority to enter into these agreements on behalf of the defendant.

The defense is predicated upon the proposition that these are not agreements of the defendant and are not binding upon it or valid for the reason that they were not authorized and Lank had no real, apparent, or ostensible authority to enter into them on behalf of the defendant and that they have not been ratified.

In response to the pleaded defense the plaintiff states that Lank by reason of his position and custom was clothed with ostensible or apparent authority to enter into these contracts with the plaintiff and that because thereof the defendant is estopped to deny his authority.

By the record it is made certain that Lank had no actual authority to enter into these agreements. Also by the record it is made certain that there was no ratification of the agreements by the defendant.

The right of plaintiff therefore to recover and coincidentally the question of whether or not the court erred in overruling the motion of the defendant for judgment notwithstanding the verdict must depend upon whether or not the evidence under the law discloses an apparent or ostensible authority to enter into the two agreements and bind the defendant thereby.

In addition to what has already been said herein as to the facts the record does not disclose that the plaintiff ever investigated the authority of Lank to enter into these or other agreements or that it made any inquiry in relation thereto.

Before the first agreement was entered into Lank called the office of plaintiff whereupon a salesman was sent to see him about the acquisition of a trailer. It is apparent that in a conversation between Lank and the salesman purchase as well as lease was discussed. The

salesman made a note of the conversation as follows: "Above gave me an order for GPX Transport trailer. Said they would purchase it but to get by the front office would have to rent it the first 4 months at book or 10% of purchase price rental." The plaintiff knew that Lank was the resident engineer at this location. It also knew that the operations of the defendant were extensive and extended over a large area and that of course it had to function through officers, agents, and employees. There is no evidence that the plaintiff had at the time information of other and similar transactions handled by Lank.

This substantially reflects all of the facts and circumstances of which plaintiff had knowledge regarding Lank's actual, apparent, or ostensible authority to make these agreements at the times when they were executed.

On the trial of the case the plaintiff was allowed to adduce testimony of a witness who was a salesman from a company engaged in business similar to that of the plaintiff substantially that in his opinion agreeable to usage and custom the plaintiff had the right to assume that Lank had authority to enter into the agreements in question and to bind the defendant thereby. This opinion was not based on custom and usage in the business of defendant or of other or similar businesses.

In addition to what has been reflected in the foregoing outline of the facts the evidence of the defendant effectually points out that Lank had, as has been already pointed out, no actual authority to enter into any such agreements on behalf of the defendant; that he had never done so with its knowledge or consent; that none had been entered into which had been later ratified; that contracts involving substantial amounts required approval from the Kansas City office; and that such authority as he had to contract without approval of the Kansas City office was after a named date specifically limited to $100 and before that date the amount was understood to be $100 but there was no record fixing the limitation.

Amounts in excess of $100 were paid out. Whether or not some of them were without previous authorization from the Kansas City office is not known. It is shown however that Lank was in daily communication with the Kansas City office with regard to the work carried on under his supervision. In any event this was not a matter which had come to the attention of the plaintiff up to the time the agreements had been executed and approved by it.

The foregoing, it is thought, is a fair résumé of the pertinent and controlling facts. Upon them and the application of controlling principles of law the rights and liabilities of the parties must depend.

The point of first consideration is that of the agency of Lank for the defendant and his authority as such agent. He was unquestionably an agent. Proof of agency alone however is not sufficient to charge a principal with the acts of the agent. In addition it must be shown that the act for which one seeks to hold the principal liable came within the scope of the agent's authority.

In Meier v. Geldis, 148 Neb. 234, 26 N. W. 2d 813, it was said: "The question of agency is one of fact and there is no presumption of its existence. The party alleging the existence of the agency relationship assumes the burden of proving the agent's authority and that the acts of the agent, for which liability against the principal is sought, must be shown to be within the scope of the agent's authority." See, also, Bartholomew v. Skelly Oil Co., 144 Neb. 51, 12 N. W. 2d 122; Wagoun v. Chicago, B. & Q. R. R., 155 Neb. 132, 50 N. W. 2d 810; 2 Am. Jur., Agency, § 95, p. 76; 2 C. J. S., Agency, § 93 (2), p. 1196.

The proof in this case considered most favorably to the plaintiff negatives the existence of actual authority in Lank to enter into these contracts on behalf of the defendant.

If then the defendant is to be bound this must be so

on the basis of ostensible or apparent authority. This court has treated ostensible and apparent agency as synonymous. In Ware v. Home Mutual Ins. Ass'n, 135 Neb. 329, 281 N. W. 617, by quotation from 2 C. J., Agency, § 14, p. 427, it was said: " 'An apparent or ostensible agent is one whom the principal, either intentionally or by want of ordinary care, induces third persons to believe to be his agent, although he has not, either expressly or by implication, conferred authority upon him.' "

As to the authority of an ostensible agent this court, by quotation from 2 C. J., Agency, § 212, p. 573, said in this same case: " 'Ostensible authority to act as agent may be conferred if the principal affirmatively or intentionally, or by lack of ordinary care, causes or allows third persons to act on an apparent agency.' " Cited also were Thomson v. Shelton, 49 Neb. 644, 68 N. W. 1055; Phoenix Ins. Co. v. Walter, 51 Neb. 182, 70 N. W. 938; Northwest Thresher Co. v. Eddyville State Bank, 80 Neb. 377, 114 N. W. 291.

It is pointed out in the reported cases that the act or the failure to act on the part of the principal which will give rise to the ostensible or apparent agency must be with regard to something which has been called to the attention of the third person on which he reasonably had the right to rely.

The correct rule is the following: "Where a principal has, by his voluntary act, placed an agent in such a situation that a person of ordinary prudence, conversant with business usages and the nature of the particular business, is justified in presuming that such agent has authority to perform a particular act, and therefore deals with the agent, the principal is estopped as against such third person from denying the agent's authority. * * *." Johnston v. Milwaukee & Wyoming Investment Co., 46 Neb. 480, 64 N. W. 1100. See, also, Holt v. Schneider, 57 Neb. 523, 77 N. W. 1086; Mahaffy v. Hansen Live Stock & Feeding Co., 105 Neb. 9, 178 N. W. 829; Haskin

v. Langdon, 127 Neb. 535, 256 N. W. 8; 2 Am. Jur., Agency, § 104, p. 86.

In this case there was no affirmative act or acts of the defendant which could be pointed to indicating ostensible authority in Lank to enter into these contracts on behalf of the defendant except that he was resident engineer on this project. That was the only information that the plaintiff possessed. Furthermore there is no authentic indication that the plaintiff sought any further information in this respect. Also it is apparent that plaintiff was not in possession of knowledge of the manner or custom of the defendant in the handling of like or similar matters. Any such information as it had at the time of the trial came after the execution of the contracts and not before.

On the question of failure of the defendant it becomes apparent that the defendant did not fail to act in any wise which would justify the plaintiff in a conclusion that Lank had ostensible authority to bind it by these contracts.

In the absence of an apparent situation which demands the disclosure of the limitations upon the authority of an agent, a principal is not bound at his peril to disclose those limitations. Rather the burden is on the person dealing with a known agent, not to deal blindly and trust the agent's representations as to the extent of his powers, but to use reasonable diligence and prudence to ascertain whether the agent acts within the scope of his powers. The rule is well stated as follows in 2 Am. Jur., Agency, § 95, p. 76: "A person dealing with a known agent is not authorized under any circumstances blindly to trust the agent's statements as to the extent of his powers; such person must not act negligently, but must use reasonable diligence and prudence to ascertain whether the agent acts within the scope of his powers. In other words, a person dealing with an agent assumes the risk of lack of authority in the agent. He cannot charge the principal by relying upon the

agent's assumption of authority which proves to be unfounded. The principal, on the other hand, may act on the presumption that third persons dealing with his agent will not be negligent in failing to ascertain the extent of his authority as well as the existence of his agency." Cases cited from numerous jurisdictions abundantly support the stated principle.

The conclusion is unavoidable in these instances that the plaintiff blindly trusted that Lank had authority from the defendant to execute the contracts. The record does not even disclose that inquiry was ever made of Lank as to his authority. Insofar as the record is concerned the plaintiff assumed from what it could see alone that Lank had authority to execute these agreements and bind the defendant.

It cannot therefore be said that there was any act or failure to act on the part of the defendant which created in Lank an ostensible or apparent agency on which in these instances the plaintiff had the right to rely. Unless it may be said that there was evidence of custom and usage which created in Lank an ostensible or apparent agency there was nothing by which the defendant could be bound. We think there was no such evidence.

It is true, as pointed out in Johnston v. Milwaukee & Wyoming Investment Co., *supra,* that usage and custom is an element which is to be considered in determining whether or not an ostensible or apparent agency exists, but it must be considered along with the other essential elements such as a voluntary act or failure to act on the part of the principal, knowledge at the time of custom and usages of the particular business by a third person, and ordinary prudence on the part of the third person in the light of his knowledge or lack of knowledge.

There was no culpable voluntary act or failure to act on the part of the defendant in placing Lank in the position he held and in clothing him with the authority which he had as has been herein described. On the part

of the plaintiff there is an absence of evidence that prior to the execution of these contracts it was conversant with the business usages or of the nature of the particular business in which the defendant was engaged or that it sought information in relation thereto or that it acted with ordinary prudence in presuming that Lank had authority to bind the defendant by these contracts.

These conclusions leave the claimed authority of Lank to bind the defendant without evidentiary support. This being true, and authority being an essential element of plaintiff's causes of action, it must be said that proof of the causes of action failed. It then became the duty of the district court to sustain the motion of defendant for a directed verdict. On account of its failure in this respect it then became its duty to sustain the motion for judgment notwithstanding the verdict. This failure requires a reversal here. In re Estate of Bingaman, 155 Neb. 24, 50 N. W. 2d 523; Wagoun v. Chicago, B. & Q. R. R., *supra*.

This determination renders a consideration of the other questions raised by the appeal and those raised by the cross-appeal unnecessary.

The judgment of the district court is reversed and the cause remanded with directions to render judgment notwithstanding the verdict in favor of the defendant and against the plaintiff.

REVERSED AND REMANDED WITH DIRECTIONS.

DICK FLESSNER, APPELLANT, V. ANTHONY J. WENQUIST ET AL., APPELLEES.
56 N. W. 2d 294

Filed January 2, 1953. No. 33219

1. **Specific Performance.** Specific performance of an alleged oral contract to devise real estate owned by a deceased person at the time of his death will not be granted unless the contract

and the terms thereof are established by clear, satisfactory, unequivocal, and convincing evidence.

2. **Specific Performance: Quantum Meruit.** An action for specific performance of an alleged oral contract to devise real estate to the plaintiff and a cause of action for the recovery of money only on the basis of a quantum meruit for services rendered by plaintiff to the other party to the alleged contract and for the value of improvements made to the real estate, the subject of the alleged contract, are inconsistent remedies.
3. **Courts.** A district court of this state lacks original jurisdiction to hear and adjudicate a cause of action for money only claimed to have existed against a person at the time of his death. Original jurisdiction of such a claim and the allowance or rejection thereof is, by the Constitution of the state, conferred upon the county court having jurisdiction of the estate of the deceased debtor.

APPEAL from the district court for Saunders County: H. EMERSON KOKJER, JUDGE. *Affirmed in part and in part reversed and remanded with directions.*

Howard V. Kanouff and *George W. Haessler,* for appellant.

H. A. Bryant and *Swenson, Viren & Turner,* for appellees.

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

BOSLAUGH, J.

This is an action in equity for specific performance of an alleged oral contract the subject of which is land in Saunders County. The district court denied the relief asked by appellant, dismissed his petition, and denied his motion for a new trial.

Appellant alleged that he entered into the possession of the land as a lessee under a written lease with the then owners thereof about March 1, 1934, and was thereafter until April 4, 1951, the date of the filing of his amended petition, in the possession thereof; that in the year 1937 Ludwig J. Thorstenson, Esther H. Thorstenson, and Ada L. Thorstenson, the owners of the real estate,

desired appellant to continue in the possession of the land; that they then entered into an oral agreement with him by the terms of which he was to continue to occupy it until the death of the last of the three owners, pay one-half of all crops raised thereon to the owners or the survivor or survivors of them, keep the land in good fertility, the fences and buildings thereon in good repair, treat the real estate as his own, put such improvements thereon as he desired without expense to the owners, except such improvements or repairs as they elected to make; that in the event Ludwig J. Thorstenson predeceased either or both of his sisters, Esther H. Thorstenson and Ada L. Thorstenson, appellant would aid, assist, and look after their needs as would a brother; that in consideration of the promises of appellant as stated the owners of the real estate promised and agreed that appellant should consider the real estate as belonging to him except for the payment of rentals as recited above; that he would never have to move therefrom; that the last survivor of the owners would devise the real estate to him; that the last survivor of the owners of the land was Ada L. Thorstenson; that she died intestate on August 14, 1950; that she failed to devise the land to appellant as she was required to do by the agreement; and that he fully and timely performed the contract.

Appellees, except the administrators of the estate of Ada L. Thorstenson, deceased, denied that any contract was made between Ludwig J. Thorstenson, Esther H. Thorstenson, and Ada L. Thorstenson, or any of them, and appellant by which he was to acquire title to the land in any manner or at any time; denied that appellant had any right, title, or interest in or claim to the land; and they asked that the action be dismissed. The representatives of the estate of Ada L. Thorstenson, deceased, denied the claims of appellant; alleged their decedent was the owner of the land at the time of her death; that her heirs were the owners thereof; and that

they as administrators were entitled to the rents and profits from the land during the administration of the estate of the deceased.

The district court found that the alleged contract relied upon by appellant was within the bar of the statute of frauds; that there was no direct evidence that the alleged contract was made; and that there was no sufficient evidence of the existence of the contract or the terms and conditions thereof. The relief sought by appellant was denied.

Appellant asserts that the findings and decree of the district court are not sustained by the evidence but are opposed to it and that they are contrary to law.

There is an absence of evidence of any conversation or negotiation of any kind or manner at any time between the owners of the land involved in this case or any of them and appellant concerning the alleged oral contract. In other words there is no direct proof of it. Likewise there is an entire absence of testimony that any of the persons to the supposed contract by expression or otherwise admitted that there was an agreement. There was no attempt to connect Esther H. Thorstenson, the owner of one-sixth of the land, with the supposed contract. There is not the faintest trace of evidence that she made any agreement with appellant or any one else for the disposition of her interest in the land.

The appellant produced testimony of statements of Ludwig J. Thorstenson made to neighbors and acquaintances which it is claimed proved the contract relied on in this case. One of these testified that in the year 1937 or 1938 he suggested to Mr. Thorstenson that he should sell the farm on which appellant lived and move to town. Mr. Thorstenson stated in reply " 'That's Dick's farm.' " At a later time during a conversation with the same person concerning the Mead military installation, Mr. Thorstenson said: " 'Thats a good thing they didn't go any farther west or they would take Dick's farm.' "

He said on another occasion " 'That's Dick's farm and he's a good renter, that was his farm.' 'I told him to fix up everything on that place, its your farm.' " It was testified that Mr. Thorstenson said to a neighbor and her daughter in the fall of 1947 that Dick was a good farmer and " 'that place (pointing north toward where appellant lived) will stay to Dick, he will never have to move' "; that Dick was always willing to help him and did help him; and " 'That's Dick Flessner's farm, that's going to be Dick Flessner's farm.' " A former tenant of a part of the Thorstenson land testified that about the year 1938, 1939, or 1940, he "joshed" Mr. Thorstenson about the farm he gave to Dick and that he replied " 'That's a person's business, Dick needs it, he's got a large family.' " This witness testified about another occasion in this way "Well, I would always tell him, 'If you give that to Dick you got lots of money you can give me some' he would laugh and say, 'You are not as close to me as Dick', then I would forget it and then later I would bring it up again." This is all that appears in the record that is claimed to establish Ludwig J. Thorstenson as a party to the alleged oral contract.

The evidence intended to show that Ada L. Thorstenson was a party to and was bound by the alleged oral contract is even more limited. The former tenant referred to above testified that when he, Mr. Thorstenson, and Ada L. Thorstenson were present there was a conversation concerning the land involved herein and at that time Ada said " 'Well Dick is awful nice to us.' " After the death of her brother, Ludwig J. Thorstenson, in a conversation with a neighbor it is said that Ada inquired if her brother had told the neighbor who he, Ludwig, was going to give " '* * * them farms to * * *.' " The neighbor told her Ludwig was giving " '* * * that farm to Dick' " and she answered " 'That's all right.' * * * 'Dick did a lot of work for us.' " There is evidence that in a conversation between Ada L. Thorstenson

and a neighbor after the death of her brother and a few months before her death she said she did not know what to do with a house she had bought in town; that " 'Some people said I should make a will, I don't know' "; and she added " 'I want to give something to the church, something to the College and something to Dick.' "

The record is silent except the assertions of the petition as to when and between whom the agreement was made. The same is true as to what it contained. It is not disclosed by proof what the owners of the land offered the appellant or what he promised the owners. It was of peculiar importance as to Ada L. Thorstenson for appellant to establish her offer and the acceptance of it by him because she was the last survivor of the owners of the land. Under the theory of appellant she was bound by the terms of the alleged contract to devise the land to him. He had the inescapable necessity of showing by satisfactory, unequivocal, and convincing proof that she entered into the contract alleged by him. The initial burden in this case was on appellant, as it is on every plaintiff in a case of this class, to prove the contract and the terms thereof as alleged by a preponderance of evidence which is clear, satisfactory, unequivocal, and convincing. In essence the attempt of appellant in this case is by a contract resting in parol to distribute the estate of a deceased person in a way contrary to that provided by law. The evidence to support such a result is and properly must be scrutinized carefully and in a most scrupulous manner. Such a contract must be established by clear and convincing evidence, and its terms must be definite and certain. In Overlander v. Ware, 102 Neb. 216, 166 N. W. 611, this court laid down the rule which has been consistently followed and frequently repeated as follows: "In considering cases of this character, where one is claiming the estate of a person deceased under an alleged oral contract, the evidence of such contract and the terms of it must be clear, satisfactory and unequivocal. Such

contracts are on their face void as within the statute of frauds, because not in writing * * *." See, also, Lintz v. Apking, 145 Neb. 714, 18 N. W. 2d 55; Caspers v. Frerichs, 146 Neb. 740, 21 N. W. 2d 513; Casper v. Frey, 152 Neb. 441, 41 N. W. 2d 363; Nelson v. Glidewell, 155 Neb. 372, 51 N. W. 2d 892; Annotation, 69 A. L. R. 14.

The case of appellant fails to satisfy the first requisite of a case of this character and the trial court was correct in denying appellant the relief he sought.

The cross-appeal tests the correctness of the findings of the trial court that appellant rendered services and performed acts for the benefit of Ludwig J. Thorstenson, Esther H. Thorstenson, and Ada L. Thorstenson; and that he at his expense made improvements on and to their land for which he should be compensated upon a quantum meruit basis. The court determined the amount appellant should recover from appellees and judgment therefor was rendered against them and in favor of appellant. Appellees question the authority of the district court in this regard. There is no pleading to support the findings and judgment contested by the cross-appeal. The record is devoid of showing of any relationship between the parties. The appellees are the personal representatives and heirs of Ada L. Thorstenson, deceased. If appellant had any right to compensation for services rendered Ludwig J. Thorstenson, Esther H. Thorstenson, and Ada L. Thorstenson and for improvements placed on the real estate involved herein, it necessarily was derived from their relationship with appellant and not from any relationship with appellees. He and the appellees were strangers. There is no pleading or proof that appellant had the obligation of any one to compensate him for the services rendered or the improvements made by him on the land. Likewise there is no evidence showing to which of the three persons the various services were rendered and no differentiation of the interest each had in the improvements allegedly placed on the farm. The appellees who are the heirs of

Ada L. Thorstenson could not be held liable for services rendered to Esther H. Thorstenson or Ludwig J. Thorstenson, and appellees could not be held liable for the value of all the improvements placed on the farm at a time when Ada L. Thorstenson was not the owner of the whole thereof. She did not become responsible for any indebtedness of her brother and sister because she became their heir. Neither did appellees become responsible for any indebtedness of Ada L. Thorstenson because of their relationship to her and her death. A statute expressly protected the administrators of the estate of Ada L. Thorstenson, deceased, from judgment for the liability recited in the findings. § 30-801, R. R. S. 1943; Rehn v. Bingaman, 151 Neb. 196, 36 N. W. 2d 856.

A suit to enforce an oral contract to devise real estate and a claim for money only on a quantum meruit basis are inconsistent. This principle is recognized in Crnkovich v. Crnkovich, 144 Neb. 904, 15 N. W. 2d 66, in which it is said: "In their brief plaintiffs request, if specific performance is denied, that a lien be impressed upon the real estate for the amount of the investment of George Crnkovich therein. Such relief must be denied. His remedy in such case would be in an action at law for the recovery back of such payment or payments as were made under the alleged oral contract. * * * The fact that the statute barring the filing of claims against decedent estates may bar a recovery furnishes no legal reason for the granting of relief in this action."

If any amount was due appellant for services rendered the owners of the land or for improvements placed thereon, he could only get it from the estate of the person or the estates of the persons indebted to him. The district court has no probate jurisdiction. The county court only has original jurisdiction to entertain and allow a claim based on a liability of a deceased person existing at the time of his death. Rehn v. Bingaman, *supra*; Moore v. Moore, 58 Neb. 268, 78 N. W. 495. The

judgment of the district court awarding appellant recovery for services rendered and improvements made on the land cannot be sustained.

The judgment of the district court denying specific performance of the alleged oral contract relied upon by appellant as the basis of this case should be and it is affirmed. The judgment in favor of appellant for the value of services rendered and the improvements made on the land by him should be and it is reversed and the cause remanded with directions to the district court for Saunders County to enter a judgment in accordance with this opinion.

AFFIRMED IN PART AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

GEO. N. MECHAM, APPELLEE, V. JESSIE BEARD COLBY, APPELLANT.
56 N. W. 2d 299

Filed January 2, 1953. No. 33221.

1. **Trial: Judgments.** The summary judgment act, sections 25-1330 to 25-1336, R. S. Supp., 1951, authorizes summary judgment only where the moving party is entitled to judgment as a matter of law, where it is clear what the truth is, and that no genuine issue remains for trial. The purpose of the statute is not to cut litigants off from their right of trial by jury if they really have issues to try.
2. ———: ———. In considering a motion for summary judgment the court should view the evidence in the light most favorable to the party against whom it is directed.
3. ———: ———. The court examines the evidence on motion for summary judgment, not to decide any issue of fact presented, but to discover if any real issue of fact exists.
4. ———: ———. The burden is upon the party moving for summary judgment to show that no issue of fact exists, and unless he can conclusively do so the motion must be overruled.
5. **Contracts.** When the provisions of a contract together with the facts and circumstances that aid in ascertaining the intent of the parties thereto are not in dispute, the proper construction of such contract is a question of law.

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

Floersch & Floersch, for appellant.

Mecham, Stoehr, Moore, Mecham & Hills, for appellee.

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

MESSMORE, J.

This is an action brought in the district court for Douglas County by Geo. N. Mecham as plaintiff against Jessie Beard Colby as defendant to recover for legal services rendered the defendant.

The plaintiff's petition, insofar as necessary to consider here, alleged his employment as counsel for the defendant to protect her interests as principal beneficiary under her brother's will and any claim she might have against the Beard Wall Paper & Paint Company, Inc. The petition detailed the legal services rendered by the plaintiff for the defendant and the results obtained for defendant's benefit by virtue of such services; alleged that on December 13, 1946, the plaintiff rendered a bill for professional services to the defendant which was approved by her in writing and which she agreed to pay, in the amount of $2,000; and prayed judgment in the amount of $2,000 and costs expended.

The defendant's answer denied generally the allegations of the plaintiff's petition; set out facts that the legal services rendered by the plaintiff in behalf of the defendant were detrimental to her best interests; that the defendant was the principal beneficiary under the will of her brother Robert N. Beard, deceased, and by virtue of such fact had a claim against the Beard Wall Paper & Paint Company, Inc.; that the amount claimed by the plaintiff for legal services rendered the defendant is excessive and not the fair and reasonable value of said services; discloses the defendant approved the statement rendered by the plaintiff in the amount of $2,000

for services rendered and admits that she signed it; and prayed for dismissal of the plaintiff's petition and for recovery of costs expended in this action.

The factual particulars set forth in the pleadings will be more fully covered in a resume of the facts appearing in the opinion.

The plaintiff did not file a reply to the defendant's answer, but filed a motion to enter judgment in behalf of the plaintiff in the amount of $2,000 with interest thereon at the legal rate from December 13, 1946, and costs in accordance with sections 25-1330 to 25-1336, R. S. Supp., 1951. The motion for summary judgment was sustained, and judgment was entered in favor of the plaintiff in the amount of $2,000, interest, and costs in the amount of $60.45.

The defendant filed a motion for new trial which was overruled and defendant perfected appeal to this court.

For convenience we will refer to the parties as designated in the district court, Geo. N. Mecham as plaintiff, and Jessie Beard Colby as defendant.

We deem it advisable at this time to set forth certain statutory provisions of the summary judgment act and its effect.

Section 25-1330, R. S. Supp., 1951, provides: "A party seeking to recover in district court upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the filing of answer or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof."

Section 25-1332, R. S. Supp., 1951, provides in part as follows: "The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that

the moving party is entitled to a judgment as a matter of law."

The foregoing statute is patterned after Rule 56 of the Federal Rules of Civil Procedure. See 28 U. S. C. A., Federal Rules of Civil Procedure, Rule 56, p. 153.

In considering a motion for a summary judgment the court should view the evidence in the light most favorable to the party against whom it is directed, giving to that party the benefit of all favorable inferences that may be reasonably drawn therefrom. See, Illian v. McManaman, *ante* p. 12, 54 N. W. 2d 244; Dennis v. Berens, *ante* p. 41, 54 N. W. 2d 259; Ramsouer v. Midland Valley R. R. Co., 135 F. 2d 101; Dulansky v. Iowa-Illinois Gas & Electric Co., 191 F. 2d 881.

The court examines the evidence on motion for summary judgment, not to decide any issue of fact presented in the case, but to discover if any real issue of fact exists. See, Dennis v. Berens, *supra;* Sprague v. Vogt, 150 F. 2d 795. In other words, the court can merely determine that an issue of fact does or does not exist. If such an issue does exist, the summary judgment act has no application; if such issue does not exist, a motion for a summary judgment affords a proper remedy. The evidence offered in support of the motion is for the purpose of showing that no issue of fact exists, not to try issues on pleadings, depositions, admissions, and affidavits which constitute only a part of the evidence available on a trial on the merits. The burden is upon the moving party to show that no issue of fact exists, and unless he can conclusively do so the motion for summary judgment must be overruled. See, Illian v. McManaman, *supra;* Dennis v. Berens, *supra,* and cases cited therein.

With the foregoing rules in mind we proceed to a determination of this appeal and the depositions and affidavits on file which in substance disclose the following: The Beard Wall Paper & Paint Company, Inc., was incorporated in 1917. We will refer to it as the corpora-

tion. Robert N. Beard, the brother of the defendant Jessie Beard Colby, was president of the corporation, the manager thereof, and held the controlling number of shares of stock therein. For convenience we will refer to Robert N. Beard as Beard.

It appears there were 300 shares of common stock outstanding, of which Beard owned 185 shares. Prior to 1939, and at that time, the corporation was in financial straits and operated at a loss. On November 8, 1939, an agreement was entered into by the corporation with three of its principal creditors by the terms of which a creditors' committee was formed to take over, manage, and have exclusive control of the business for the benefit of such creditors and other creditors of the corporation. The purpose of the agreement was to endeavor to pay the creditors and put the business on a profitable basis. The affairs of the corporation were complicated by the fact that Beard had been borrowing and using corporate funds for his own personal use, which appeared on the books of the corporation. On October 20, 1941, Beard died. At that time he owed the corporation $14,737.24, with interest in the amount of $7,342.33, making a total indebtedness to the corporation of $22,079.57, no part of which had been paid. At the time of Beard's death there were 300 shares of common stock of the corporation outstanding, of which he owned 185 shares. There was also preferred stock owned by another party. The indebtedness of the corporation at the time of Beard's death was $53,634.21. There was a life insurance policy on Beard's life in the amount of $32,000, the three principal creditors being the beneficiaries of the policy. This was applied on the corporation's outstanding indebtedness. The indebtedness of the corporation on current accounts as of the date of January 31, 1942, was $41,587.34. Had there been liquidation of the corporation at the time of Beard's death, the assets of the same would have been insufficient to pay the entire outstanding indebtedness. The common stock

of the corporation had little or no value.

On December 17, 1941, the defendant went to the plaintiff's office and employed him to represent her as her attorney with reference to the estate of her brother. She was the principal beneficiary under his will and would inherit the 185 shares of common stock in the corporation owned by him. By virtue of such fact she contended she had a claim against the corporation, and the plaintiff was instructed to protect her interests.

According to the defendant's deposition, the corporation was in financial straits in 1939. It had bought too heavily and was unable to sell its merchandise during the hard times and the crop failures; business dropped off and it was overstocked. The plaintiff agreed to act as the defendant's attorney to protect her interests in the estate of her brother and any claim she might have against the corporation. Thereafter the plaintiff had several conferences with the defendant and the officers of the creditors' committee, and corresponded with numerous individuals to ascertain the value of the common stock of the corporation, its indebtedness, and financial condition.

In April 1945, the Beard Wall Paper & Paint Company, Inc., as an alleged bona fide creditor, filed a petition in the county court of Douglas County for the administration of the estate of Robert N. Beard, deceased. Objections were filed to the petition for probate of the will for the reason that more than two years had elapsed since the death of Robert N. Beard. No hearing was had thereon, but negotiations for an amicable adjustment of the defendant's claim continued. The plaintiff acted as attorney for the defendant and the creditors' committee acted for the corporation. During the process of negotiations several offers were made to the defendant to obtain her interest in the corporation, one for $1,000, one for $3,000, and one for $5,000, all of which she refused. After the negotiations between the plaintiff, acting for the defendant, and the creditors' committee had

been in progress for a period of nearly five years, the financial status of the corporation improved until finally the creditors' committee ceased operation with reference to the management of the corporation and returned the business to its proper officers.

On October 3, 1946, an agreement in writing was had between the corporation and its proper officers and the defendant, brought about by the plaintiff, in settlement of defendant's claim against the corporation. According to the terms of this agreement, the defendant was to surrender 75 of the 185 shares of stock left to her by virtue of her brother's will for the cancellation of the debt owing by her brother to the corporation, not to be reissued by the corporation without the unanimous consent of the stockholders. This reduced the number of outstanding shares of common stock of the corporation to 225. The defendant retained 110 shares of common stock of the corporation. In addition, the corporation agreed to pay to the defendant $50 on the first day of each and every month commencing with the first day of February 1946, as an advance of dividends on the common stock held by her in the corporation. It was further agreed that the defendant should not participate in any manner in the management and daily operation of the business of the corporation.

As a result of this agreement, the defendant received a cancellation of her deceased brother's debt owing to the corporation in the amount of $14,737.24, with interest amounting to $7,342.33, or a total of $22,079.57, and the receipt of 110 shares of common stock valued at $28,260. She also received a monthly check for $50 for a period of 30 months, totaling $1,500, and thereafter, by the transfer of some stock to a person who was desirous of being president of the corporation, she received $150 each month, less withholding taxes and social security payments. It also appears that she received two dividend checks in the amount of $500 each, and it is not clear by the record whether or not these

dividend checks were prior to the time the agreement was entered into. The record indicates that this transaction was prior to that time.

Other affidavits appear in the record confirming the fact that the corporation operated at a loss prior to 1939, and at that time; that the indebtedness of Beard to the corporation was as heretofore indicated; and that the settlement perfected by the plaintiff with the corporation was the best possible settlement that was obtainable for the defendant. The reasonable value of plaintiff's services was placed by one attorney's affidavit as between $7,500 and $10,000.

There also appears in the record an affidavit of counsel for the corporation prior to and during 1939 who took part in the settlement of defendant's claim against the corporation, reiterating that the corporation was in financial straits at the time; that there was an indebtedness owing the corporation by the defendant's deceased brother; and that at the time of the settlement the defendant had a full and comprehensive knowledge of the terms of the agreement of October 3, 1946.

On December 13, 1946, the plaintiff rendered a bill to the defendant, he being a member of the firm of Rosewater, Mecham, Shackelford & Stoehr, for professional services rendered to date in the matter of her claim against the Beard Wall Paper & Paint Company, Inc., and the estate of Robert N. Beard, deceased, in the amount of $2,000. On the face of this bill appears the following: "Omaha, Nebraska December 13, 1946 The above and foregoing is approved. (Signed) Mrs. Jessie B. Colby."

On December 19, 1946, the following letter was sent by Mrs. Jessie B. Colby, defendant, to the firm of Rosewater, Mecham, Shackelford & Stoehr, 1028 City National Bank Building, Omaha, Nebraska, in which the plaintiff's attention was directed to the following: "This is to acknowledge receipt of your letter of December 16th together with three enclosures. Accordingly, reaffirming your letter and our former conversation in your

office, it is understood that your fee is $2,000.00 for all services and claims against me to December 13, 1946. In compliance with your letter, you also understand that your services will be discontinued until such time as I again request your services in writing, and that I am now at liberty to consult other counsel or attorneys in this regard. It was also understood that my brother's will and all papers pertaining to my case will be turned over to any other counsel I may select. Unless I heard (hear) from you to the contrary within the next five days, I will assume that this is correct. Sincerely, (signed) Mrs. Jessie B. Colby."

The deposition and affidavits of the defendant appearing in the record relate to the history of the Beard Wall Paper & Paint Compay, Inc., both before the corporation was formed and subsequent thereto, and that the corporation was in financial difficulty in 1939. The deposition and affidavits further admit the indebtedness of Robert N. Beard, president of the corporation, before his death to be in the amount of $14,737.24; however, that this amount was on an open and running account up to September 30, 1938, containing the private transactions of Robert N. Beard, and that the last item on the account was April 1, 1940. It was not contemplated or agreed that any interest should be paid on this indebtedness as shown by defendant's affidavit and the affidavit of one other person. The deposition and affidavits show that a creditors' committee was organized to manage and have exclusive control of the business of the corporation; and that defendant employed the plaintiff to represent her with reference to her brother's will and in any claims she might have against the corporation. After she had received the $50 each month for a period of 30 months, "some stock changed hands, and a man bought it * * * and he wanted to be President and he couldn't be President without my vote, so I just wanted to be Vice-President and get a salary, and that's the way I got a salary." As a consequence she drew $150 per month less with-

holding tax and social security, and has drawn the same ever since. Also, the deposition and affidavits show that she received two dividend checks in the amount of $500; that the building was mortgaged to pay the dividends and they could not leave her out; and that in accordance with the agreement of October 3, 1946, she was required to surrender 75 shares of common stock to liquidate the debt of her brother to the corporation. By doing so she was divested of controlling shares of stock in the corporation to her detriment. The business was valued at that time at approximately $79,000, and the 75 shares of stock she surrendered to pay an indebtedness of $14,737.24, were of the value of $20,000.

One of defendant's affidavits is also to the effect that the balance sheet of the corporation as of July 31, 1942, showed a deficit of $6,708.53 on that date. The real estate and fixtures were shown at far less than the actual value, and the balance sheet showed a surplus of $15,650.45. In 1948, the building owned by the business was appraised in the amount of $42,000. Further, when she signed the agreement of October 3, 1946, she was very ill and was advised by the plaintiff that if she did not sign the agreement she would lose everything she had and the corporation stock would be worthless. She was continually advised by the plaintiff that nothing could be done by her until such time as the creditors of the corporation were taken care of.

There is an affidavit of an accountant who examined the balance sheet for the corporation for the year ending July 31, 1942, and estimated the book value of the stock on that date as shown by the balance sheet at $100 per share. He further examined the balance sheet for the fiscal year ending July 31, 1946, and from an analysis thereof formed the opinion that the book value of the stock at that time was $265 per share, basing the number of outstanding shares at 300; and that during the month of January 1947, he was present in the offices of the corporation when he was told by Martin Her-

skind and Gage Billings, who were in charge of the business, that there had been no agreement at any time between Robert N. Beard and the corporation for payment of interest on the open account of Beard with the corporation.

It also appears from the defendant's deposition and affidavits that the acknowledgment of the indebtedness to the plaintiff for legal services rendered was prior to the time she was advised of the true facts concerning the agreement dated October 3, 1946, and the actual value of the 75 shares of stock surrendered by her in the settlement of her brother's debt to the corporation, which value was in excess of the amount of the debt. It was then that she first realized that the amount of the bill rendered by the plaintiff for legal services in her behalf was not the fair and reasonable value of the services rendered by him. That the services rendered by the plaintiff were detrimental to her best interests in that it left her entire inheritance tied up in an investment over which she had no control and which she could not readily liquidate, and she was left to the mercy of the holders of the controlling stock of the corporation, therefore the charges made were not fair and reasonable.

It is apparent that the defendant approved the written statement of the plaintiff for his charge of $2,000 for attorney fees. This constitutes a contract between the parties. By the defendant's letter of December 19, 1946, she reaffirmed the contract, stating she would hold the plaintiff to the terms thereof. The plaintiff's promise under the contract was to accept $2,000 for the services rendered. A consideration for the defendant's promise to pay was the service which the plaintiff had rendered to the defendant, and the consideration for that service was the promise of the defendant to pay the plaintiff his fee of $2,000. It is apparent that this was sufficient consideration for a contract.

It is defendant's contention that the records disclose

a genuine issue of fact which requires a trial to be had on the merits of the case as to what the reasonable value of the services rendered by the plaintiff to the defendant would amount to.

The defendant assigns as error that the court erred in finding from the pleadings, affidavits, and depositions on file that there was no genuine issue as to any material fact in this case, and that the plaintiff was entitled to a judgment as a matter of law.

"When the provisions of a contract together with the facts and circumstances that aid in ascertaining the intent of the parties thereto are not in dispute, the proper construction of such contract is a question of law." Kimball v. Cooper, 134 Neb. 536, 279 N. W. 194. See, also, Western Mfg. Co. v. Rogers, 54 Neb. 456, 74 N. W. 849.

"The construction of a written contract, if couched in clear, unambiguous language, is a question solely for the court." Crancer v. Reichenbach, 130 Neb. 645, 266 N. W. 57. See, also, Peru Plow & Implement Co. v. Johnson Bros., 86 Neb. 428, 125 N. W. 595; Hinman v. Austin Mfg. Co., 65 Neb. 187, 90 N. W. 934; McCormick Harvesting Machine Co. v. Davis, 61 Neb. 406, 85 N. W. 390. In the latter case it was held: "It is the duty of the court to interpret the contract between the parties." See, also, Martin v. Reavis, 117 Neb. 219, 220 N. W. 238.

There appears from the record a clear promise on the part of the defendant to pay the plaintiff attorney fees in the amount of $2,000. The employment of the plaintiff is admitted, and it is admitted that the defendant has never paid the attorney fees. Defendant attempted to justify her failure to keep her promise to pay the attorney fees by stating that the agreement she entered into on October 3, 1946, heretofore mentioned, was not for her best interests and was a detriment to her. This is not relevant. The defendant accepted the terms of the contract of October 3, 1946, and took the benefits received therefrom.

Under the authorities heretofore cited with reference

to the summary judgment act, we conclude that no genuine issue of fact is presented in this case, and the plaintiff was entitled to a summary judgment as rendered by the trial court.

AFFIRMED.

ADAM HILZER, JR., APPELLANT, V. FARMERS IRRIGATION DISTRICT, APPELLEE.
56 N. W. 2d 457

Filed January 2, 1953. No. 33232.

1. **Negligence.** Whenever the circumstances attending a situation are such that an ordinarily prudent person could reasonably apprehend that, as the natural and probable consequences of his act, another person, rightfully there, will be in danger of receiving an injury, a duty to exercise ordinary care to prevent such injury arises; and, if such care is not exercised by the party on whom the duty rests and injury to another person results therefrom, liability on the part of the negligent party to the person injured will generally exist, in the absence of any other controlling element or fact, and this, too, without regard to the legal relationship of the parties.
2. **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.
3. **Negligence.** Negligence is a failure to do what reasonable and prudent persons would ordinarily have done under the circumstances and situation, or doing what reasonable and prudent persons under the existing circumstances would not have done.
4. ———. Where one is confronted suddenly with an emergency and is required to act quickly, he is not necessarily negligent if he pursues a course which mature reflection or deliberate judgment might prove to be wrong. All the law requires is that one conduct himself as an ordinary, careful, and prudent person would have done under similar circumstances, and if he does that he is not held to be negligent, even though he committed an error of judgment.

5. ———. In order to justify a resort to the defense of sudden emergency there must be an absence of opportunity for mature deliberation.
6. ———. An act of God is such an unusual and extraordinary manifestation of the forces of nature that it could not under normal conditions have been reasonably anticipated or expected.

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

Mothersead, Wright & Simmons, for appellant.

Neighbors & Danielson, for appellee.

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

WENKE, J.

Adam Hilzer, Jr., brought this action in the district court for Scotts Bluff County against the Farmers Irrigation District. The purpose of the action is to recover for damages to his personal property, consisting of farm machinery, equipment, and tools, done by water escaping from defendant's canal. The grounds on which plaintiff based his rights were defendant's failure to warn him of a break in its canal and failure to open waste gates along its canal, it being plaintiff's thought that if notice had been given he could, in a short period of time, have moved the machinery, equipment, and tools to higher ground and saved it from loss or damage by the escaping water.

A jury returned a verdict for the defendant.

The plaintiff thereupon filed a motion for new trial and, from the overruling thereof, has perfected this appeal.

The appellee is an irrigation district organized under the laws of the State of Nebraska and will be referred to as the district. The district was organized in 1906. It then commenced building its main canal which, when completed, was about 80 miles long. The main canal extends from a point about 1 mile east of the Wyoming border, near Henry, Nebraska, to a point about 8 miles

east of Bayard, Nebraska. Where it crosses the northwest quarter of Section 7, Township 22 North, Range 54 West of the 6th P. M., in Scotts Bluff County, which is north and east of the city of Scottsbluff, the canal is about 40 feet wide at the bottom, about 55 to 60 feet wide at the top, and capable of carrying 1,200 second-feet of water when flowing at capacity. As it passes through this quarter section the top of the south bank of the canal is about 24 feet wide. A road is located thereon. The area south and immediately adjacent to the canal, at the location above described, is not in a drain or draw but is tableland sloping generally to the south.

"* * * the owner of an irrigation ditch or canal is required to exercise ordinary care in the construction, maintenance, and operation thereof. Otherwise stated, the measure of care which he is bound to use is that which ordinarily prudent men exercise under like circumstances when the risk is their own, or such as a prudent man, with due regard for the rights of others, and the risk of his undertaking, would exercise in conveying through an artificial channel a substance such as water, that possesses detrimental and destructive as well as beneficial and productive qualities, unless properly restrained. If the requisite degree of care is not exercised, the proprietor may be held liable for all damage proximately resulting from the wrongful act or omission, * * *." 30 Am. Jur., Irrigation, § 57, p. 639.

We think, if it becomes apparent to those operating an irrigation canal that a dangerous condition has developed in the operation thereof which is liable to cause injury, where a warning would be effective to prevent that injury, there is a duty to warn.

As stated in 65 C. J. S., Negligence, § 89, p. 598: "Where a person is performing an act or engaging in an operation which is likely to be dangerous to persons in the vicinity, it is his duty to warn such persons of the danger, * * *."

In Zimmer v. Brandon, 134 Neb. 311, 278 N. W. 502, we quoted the following from Lisle v. Anderson, 61 Okl. 68, 159 P. 278: " 'Whenever the circumstances attending a situation are such that an ordinarily prudent person could reasonably apprehend that, as the natural and probable consequences of his act, another person, rightfully there, will be in danger of receiving an injury, a duty to exercise ordinary care to prevent such injury arises; and, if such care is not exercised by the party on whom the duty rests and injury to another person results therefrom, liability on the part of the negligent party to the person injured will generally exist, in the absence of any other controlling element or fact, and this, too, without regard to the legal relationship of the parties.' "

We will first consider the district's contention that appellant failed to make a case. In considering that question the following rule is 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.

On June 24, 1951, the district was under the supervision of E. O. Daggett, the general manager who lived in Scottsbluff, Nebraska. Immediately under his supervision were three division superintendents. To facilitate operations the district had been divided into three divisions, one of the division superintendents being in charge of each. The district usually employed between 35 and 45 people. Normally it has about 21 ditch riders and 9 to 11 members of repair crews.

Division superintendent William Johnson was in charge of the area which included the south half of the

northwest quarter of Section 7, Township 22, Range 54 West of the 6th P. M., in Scotts Bluff County, which will hereinafter be referred to as the Pickering land. Immediately under his supervision were 9 ditch riders and at least 3 members of a repair crew.

On Sunday, June 24, 1951, there was a rain in the area immediately north of the district's main ditch. It ranged from north of Mitchell east to just north and east of Scottsbluff. It commenced about 3 p. m. and reached unprecedented proportions. By 6 p. m. it had ceased. The rain was estimated at various places in this area to have ranged from 3½ to 9 inches. It caused immediate flooding.

The flood waters resulting from this rain started to reach the district's main canal by 5:30 p. m. and by 6:30 p. m. the canal, at the point of the break on the Pickering land, was completely filled. Just prior to the rain the canal, at this point, had been carrying about 360 second-feet of water.

As soon as it became apparent that there would be trouble from flood waters all of the district's employees were called out. This was shortly after 6 p. m. The employees proceeded to patrol the main canal. They remained on the job until 3 a. m. on June 25. During the course of the evening several breaks occurred in the main canal including the break on the Pickering land.

Appellant was farming the southwest quarter of Section 18, Township 22 North, Range 54 West of the 6th P. M., in Scotts Bluff County. The farmstead on this quarter section of land is located in the northeast part thereof. It is at the head of a canyon where the land breaks from the table down to a lower level. The farmstead is located about a mile and a quarter south of where the break occurred on the Pickering land.

About 8 p. m. one of the district's employees noticed the canal, where it crossed the Pickering land, was running over its south bank and, shortly thereafter, he

noticed the amount running over the bank had very materially increased. There is evidence that the general manager was also aware of that fact and that about 8 p. m., or shortly thereafter, he notified one of the members of the district's board of directors that the canal was running over north of his place, which was on the Pickering land. There is also evidence from which the jury could reasonably infer that shortly after 8 p. m. both general manager Daggett and division superintendent Johnson knew there had been a break in the canal on the Pickering land.

Maps which were in the possession of the district show the topography of the area south of where the break on the Pickering land occurred. They indicate the water from the break would first flow southwest; then almost west across the road between Sections 7 and 12; then south; then east across this same road onto the southwest quarter of the southwest quarter of Section 7; then south across the road between Sections 7 and 18 onto the northwest quarter of the northwest quarter of Section 18; then in a general southeasterly direction across the northwest quarter of Section 18 until it reached the southeast quarter thereof; and that then it would divide and flow partly across the southwest quarter of the northeast quarter of Section 18 and partly through a canyon break located on the northeast corner of the southwest quarter of Section 18 at the head of which appellant was living.

After general manager Daggett had talked by telephone with Jerry Hays, a member of the district's board of directors who lived just south and east of the Pickering land, advising him that the canal was running over north of his place, Hays went out to see what the conditions were. He found that a break in the canal bank had occurred on the Pickering land and that water was rushing from the break and flowing to the southwest. He immediately notified two farmers, Simon Anderson and Henry Burbank who lived in the area he thought

would be flooded, of the break but neither he nor anyone else notified the appellant thereof, although appellant had a telephone that was in working condition and Hays knew where the farm buildings in which appellant lived were located.

The evidence shows that some of the water escaping through the break in the district's canal on the Pickering land flowed through the canyon, at the head of which the appellant lived, and caused serious damage to his equipment, machinery, and tools.

There is evidence in the record that would sustain a finding that if appellant had been notified of the break in the canal within a reasonable time after it occurred he would have had time to move his equipment, machinery, and tools to higher ground, which was nearby, and thus have prevented damage thereto.

"Negligence is a failure to do what reasonable and prudent persons would ordinarily have done under the circumstances and situation, or doing what reasonable and prudent persons under the existing circumstances would not have done." Mundy v. Davis, 154 Neb. 423, 48 N. W. 2d 394.

There are facts contrary to those hereinbefore set forth. Consequently, we find the record presents a question that a jury must decide; that is, were those in charge of the canal negligent in failing to warn appellant of the break therein on the Pickering land, and if so, was such failure the proximate cause of appellant's damages?

As stated in Maize v. Atlantic Refining Co., 352 Pa. 51, 41 A. 2d 850, 160 A. L. R. 449, by quoting from Ebbert v. Philadelphia Electric Co., 330 Pa. 257, 198 A. 323: " 'The test to determine whether there is liability in an action of tort is in the answer to the question whether the defendant by an act or omission injured another by disregarding a duty imposed by law in respect to that other.' "

And as stated in Smith v. Twin State Gas & Electric Co., 83 N. H. 439, 144 A. 57, 61 A. L. R. 1015: "It had

the duty of due care to warn him about it if it had reasonable opportunity to give warning after the danger existed, and due care called for warning if there was enough chance of danger to the decedent to prompt men of ordinary prudence in the defendant's place to warn him."

In view of what we have hereinbefore said it became the duty of the court to instruct the jury upon the issues presented by the pleadings which found support in the evidence.

The court was correct in not submitting the issue raised by appellant's claim that the district was negligent in failing to promptly open the waste gates along its canal in order to reduce the flow of water. The evidence, without dispute, shows that all waste gates were opened, sluiceways near the headgate opened, the headgate shut off, and, insofar as possible, they, including overflow spillways, were kept clear of debris. This was done as soon as danger of overflow threatened and continued as long as it served any useful purpose.

The court was also correct in submitting the issue raised by appellant's claim that the district failed to warn him of a break in its canal. However, in addition thereto the court submitted the issue of the district's failure to warn appellant of the imminent danger of its canal breaking. No such issue was pleaded. It is true that appellant attempted to amend his petition to include such issue but the trial court refused the request. There was evidence in the record at the time which would support such a claim. Appellant makes no contention that he was prejudiced thereby, nor could he successfully do so since it was favorable to him. Nevertheless, since the cause must go back for retrial for other reasons, we merely point out this error to prevent its repetition. This issue should not be again submitted unless the pleadings are properly amended to include it.

Appellant contends the court erred when it gave its instructions Nos. 10 and 11. He contends these instruc-

tions submitted the question of the conduct of those in charge of the canal on the theory that the jury could find they were acting in a sudden emergency, and if so, apply to their conduct the principles applicable in such situations. That is the import of these two instructions.

We said in Riekes v. Schantz, 144 Neb. 150, 12 N. W. 2d 766: "We have said many times that, where one is confronted suddenly with an emergency and is required to act quickly, he is not necessarily negligent if he pursues a course which mature reflection or deliberate judgment might prove to be wrong. All the law requires is that one conduct himself as an ordinary, careful and prudent person would have done under similar circumstances, and if he does that he is not held to be negligent, even though he committed an error of judgment. Belik v. Warsocki, 126 Neb. 560, 253 N. W. 689."

The evidence shows that those in charge of the canal knew about 7 p. m. that it was getting dangerously full; that about 8 p. m. they knew the water was running over its south bank on the Pickering land; that they knew the volume of the water running over the bank was rapidly increasing; that they knew, or should have known, there was danger that the rapidly increasing volume of water would probably cause a break in the bank; and that sometime after 8 p. m. they knew the water had actually broken through the bank and that it was flowing out of the ditch through this break onto the adjoining tablelands. The damage to appellant's machinery, tools, and equipment occurred after 9:45 p. m. although it is not shown at exactly what time the water started flowing through the canyon.

"In order to justify a resort to the defense of sudden emergency * * * there must be an absence of opportunity for mature deliberation." Horton Motor Lines v. Currie, 92 F. 2d 164.

"An 'emergency' is a sudden or unexpected happening or occasion calling for immediate action. All the

authorities agree that the presence of danger must be imminent, leaving no time for deliberation." Horton Motor Lines v. Currie, *supra.*

"Emergency is commonly defined as: 'An unforseen combination of circumstances which calls for immediate action.' Webster's New International Dictionary, 2d ed., Unabridged." Roby v. Auker, 149 Neb. 734, 32 N. W. 2d 491.

"* * * the above rule cannot be successfully invoked by either party in a negligence case unless there is competent evidence to support a conclusion that a sudden emergency actually existed, * * *." Roby v. Auker, *supra.*

The evidence shows that those in charge of the canal had sufficient time to give thought to the danger to others that would arise if the canal on the Pickering land broke and which did arise when the break actually occurred. In this situation the sudden emergency doctrine had no application and it was error for the court to submit it. By doing so it had the effect of permitting the jury to relieve those in charge of the district from exercising ordinary care.

Appellant also contends the court erred when, over objection, it admitted evidence, both oral and documentary, of the extent and intensity of the rain, the extent and intensity of the flood resulting therefrom, and the extent of the resulting damage to the district's canal. This contention of appellant is based on the fact that his claim of negligence on the part of the district is based on its failure to warn him there was impending danger that the flood waters would break out of the canal on the Pickering land and of the fact that it had not done so when the break actually occurred, and not upon any claim of negligence on the part of the district in the construction or maintenance of its canal or upon the fact that it was not able to hold the flood water in its canal.

We think the jury, in considering the question of whether or not those in charge of the district were negli-

gent in failing to warn appellant, was entitled to a picture of the entire situation, including all the facts, circumstances, and conditions with which those in charge of the district were confronted. The evidence objected to was properly admissible for that purpose.

Appellant also contends the court erred by giving its instructions Nos. 4 and 14. This contention is likewise based on the fact that the rights here claimed by appellant are not based on any contention that the district was negligent in either the construction or maintenance of the canal nor on the fact that it was not able to hold the flood waters in its canal. In other words, appellant does not base his claim for damages on the fact that the district was not able to contain the water but upon the failure to warn him, under the circumstances here established, when it knew there was imminent danger of the flood waters breaking out of the canal and of the fact that it had done so when the break actually occurred.

By its instruction No. 4 the court advised the jury that the district had plead in its answer that the break in its canal, and any damage caused to appellant by the water flowing therefrom, resulted from a rain and flood condition which were unprecedented in character and an act of God. By its instruction No. 14 the court defined what constitutes an act of God and that no liability exists for damages resulting solely therefrom. The real effect of these two instructions was to submit the defense pleaded; that is, that if the damages resulted from an act of God then the district would not be liable therefor.

We have defined an act of God as follows: "An act of God is such an unusual and extraordinary manifestation of the forces of nature that it could not under normal conditions have been reasonably anticipated or expected." Fairmont Creamery Co. v. Thompson, 139 Neb. 677, 298 N. W. 551.

We do not think, considering the basis on which the appellant seeks to recover, the fact that the storm was

of unprecedented proportions and concededly an act of God makes that fact available as a defense. Appellant does not contend that the district should have contained the water within its canal nor that he can recover because it was unable to do so. The basis on which he seeks to recover is that when the situation developed which threatened to and did cause a break in the district's canal on the Pickering land that then those in charge thereof had a duty to warn him. We find appellant's rights, under the factual situation here, to have been prejudiced by the giving of instructions Nos. 4 and 14.

In connection with instruction No. 14 appellant complains of the fact that the court used "approximately" when it should have used "proximately" and, also, in the last sentence thereof, of the use of "flood" where it should have used "break in its canal." These complaints are not without merit but since the cause must go back for retrial the same mistakes will undoubtedly not occur again.

The appellant also complains of the court's definition of proximate cause. The definition given by the court is as follows: "By the term 'proximate cause' is meant the primary or moving cause or fault where no other and independent cause disconnected therewith and self-operating, intervenes to produce the result."

Appellant's complaint is based on the contention that since the negligence complained of by him was the failure of the district to act that under no circumstances could this be considered by the jury as a moving cause. What appellant overlooks in this definition is that it not only refers to the primary or moving cause but also to the primary or moving fault. If those in charge of the canal failed to perform their duty, as is contended by appellant, then such was a fault on their part and covered by the definition given.

For the reasons herein stated we reverse the judgment of the trial court and remand the cause for retrial.

REVERSED AND REMANDED.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1953

HAROLD FROM ET AL., APPELLANTS, V. J. R. SUTTON ET AL., APPELLEES.
56 N. W. 2d 441

Filed January 9, 1953. No. 33231.

1. **Appeal and Error.** An appeal is not a remedy to cure or remove an error in matter of law only but is a retrial of the whole case upon the pleadings and proofs.
2. ———. To obtain redress by appeal the right to appeal must exist at the time. This right is not one at common law.
3. ———. The right of appeal in this state is purely statutory and, unless the statute provides for an appeal from the decision of a quasi-judicial tribunal, such right does not exist.
4. ———. The mode and manner of appeal is statutory and such jurisdiction can only be conferred in the manner provided by statute.
5. ———. One cannot be denied his right of review in the appellate courts and proceedings in error are always resorted to where no other method is pointed out or provided for.
6. ———. A petition in error in the district court to review a judgment or order of an inferior tribunal is an independent proceeding, having for its immediate object a reversal of the judgment or order complained of.

APPEAL from the district court for Deuel County: JOHN H. KUNS, JUDGE. *Reversed and remanded with directions.*

Torgeson, Halcomb & O'Brien, for appellants.

Richards & Richards, for appellees.

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

WENKE, J.

This is an appeal from the district court for Deuel County. It involves an appraisal of the improvements on school lands under and pursuant to the provisions of section 72-240.06, R. R. S. 1943.

This statute provides in part: "If the lease is made to a person other than the lessee, the value of all the improvements on the land shall be appraised by a majority of the members of the board of county commissioners or by three of the supervisors, * * *."

The factual situation making necessary such appraisal is as follows: Harold From and Hazel From were the owners of a 25-year lease on state school lands consisting of the west half of Section 16, Township 14 North, Range 45 West of the 6th P. M., in Deuel County; this lease, by its terms, expired on December 31, 1949; the Froms made application for a new lease under section 72-240, R. R. S. 1943; upon their application being received the Board of Educational Lands and Funds issued to them a new 12-year lease under and pursuant to the authority of the provisions of section 72-240.01, R. R. S. 1943; State ex rel. Ebke v. Board of Educational Lands and Funds, 154 Neb. 244, 47 N. W. 2d 520, determined all leases executed pursuant to and under the authority of those statutes were a nullity; as a result of that decision the Board of Educational Lands and Funds, on November 28, 1951, offered at public auction a 12-year lease on these lands; J. R. Sutton and Vera Mae Sutton were the high bidders at the sale, offering to pay a bonus of $3,100; and the Suttons were, upon application made in accordance with the bid, given a new 12-year lease commencing January 1, 1952.

The county commissioners of Deuel County thereupon appraised the improvements on this school land and, on January 28, 1952, filed their appraisal with the

county treasurer of Deuel County. Thereafter, on February 26, 1952, the Suttons filed in the office of the clerk of the district court for Deuel County a petition on appeal, notice of appeal, and a certified copy of the commissioners' report. Thereupon they caused summons to be issued and served on the Froms notifying them of that fact. The Froms' motions to dismiss the appeal were overruled and the court submitted the question of the value of the improvements to a jury. From the overruling of their motion for new trial and the entry of judgment on the verdict, the Froms have taken this appeal.

The first question presented by the appeal is, does section 72-240.06, R. R. S. 1943, provide for an appeal to the district court from an appraisement of improvements on school lands? The trial court treated the action taken by the Suttons as an appeal and tried the cause accordingly.

"An appeal is not a remedy to cure or remove an error in matter of law only, but it is a re-trial of the whole case upon the pleadings and proofs." Wilcox v. Saunders, 4 Neb. 569.

"The term 'appeal' is a process of civil law origin and removes the cause entirely, subjecting the fact as well as the law to a review and retrial." Consolidated Credit Corporation v. Berger, 141 Neb. 598, 4 N. W. 2d 571.

"* * * to obtain redress by appeal, the right to appeal must exist at the time; this right is not one at common law; it can only exist by statute, * * *." Wilcox v. Saunders, *supra.*

"The right of appeal in this state is purely statutory, and, unless the statute provides for an appeal from the decision of a quasi judicial tribunal, such right does not exist." Whedon v. Lancaster County, 76 Neb. 761, 107 N. W. 1092. See, also, Loup River Public Power Dist. v. Platte County, 135 Neb. 21, 280 N. W. 430; Roberts v. City of Mitchell, 131 Neb. 672, 269 N. W. 515.

"An appeal, in the technical sense of the term, is a remedy which exists only by force of statute and within the limits defined by statute." Pollock v. School District, 54 Neb. 171, 74 N. W. 393.

Section 72-240.06, R. R. S. 1943, insofar as an appeal from the appraisement is concerned, provides: "Either the lessee or the new lessee may, if he is dissatisfied with the appraisement, within thirty days after the filing thereof, appeal therefrom to the district court of the county in which the land is situated."

"The mode and manner of appeal is statutory, and a litigant who complies with the requirements of the applicable statute is entitled to a review of his case to the extent of the scope provided by law. Larson v. Wegner, 120 Neb. 449, 233 N. W. 253; Barney v. Platte Valley Public Power and Irrigation District, 144 Neb. 230, 13 N. W. 2d 120." Krepcik v. Interstate Transit Lines, 151 Neb. 663, 38 N. W. 2d 533.

As stated in Larson v. Wegner, 120 Neb. 449, 233 N. W. 253: "* * * such appellate jurisdiction can only be conferred in the manner provided by statute."

In this regard, as stated in Roberts v. City of Mitchell, *supra*: "It is not the function of the courts to make statutory law but to interpret such laws devised by the legislature."

It seems self-evident that the Legislature intended, by the statute it enacted, to extend to any parties coming within the scope thereof the right to an appeal which would entitle them to a retrial of the whole cause but failed to provide any procedural method for lodging jurisdiction thereof in the district court. This failure of the statute to so provide defeats the right for, as already stated, the right to appeal together with the mode and manner thereof are purely statutory.

Appellees refer to the following provisions of section 72-240.06, R. R. S. 1943: "The new lessee, if he be other than the former lessee, shall within thirty days after the filing of the appraisement pay to the county treasurer

the amount of the appraisement. The state shall have a lien upon the funds so paid to the amount of any unpaid rent on such lands due and owing to the state from the former lessee. Within thirty days after the entry of the new lease the Board of Educational Lands and Funds shall notify the county treasurer of the amount due from the former lessee for rents, and thereafter it shall become the duty of the county treasurer, upon receipt from the new lessee of the amount of the appraisement, to pay to the state the amount due from the former lessee, and to hold the balance of such funds for the use of such former lessee. The new lease shall be revocable until the amount of the appraisement has been so paid."

We do not think this provision, which requires payment to be made by the new lessee of the amount of the appraisement within thirty days after it has been filed with the county treasurer, has any relation to the appeal provision although it is required to be made within the same period of time as provided for appeal; that is, "thirty days." Such payment is required in every instance regardless of whether either party is dissatisfied and seeks to appeal. Its purpose is twofold: One, to provide a method whereby the new lessee can make his lease irrevocable and, with safety, go into possession; and the other, to secure to the state, before it permits the new lease to become irrevocable, available funds, to the extent of the value of any improvements on the lands, for unpaid rents, if any, due under the former lease.

As stated in Barney v. Platte Valley Public Power & Irr. Dist., 144 Neb. 230, 13 N. W. 2d 120: "Appellate jurisdiction of a case cannot be conferred upon a court by any action of the parties. The want of such jurisdiction may be taken advantage of at any stage of the proceedings. An appellate court cannot pass on the merits of a case falling within its appellate jurisdiction unless its jurisdiction is invoked in the manner prescribed by Constitution or statute." See, also, Roberts v. City of Mitchell, *supra*.

We find the trial court erred in handling the matter as an appeal. Having come to that conclusion we do not think it is either necessary or proper to discuss errors which it is claimed occurred in connection with the trial.

However this does not necessarily mean that the appellants' motion to dismiss should have been sustained for if what appellees did properly lodged the cause in the district court as an error proceeding the motion was properly overruled. We realize appellees did not suggest this theory to the trial court nor offer any proof on that basis. Neither do they make any claim on that basis in this court. But, as already stated, appellate jurisdiction is a matter of statute and lodges not by action of the parties but when the requirements of applicable statutes have been complied with.

Article I, section 24, of the Constitution of Nebraska provides: "The right to be heard in all civil cases in the court of last resort, by appeal, error, or otherwise, shall not be denied."

" 'One cannot be denied his right of review in the appellate courts, and proceedings in error are always resorted to where no other method is pointed out or provided for.' (Dodge County v. Acom, 72 Neb. 71, 100 N. W. 136.)" Loup River Public Power Dist. v. Platte County, *supra.*

" 'A petition in error in the district court to review a judgment or order of an inferior tribunal is an independent proceeding, having for its immediate object a reversal of the judgment or order complained of.' Ribble v. Furmin, 69 Neb. 38, 94 N. W. 967." Consolidated Credit Corporation v. Berger, *supra.*

Since section 580 of the Code of Civil Procedure is now section 25-1901, R. R. S. 1943, the following from Pollock v. School District, *supra,* is here applicable: "Section 580 of the Code of Civil Procedure authorizes the review by the district court, on petition in error, of judgments rendered or final orders made by a probate court, justice of the peace, or any other tribunal, board,

or officer exercising judicial functions, and inferior in jurisdiction to the district court. This provision affords an adequate remedy in such cases as the present."

In considering the statutory provisions relating to error proceedings the following principle should be adhered to: "The subjects of 'Review on Petition in Error' and 'Appeals' are so distinctively different and dissimilar that the provisions of the statute relating to each question cannot be taken together and construed as if they were one law and effect given to every provision." Consolidated Credit Corporation v. Berger, *supra.*

The question arises, what was the effect of what the appellees did? Appellants contend that what appellees did does not follow the statutory procedure provided in cases where an error proceeding is sought to be taken from a final order made by a tribunal or board exercising judicial functions as provided by section 25-1901, R. R. S. 1943.

In this respect the prayer of the petition filed by appellees asks that "the Court * * * reverse and vacate the final order of appraisement made and filed by the Board of County Commissioners of Deuel County, * * *." This is in accordance with the authority granted the district court by the foregoing statute.

It is contended that the appellees filed a "Petition on Appeal" whereas section 25-1903, R. R. S. 1943, requires they should have filed a petition in error. What a pleading may be denominated in the caption is not necessarily controlling. The character of a pleading is determined by its contents.

The foregoing statute also requires that the petition set forth the errors complained of. The petition sets forth appellees' contentions in 22 separate assignments, being identified by the letters from "a" to "v", inclusive. As examples are items "f" and "v":

"f. That the appraisel of the Trees, in the sum of $150.00, is arbitrary, unjust, excessively high, not reflective of the reasonable and true value of the said

trees, and that there is no provision in the statutes of the State of Nebraska, for appraising the trees as part of the improvements on said lands."

"v. That the appraisal of $831.00 for the breaking 277 acres is arbitrary, unjust, excessively high, and not reflective of the reasonable and true value of the said breaking, and in fact there is no provision in the Statutes of the State of Nebraska, for the appraisal of breaking ground as part of the improvements on said lands."

This meets the requirements of the statute: "* * * that each alleged error shall be specially set forth in the petition in error." Ainsworth v. Taylor, 53 Neb. 484, 73 N. W. 927.

Section 25-1905, R. R. S. 1943, requires that a transcript be filed with the petition containing the final order sought to be reversed, vacated, or modified. This the appellees did by filing a certified copy of the commissioners' appraisal filed with the county treasurer.

Section 25-1903, R. R. S. 1943, further provides that upon the filing of the petition "a summons shall issue and be served." This was done.

It is apparent that appellees, in their endeavor to lodge the matter in the district court, followed the procedure provided for error proceedings, none being provided in the statute providing for appeal. Since they did so the effect thereof was to bring the matter to the district court on error. It is on that basis that the district court should have considered the appellees' petition and the errors therein set forth after it overruled appellants' motions to dismiss.

As to the value placed on the various items contained in the appraisal, insofar as it was proper for the commissioners to include them, the following principle is applicable: "In such error proceedings the orders of the county board will be given the same weight and conclusiveness as the verdict of a jury, or the findings and judgment of a court, and will not be reversed or set aside unless it clearly appears that the evidence fails

to sustain them." Dodge v. Acom, 72 Neb. 71, 100 N. W. 136.

And as stated in Munk v. Frink, 81 Neb. 631, 116 N. W. 525, 17 L. R. A. N. S. 439: "In such a case the findings of the board should be upheld, unless it clearly appears that there is no evidence to uphold them."

In view of the foregoing we think appellees lodged this cause in the district court by error proceedings and that the trial court should have considered it on that basis.

As to the contention that the provision in section 72-240.06, R. R. S. 1943, that "The new lessee shall pay all costs of the appraisement" is controlling in both the district court and this court, we find it applies only in the first instance; that is, the original appraisal by either commissioners or supervisors, as the case may be.

In view of what has been said we reverse the judgment of the trial court and remand the cause to that court with directions that it consider the matter as an error proceeding.

REVERSED AND REMANDED WITH DIRECTIONS.

ARDEN E. DINKEL, APPELLEE, V. FLORA HAGEDORN, APPELLANT.
56 N. W. 2d 464

Filed January 9, 1953. No. 33262.

1. **Landlord and Tenant.** A tenant shows a cause of action for damages for wrongful eviction by averment and proof of an unexpired contract of renting, occupancy of the premises by him, eviction or dispossession by the landlord, and damages attributable to the eviction.
2. ———. A tenant who, being lawfully in possession, is wrongfully evicted by his landlord before the expiration of his term may bring an action for the resulting damages.
3. **Actions.** Under section 25-701, R. R. S. 1943, several causes of action may be joined in the same petition if they arise out of the same transaction.

4. **Pleading.** Where by statute plaintiff is authorized to plead a general performance of all conditions precedent defendant must, if he relies on the fact that any of the conditions precedent have not been performed, set out specially the condition and the breach, thus confining the issue to be tried to such particular condition or conditions precedent as he may indicate as unperformed.
5. ———. Where a party answers after an adverse ruling on his motion or demurrer, and goes to trial on the merits of an issue he has elected to join, he waives error, if any, in such ruling.
6. ———. Where during the trial of a cause both parties treat an affirmative defense as denied, it will be so considered in this court, although the plaintiff filed no reply either before or after judgment.
7. **Landlord and Tenant.** Actual eviction of a tenant by his landlord consists of removal or exclusion of the tenant from the premises, or a part thereof, by physical acts, or threats of violence equivalent to force, on the part of the landlord.
8. ———. Even though the tenant has voluntarily left the premises an entry by the landlord without his consent and not under any arrangement with him, followed by a continuous possession which is inconsistent with the possessory title assured to the tenant under the lease, amounts to an eviction.
9. ———. In determining whether there has been an actual expulsion of a tenant, with intent and effect of depriving him of the premises or some substantial part thereof, all the circumstances must be considered.

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

A. C. Plantz and *Lawrence E. Mitchell,* for appellant.

John H. Keriakedes, for appellee.

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

WENKE, J.

Arden E. Dinkel brought this action in the district court for Sheridan County against Flora Hagedorn. The basis of the action is an alleged unlawful eviction. The relief asked is to recover damages resulting therefrom consisting of the loss of possession for the balance of the lease, loss of a growing wheat crop, and loss of grain and hay stored on the premises. A trial resulted in a verdict

for the plaintiff. Defendant thereupon filed an alternative motion asking for either a judgment notwithstanding the verdict or a new trial. This motion was overruled and judgment entered on the verdict. Defendant appealed therefrom.

The principal contentions of appellant relate to whether or not the allegations of the petition or the evidence offered in support thereof are sufficient to support the verdict rendered.

"A tenant shows a cause of action for damages for wrongful eviction by averment and proof of an unexpired contract of renting, occupancy of the premises by him, eviction or dispossession by the landlord, and damages attributable to the eviction." 52 C. J. S., Landlord and Tenant, § 460, p. 187.

Admittedly, on August 14, 1948, appellant and appellee entered into a written lease whereby appellant leased to appellee for a period of three years, from March 1, 1949, to March 1, 1952, the northwest quarter of Section 8 and the east half of Section 7, all in Township 30 North, Range 46 West of the 6th P. M., in Sheridan County, Nebraska. The lease included all buildings and improvements located on the premises but did not, by its terms, require the lessee to occupy them.

"A tenant who, being lawfully in possession, is wrongfully evicted by his landlord before the expiration of his term may bring an action for the resulting damages." 52 C. J. S., Landlord and Tenant, § 460, p. 181.

Under section 25-701, R. R. S. 1943, several causes of action may be joined in the same petition if they arise out of the same transaction. Kenney v. Braun, 113 Neb. 12, 201 N. W. 641; Ryan v. Oswald, 134 Neb. 265, 278 N. W. 508.

Appellant contends the petition is deficient in that it failed to allege appellee had complied with or had offered to comply with all conditions imposed upon him by the terms of the lease. The petition sets forth: "That plaintiff faithfully complied with and carried out all of his

obligations under said lease * * *." Appellee testified he complied with all conditions of the lease during 1949.

"Our statute expressly provides: 'In pleading the performance of conditions precedent in a contract, it shall be sufficient to state that the party duly performed all the conditions on his part.' Comp. St. 1922, sec. 8640 (now section 25-836, R. R. S. 1943). Under such statutory provision the rule appears to be: 'If defendant relies on the nonperformance of the contract by the plaintiff, he must allege that fact in his answer. In pleading such nonperformance, the facts which constitute the breach must be alleged, and the breach assigned must conform to the terms of the contract. * * * Where by statute plaintiff is authorized to plead a general performance of all conditions precedent, defendant must, if he relies on the fact that any of the conditions precedent have not been performed, set out specially the condition and the breach, thus confining the issue to be tried to such particular condition or conditions precedent as he may indicate as unperformed.'" Morearty v. City of McCook, 119 Neb. 202, 228 N. W. 367. See, also, Lehnherr v. National Accident Ins. Co., 126 Neb. 199, 252 N. W. 823; Davidson v. First American Ins. Co., 129 Neb. 184, 261 N. W. 144.

The only issue raised by appellant in her amended answer was abandonment. That issue was submitted. The effect of the jury's verdict was that appellee had not abandoned the premises. We find no merit in this contention.

Appellant contends the allegations in the petition as to the force used should have been more definite and certain and that her motion to that effect should have been sustained. The petition alleges: "* * * that on or about 24 November 1949 defendant re-entered said premises and ousted the plaintiff there from by force of arms." We think it would have been better practice if the trial court had required appellee to make his petition more

definite in this respect but we do not find appellant was prejudiced thereby.

In view of the fact that appellant, after her motion to make more definite and certain and demurrer had both been overruled, filed an amended answer on which trial was had, the following rule is applicable: " 'Where a party answers over after an adverse ruling on his motion or demurrer, and goes to trial on the merits of an issue he has elected to join, he waives the error, if any, in such ruling.' Worrall Grain Co. v. Johnson, 83 Neb. 349, 119 N. W. 668. See, also, Palmer v. Caywood, 64 Neb. 372, 89 N. W. 1034; Citizens State Bank v. Pence, 59 Neb. 579, 81 N. W. 623; Lederer v. Union Savings Bank, 52 Neb. 133, 71 N. W. 954; Buck v. Reed, 27 Neb. 67, 42 N. W. 894." State ex rel. Wright v. Barney, 133 Neb. 676, 276 N. W. 676.

Appellant contends, because no reply was filed to her amended answer, that the defense therein pleaded of abandonment was admitted. In support thereof she cites the following rule: "Every material allegation of new matter in a pleading not denied by the answer or reply, for the purposes of the action is to be taken as true." Consaul v. Sheldon, 35 Neb. 247, 52 N. W. 1104. See, also, Van Etten v. Kosters, 48 Neb. 152, 66 N. W. 1106; Harlan County v. Hogsett, 60 Neb. 362, 83 N. W. 171.

The court gave the following instruction: "The plaintiff denies each and every allegation of new matter contained in the defendant's answer."

It is apparent from the record that it was so considered by the parties at the time of trial. We find the following rule here applicable: " 'Where during the trial of a cause both parties treat an affirmative defense as denied, it will be so considered in this court, although the plaintiff filed no reply either before or after judgment.' Crilly v. Ruyle, 87 Neb. 367, 127 N. W. 251. See, also, Hunter v. Weiner, 103 Neb. 538, 172 N. W. 521; In re Estate of Nilson, 126 Neb. 541, 253 N. W.

675." Central Construction Co. v. Highsmith, 155 Neb. 113, 50 N. W. 2d 817.

Appellant contends that the evidence introduced by appellee fails to show he was evicted from the premises and that her motion for a judgment notwithstanding the verdict should have been sustained. In considering the evidence in this regard the following rule is 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.

There is evidence from which a jury could have found as follows: That appellee commenced occupying the premises in 1947; that he continued to occupy them after March 1, 1949, under the three-year lease entered into on August 14, 1948; that sometime before November 24, 1949, he rented some other lands located in Dawes County; that on November 24, 1949, he moved his family to these other premises; that upon leaving he locked the house; that he left on the farm in Sheridan County a team of horses, a combine, a one-way, grain in storage, and hay in the stack; that he returned to the Sheridan County place about two weeks later and found the house and all the grain bins had been padlocked; that he returned again in April 1950, about the 15th, to get some barley; that he was then ready to start farming operations on this land; that appellant refused to let him take any barley and made him get off the place; that he returned again sometime in July 1950 to combine the winter wheat; that appellant had harvested it before he could do so; and that he returned sometime in July 1950, around the 26th, to get the wheat stored on the place,

which was under government loan, in order to deliver it but appellant made him get off the place.

The following principles are here applicable:

"Actual eviction of a tenant by his landlord consists of removal or exclusion of the tenant from the premises, or a part thereof, by physical acts, or threats of violence equivalent to force, on the part of the landlord." 52 C. J. S., Landlord and Tenant, § 450, p. 168.

"It is also an eviction where the landlord, without the tenant's consent, enters and takes possession of the demised premises, or any part thereof, during the continuance of the lease, and excludes the tenant therefrom." 52 C. J. S., Landlord and Tenant, § 450, p. 168.

"Even though the tenant has voluntarily left the premises, an entry by the landlord without his consent and not under any arrangement with him, followed by a continuous possession which is inconsistent with the possessory title assured to the tenant under the lease, amounts to an eviction, * * *." 52 C. J. S., Landlord and Tenant, § 450, p. 169.

"In determining whether there has been an actual expulsion of a tenant, with intent and effect of depriving him of the premises or some substantial part thereof, all the circumstances must be considered." 52 C. J. S., Landlord and Tenant, § 450, p. 170.

We think the evidence adduced by appellee is sufficient to permit a jury to find that he had been forcibly evicted from the premises by the appellant.

Appellant complains of instruction No. 8 given by the court. This complaint is apparently made on the theory that a recovery on the basis therein permitted was not proper. Appellant cites the following authority in support thereof: "The measure of damages for the wrongful eviction of a tenant by his landlord, or for wrongfully withholding possession of the leased premises, is ordinarily the rental value of the property for the unexpired term, less the amount of rent reserved by the lease." Shutt v. Lockner, 77 Neb. 397, 109 N. W. 383.

See, also, Jarman v. Sexton, 130 Neb. 453, 264 N. W. 305.

It should be mentioned that both of these cases provide: " 'In a proper case special damages in addition may be awarded, where such damages are certain and the natural result of the wrong complained of.' Shutt v. Lockner, 77 Neb. 397, 109 N. W. 383." Jarman v. Sexton, *supra.*

But here the question of damages for the wrongful withholding of possession during the balance of the unexpired term was withdrawn by the court and not submitted to the jury. Instruction No. 8 permits appellee to recover as damages, if he was evicted without good cause and prevented from removing them, the reasonable market value of his share of the harvested crops and hay grown on the premises in 1949 and stored thereon together with the reasonable market value of his share of the winter wheat growing thereon at the time of his eviction.

There is evidence from which a jury could find that when appellee moved from the premises he left 12 tons of hay in the stack the reasonable market value of which at that time was $8 a ton; that he left 134 bushels of barley the reasonable market value of which at that time was $.88 a bushel; that he had a ⅔ interest in at least 200 bushels of wheat the reasonable market value of which at that time was $1.97 a bushel; that there were about 75 acres of winter wheat growing on the place on November 24, 1949, in which he had a ⅔ interest which was reasonably worth $900; and that appellant prevented appellee from getting this property, seized it, and converted the same to her own use. The evidence fully justified the giving of this instruction. It was not only proper, but necessary, for the court to give such an instruction so the jurors would know, if they found for the appellee, what they should consider in arriving at the amount of their verdict.

The verdict returned was in the sum of $982.58 and, as indicated by the evidence recited, is fully supported

thereby. We find no merit in appellant's contentions and therefore affirm the judgment of the trial court.

AFFIRMED.

LEWIS E. LAFLIN, APPELLANT, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT, APPELLEE.
56 N. W. 2d 469

Filed January 9, 1953. No. 33284.

1. **Taxation: Appeal and Error.** The provisions of section 77-510, R. R. S. 1943, authorize an appeal to the Supreme Court from any final decision of the State Board of Equalization and Assessment by a person affected thereby. Where it is shown that a kind or class of property in a county was not valued in accordance with law or that it was not valued uniformly or proportionately among the various counties of the state, a taxpayer in such county is a person affected within the meaning of the statute.
2. **Appeal and Error.** Ordinarily an appeal removes a cause entirely to the appellate court, subjecting the fact as well as the law to a review.
3. ———. On appeal from a final order of an administrative board, however, the review by the appellate court is ordinarily limited to questions of law and whether or not the evidence is sufficient, if believed, to sustain the order. The sole question is whether such order was arbitrarily made.
4. **Taxation.** The statute (§ 77-508, R. R. S. 1943), requiring notice to a county before increasing or decreasing valuations of property as returned by said county, is a procedural step required of the State Board of Equalization and Assessment that operates as a condition precedent to a valid order. The failure of the Board to give such notice, where the record requires that it be done to accomplish the primary purposes of the Board, does not excuse a failure to comply with the law with respect to its duty to value and equalize property for taxation purposes.
5. ———. Under the provisions of section 77-201, R. R. S. 1943, all property in this state not expressly exempt is subject to taxation and is to be valued and assessed at its actual value.
6. ———. It is the function of the State Board of Equalization and Assessment to examine the assessment rolls of the various counties and, by the process of equalization, raise or lower the valuations therein contained to conform to the requirement that taxable property shall be assessed at its actual value.

7. ———. In so doing, the objective is not only to assess taxable property at its actual value but also to secure a uniform and proportionate valuation for taxation purposes as required by Article VIII, section 1, Constitution of Nebraska.
8. ———. A 20-year average of farm sales in a county is not competent evidence of the actual value of farm lands and improvements in such county. Such evidence is too remote.

APPEAL from the State Board of Equalization and Assesssment. *Reversed and remanded.*

Chambers, Holland & Groth, for appellant.

Clarence S. Beck, Attorney General, and *Clarence A. H. Meyer,* for appellee.

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

CARTER, J.

This is an appeal by a landowner in Johnson County from the action of the State Board of Equalization and Assessment in refusing to properly equalize the assessment of farm lands in the various counties of the state for the taxable year 1952.

The first question to be determined is the right of appellant, a landowner in Johnson County, to appeal and, if so, the nature and scope of the appeal which he may take. The answer lies in the meaning of section 77-510, R. R. S. 1943, which provides in part: "From any final decision of the State Board of Equalization and Assessment with respect to the valuation of any real or personal property, any person, county or municipality affected thereby may prosecute an appeal to the Supreme Court. * * * Notice of intention to obtain a review shall be filed within ten days from the date of the entry by the board, and when docketed said cause shall be given precedence by the Supreme Court over all civil cases."

In determining the meaning to be given the foregoing provision it is necessary that it be construed with other provisions dealing with the powers of the State Board

of Equalization and Assessment, which will hereafter be referred to as the Board. Section 77-506, R. R. S. 1943, states in part: "The State Board of Equalization and Assessment shall proceed to examine the abstracts of real and personal property assessed for taxation in the several counties of the state, including the railroads and pipe lines entirely within such county, and all other property, and shall equalize such assessment so as to make the same conform to law. For that purpose it shall have the power to increase or decrease the assessed valuation of real or personal property of any county or tax district." In section 77-507, R. R. S. 1943, the statute also states in part: "The State Board of Equalization and Assessment shall have the power, in equalizing assessments, to increase or decrease the assessed valuation of any class, classes or kinds of property, personal, real, or mixed in any county or tax district, whenever in their judgment it shall be necessary to make such assessment conform to law." It seems clear to us that these powers are such that an individual taxpayer assessed on "any class, classes or kinds of property, personal, real, or mixed in any county or tax district," is a person affected within the meaning of section 77-510, R. R. S. 1943, when the Board fails in its duty to raise or lower the valuations of property within the county in which his property is situated, as required by the act. The latter section, prior to December 1, 1944, the effective date of the 1943 Revised Statutes, provided only for a writ of error. The provision providing for an appeal instead of a writ of error has the effect of broadening the scope of the review, although it refers solely to a judicial review of the final orders of an administrative board. We may not substitute our judgment for that of the Board, but we may review the record to determine if the Board has complied with the requirements of the statute in exercising the powers granted to it by legislative authority and, where the record is clear that it has not, hold its action to be contrary to law and remand the

issue in controversy for the further consideration of the Board. State ex rel. Sorensen v. State Board of Equalization and Assessment, 123 Neb. 259, 242 N. W. 609.

The record discloses that 19 counties were notified to appear before a meeting of the Board to show cause why the assessments of lands and improvements in such counties should not be raised. Appearances were made also by Johnson County by its county attorney and one county commissioner, although no notice of an intended increase or decrease of assessments had been served upon such county. Appellant also appeared with legal counsel and protested the valuations and assessments made in Johnson County as being excessive and, in addition thereto, that such valuations and assessments were proportionately higher than those on like property in other counties, which had the effect of requiring the appellant to pay a disproportionate share of the state property tax. The Board disposed of the contentions of the representatives of Johnson County and the appellant by stating in part that "the Board decided to take no action towards reducing the assessed value of farm lands and improvements in Johnson County."

It is the contention of the Attorney General that action could not be taken towards reducing the assessed value of farm lands and improvements in Johnson County as no notice had been given. It is then urged that appellant's remedy is to mandamus the Board to give the required notice if a prima facie case can be made, and not by direct appeal to this court. With this we are not in accord. It was evidently the intention of the Legislature to afford relief to any person, county, or municipality by a direct appeal from a final order of the Board which denied relief to one who had made a showing requiring the affirmative action of the Board. We think appellant pursued the remedy which the Legislature authorized when statutory authority was granted to permit a direct appeal to this court. There being evidence in the record before the Board conclusively indicating that Johnson

County lands and improvements were valued higher than those of similar kind and class in other counties, the final order of the Board declining to take action with respect thereto constitutes a final disposition of the matter which so affects the appellant that a right to appeal accrued as provided by section 77-510, R. R. S. 1943. See Consolidated Credit Corporation v. Berger, 141 Neb. 598, 4 N. W. 2d 571.

The point is made that the Board had no jurisdiction over Johnson County and, consequently, it had no power to reduce valuations in that county. The statute does require that notice be given to a county before valuations are raised or decreased in such county. But the duty is upon the Board to give the notice when the facts show that the valuations in a county must be reduced or increased in order to comply with applicable statutes on the subject. Where the Board fails to give the notice when the facts show that one is required in order to secure a compliance with the provisions of the statute, the Board cannot give validity to an otherwise invalid order by the simple expedient of not giving notice to those entitled to it under the statute. In other words, it is the duty of the Board to equalize the valuation of property of the same kind and class as between the different counties of the state. The giving of notice to counties it deems undervalued or overvalued is merely an incident to the accomplishment of its primary duty and one of the necessary steps that must be taken in any case where an equalization of values for the purposes of assessment are necessary. A failure of the Board to act when it is required to act is not excused because the Board has failed to follow the steps which the statute has imposed as a condition precedent to a valid order.

The record of the proceedings held before the Board shows the following pertinent facts: The Board convened on July 24, 1952, and took under consideration the matter of the equalization of real property in the

state and particularly devoted its attention to the assessed valuations of farm lands and improvements. The final decision of the Board was that the value of farm lands and improvements in all counties whose 1952 assessed valuations per acre as shown by the abstracts filed by the respective counties were less than 50 percent of the 20-year average selling price per acre be raised to equal at least 50 percent of such average. Notice was thereupon given to 19 counties falling within this classification to show cause on July 30, 1952, pursuant to section 77-508, R. R. S. 1943, why such increases should not be made. On July 30, 1952, the Board again met and, after hearing representatives of some of the 19 counties cited, made the increases as to them, from which no appeal was taken. The Board then heard the objections of Johnson County and the appellant, and made the final order to which we have heretofore alluded.

It is clear that the yardstick used in determining the value of farm lands and improvements for the assessment of taxes in 1952 was a percentage ratio of the 1952 assessed value per acre, as shown by abstracts of real and personal property assessed for taxation in the several counties of the state, to the 20-year average sale price per acre from 1932 to 1951 inclusive. The determination of the 20-year average sale price was made from records of transfers of real estate in each county as reported to the Board pursuant to section 77-1320, R. R. S. 1943. The state Tax Commissioner stated that, in making the 20-year average, sales of all types of land were included during the 20-year period. He stated further that the low sales during the period of depressed real estate values in 1933 and 1934 were included as an offsetting influence to those occurring in the last three or four years which have been characterized by inflationary pressures. In computing the average, unrealistic sales were screened out. Sales, when the consideration was deemed too low because they were forced sales

or sales between members of families, were deemed to have been offset by lands commanding a premium such as where two owners of real estate desired a tract of land contiguous to each one's property. It is evident, of course, that as an average sale price of land transactions between a willing buyer and a willing seller without the intervention of unusual circumstances, leaves much to be desired as an average sale price of farm lands and improvements even if it was competent evidence of actual value.

The result of the statistical survey thus made resulted in a great variance in the different counties of the state. As we have heretofore stated, the value of farm lands and improvements in 19 counties was assessed in 1952 at less than 50 percent of the 20-year average selling price per acre. We shall deal with them hereafter at the assessed valuations placed upon them by the Board at the hearing held on July 30, 1952. The overall result was that the average percentage ratio of the assessed value per acre for 1952 was 69 percent of the average sale price per acre as determined by the formula adopted by the Board. As an example we find farm lands and improvements in Thayer, Knox, and Gosper Counties valued at the average rate of 69 percent under the Board's formula. By the same formula farm lands and improvements are assessed at 50 percent in Keya Paha County and 51 percent in Kimball and McPherson Counties; and by the same criterion the same class of property is assessed in Johnson County at 82 percent, in Adams County at 78 percent, and in Pierce County at 77 percent. These examples serve to demonstrate that under the formula devised by the Board itself no attempt was made to assess farm lands and improvements on a uniform basis. It is under such a record that this court is called upon to determine the merits of the appeal of the appellant, a landowner in Johnson County. Historically we take note of the fact that prior to the enactment of the revenue act of 1921 the basis of assess-

ment for tax purposes was 20 percent of actual value. After the passage of that act all property in this state, not expressly exempt, was subject to taxation and was to be valued and assessed at its actual value. § 77-201, R. R. S. 1943. Actual value was therein defined as "its value in the market in the ordinary course of trade." We have repeatedly stated in effect that farm lands for purposes of taxation, as provided by this statute, shall be valued and assessed at their actual value, their value in the market in the ordinary course of trade. Schulz v. Dixon County, 134 Neb. 549, 279 N. W. 179, 119 A. L. R. 1294; Homan v. Board of Equalization, 141 Neb. 400, 3 N. W. 2d 650; Swanson v. Board of Equalization, 142 Neb. 506, 6 N. W. 2d 777.

It is clear from an examination of the record before us that the Board failed in its duty to value farm lands and improvements on the basis of their actual value and to equalize between counties for the purpose of compelling compliance with controlling statutes on the subject. We cannot see where the 20-year average sale price of lands of similar kind or class in a county can have any evidentiary value in determining present market value. It seems to us that an attempt to offset present high or inflationary values by averaging in the low-market values of 1933 and 1934 is in direct opposition to the intent of the law. It is the duty of the Board to fix the value of farm lands and improvements at their actual value at the time they are appraised for assessment purposes. Any attempt to depart from this provision of the statute by averaging values during past periods of time which are too remote to have evidentiary force, constitutes a noncompliance with legislative direction and any relief from this requirement, if relief is required, must come from the Legislature. It will be observed that the revenue act of 1921 directed that property be valued for taxation purposes at its actual value instead of 20 percent thereof. It was also provided that maximum rates of levy were limited to 20 percent of

the amount at which they had been fixed theretofore. The maximum rates of levy are therefore determinable with definiteness. The failure of the taxing authorities to value for taxation purposes on the basis provided by statute has had the effect of materially reducing the amounts of taxes produced from the maximum limits imposed and has, undoubtedly, produced financial distress in some political subdivisions of the state. This result has been brought about by the failure of the taxing authorities to raise valuations as provided by the revenue act of 1921 while the decrease in maximum rates of levy, concurrently effective, have been given full force, they being solely a matter of mathematical calculation.

It is the function of the Board to see to it that all property is assessed at its actual value and that the failure of any of the various counties to comply with this requirement shall be corrected by the process of equalization between such counties. Boyd County v. State Board of Equalization and Assessment, 138 Neb. 896, 296 N. W. 152. The Board does not deal with assessments of individuals, either directly or as a board of review. That is the function of the county board of equalization. Scotts Bluff County v. State Board of Equalization and Assessment, 143 Neb. 837, 11 N. W. 2d 453. The right of appeal conferred upon a person affected, as provided by section 77-510, R. R. S. 1943, involves something more than the valuation placed upon the specific property of an individual taxpayer for the reason that the Board has no authority to deal with individual valuations and assessments. Consequently the appeal must extend to the validity of the final order or orders of the Board fixing the actual valuations of "any class, classes or kinds of property, personal, real, or mixed in any county or tax district."

The record shows on its face that the Board did not value farm lands and improvements for assessment in the various counties on the basis of the actual value, their value in the market in the ordinary course of trade.

This being so, the final orders of the Board are in violation of the positive directions of applicable statutes, and from which orders an appeal can be prosecuted by any person affected under section 77-510, R. R. S. 1943. We are of the opinion that appellant's appealable interest lies in the fact that the record shows that farm lands and improvements in the various counties of the state are not assessed at actual value as defined by the statute and that there has been no uniformity of assessment between the various counties of the state under the formula used by the Board even if such formula could be assumed to correctly represent the actual value of this class of property throughout the state. Under such circumstances the final order of the Board is not in compliance with law and must be deemed to be an arbitrary valuation of this class of property. Whether or not the valuations of Johnson County can be properly equalized and assessed without compensating corrections in the remaining counties of the state is not for this court to determine. We cannot, on an appeal, sit as a super board of equalization and assessment. Our function is solely to determine the legality of the action of the Board and, after a finding of illegality, to vacate and set aside the action of the Board and leave to it the matter of entering an order meeting the requirements of the law. Chicago, R. I. & P. Ry. Co. v. State, 111 Neb. 362, 197 N. W. 114; State ex rel. Sorensen v. State Board of Equalization and Assessment, *supra*. We find from the record that valuations of farm property and improvements for purposes of taxation were not made on the basis of actual value as defined by the statute, and that there was a failure to equalize between Johnson County and the remaining counties of the state as shown by the undisputed facts in the record. We point out that the applicable statutes require that farm lands and improvements in Johnson County, as in all other counties, are required to be valued at actual value for taxation purposes. It is also required that the values of such class

of property should be equalized by raising or lowering valuations, as the case may be, so that all property of the class can be assessed at its actual value and thereby secure a valuation uniform and proportionate as to such class for taxation purposes as required by Article VIII, section 1, Constitution of Nebraska. Under the situation here found to exist, the Board is required to reconvene for the purpose of entering an order complying with applicable statutes on the subject as interpreted by this opinion. The action of the Board is hereby set aside and the cause remanded to the State Board of Equalization and Assessment for such further action as may be required by law.

REVERSED AND REMANDED.

MADALON E. TAYLOR, APPELLEE, V. J. M. MCDONALD COMPANY, A CORPORATION, APPELLANT.
56 N. W. 2d 610

Filed January 16, 1953. No. 33205.

1. **Negligence.** A person who enters a store for the purpose of making a purchase is an invitee and the owner of the store must use reasonable care to keep the premises reasonably safe for the use of the invitee, but the owner is not an insurer against accident.
2. **Appeal and Error.** In testing the sufficiency of evidence to sustain a verdict it must be considered in the light most favorable to the successful party.
3. ———. A judgment and verdict will not be reversed when the record discloses that there was competent evidence to sustain the finding of the jury.
4. **Negligence.** Where the evidence shows that plaintiff discovered chewing gum on the heel of her shoe after slipping and falling, and there is evidence that gum was found on the floor which had been scuffed over as if done by a person slipping upon it, the jury can properly infer that the gum deposit was the proximate cause of her fall.
5. ———. Where the evidence shows that plaintiff slipped on a wad of chewing gum on the floor, which had been there for two

weeks or more, it will sustain a finding that defendant in the exercise of reasonable care to keep the premises in safe condition for the use of customers should have found and removed it.

APPEAL from the district court for Phelps County: EDMUND P. NUSS, JUDGE. *Affirmed.*

Stiner & Boslaugh, for appellant.

Anderson, Storms & Anderson, for appellee.

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

CARTER, J.

This is an action to recover damages for personal injuries sustained by plaintiff on April 4, 1950, when she fell on the floor in one of the aisles of defendant's department store while patronizing the store as a customer. The jury returned a verdict for the plaintiff in the amount of $1,250. The defendant appeals.

The evidence shows that plaintiff entered the store at the south entrance at the west side of the building. She proceeded north in the west aisle of the store. A number of 10-foot counters extended practically the full length of the building on the west side of the aisle and the east side was occupied by a number of tables placed end to end, each of which was about eight feet in length with approximately three-foot spaces between them. The aisle was about four feet wide. Plaintiff testified that as she proceeded north the floor of the aisle appeared normal and that she saw nothing on the floor that appeared to be hazardous. She stopped at the third counter on the west side and made a purchase. She accompanied the clerk across the aisle to the wrapping counter and, after receiving her merchandise and paying for the same, she turned and started down the aisle towards the south store entrance. As she did so her foot slipped, which threw her against the first table with such force that she was thrown against the counter on the west side of the aisle and finally fell, striking her face

against the second table south on the east side of the aisle. She was helped to her feet by employees in the store, at which time she observed gum on the heel of her left shoe. She says she felt her foot stick on something and that the gum on the heel of her shoe was sticky. She suffered injuries which are described in the record. We shall not describe them here for no objection is made to the amount of the verdict if liability is established under the law and the evidence.

The janitor of the building testified that he found a wad of gum near the spot where he was told that appellee fell, which he described as being as large as a half dollar and one-quarter inch in thickness. He said: "It seemed to be broken off a little bit like somebody had skuffed over it or something, or hit it with her foot." He further stated that he scraped up the gum, that it was dry underneath, and that it was sort of greasy and slick-like. He testified further that the gum had been oiled over and that the oil had not penetrated to the floor.

The store manager testified that he talked with appellee before she left the store and that she then informed him that she had slipped on some gum. The clerk who waited on appellee testified that there was no gum at the point where appellee said she slipped. The store manager saw the gum on appellee's shoe and on the floor. He was unable to state at what point on the floor the gum was found.

The store manager testified that the floors were mopped with a commercial preparation, sometimes every six weeks and sometimes as far apart as two or three months. The floor had not been treated for at least two weeks. The gum in question had been mopped over so that it had been there at least two weeks. The oil preparation had not penetrated through the gum to the floor, as the floor was dry when the gum was removed. The evidence is in conflict as to the thickness and quantity of gum that was found on the floor. There

was no general practice regarding the removal of gum from the floor, the janitor testifying that he removed it only as he found time to do so. There was evidence of the custom of operators of similar stores regarding the removal of gum from floors. No uniformity of practice was established, the evidence being very conflicting. There was evidence by such operators that persons had been known to slip and fall on gum deposits on similar floors. There was also evidence by equally experienced operators that they had never heard of anyone falling because of slipping on a gum deposit. There was also evidence that large gum deposits on floors were generally considered to be hazardous.

A person who enters a retail store for the purpose of making a purchase is an invited guest within the legal meaning of that term. The owner of such a store is required to maintain it in a reasonably safe condition for customers. A customer is an invitee and the owner must exercise reasonable care to keep the building reasonably safe for his use, but the owner is not an insurer against accident. Rogers v. J. C. Penney Co., 127 Neb. 885, 257 N. W. 252; Rankin v. J. L. Brandeis & Sons, 135 Neb. 86, 280 N. W. 260.

The only question presented by this appeal is whether there was sufficient evidence of negligence on the part of the defendant to sustain the action of the trial court in submitting the case to the jury. The rule is that, where different minds may reasonably draw different conclusions from the evidence as to whether or not they establish negligence, the issues are for the jury. In Markussen v. Mengedoht, 132 Neb. 472, 272 N. W. 241, we stated the rule in the following language: "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. Scarborough v. Aeroservice, Inc., 155 Neb. 749, 53 N. W. 2d 902. Nor is a plaintiff required to exclude the possibility that the accident might have happened some other way. Fonda v. Northwestern Public Service Co., 138 Neb. 262, 292 N. W. 712. In testing the sufficiency of evidence to support a verdict it must be considered in the light most favorable to the successful party. Stolting v. Everett, 155 Neb. 292, 51 N. W. 2d 603. A judgment and verdict will not be reversed when the record discloses that there was competent evidence to sustain the finding of the jury. Kunkel v. Cohagen, 151 Neb. 774, 39 N. W. 2d 609.

Applying the foregoing rules, we are required to accept the findings of the jury that there was a wad of gum on the floor where appellee slipped. There was gum on the heel of her shoe and the evidence shows that the gum was scuffed over like someone had hit it with his foot. That appellee fell in some manner is not disputed and no other cause is shown or attempted to be shown in the record.

The cases in this jurisdiction readily divide themselves into two classes. The first class consists of those cases where it was claimed the accident resulted from inadequate lighting, permitting the existence of conditions of a permanent nature that were inherently hazardous, and situations of similar import. In this class of cases are: Broadston v. Beddeo Clothing Co., 104 Neb. 604, 178 N. W. 190; Long v. Crystal Refrigerator Co., 134 Neb. 44, 277 N. W. 830; Pierce v. Burlington Transportation Co., 139 Neb. 423, 297 N. W. 656; and Bowerman v. Greenberg, 142 Neb. 721, 7 N. W. 2d 711. The second class consists of those cases where foreign substances on the floor used by customers created a hazardous con-

dition. Among the cases falling within this classification are Glenn v. W. T. Grant Co., 129 Neb. 173, 260 N. W. 811, where recovery was permitted for injuries suffered from a fall on an excessively and improperly oiled basement floor in defendant's store; and Rankin v. J. L. Brandeis & Sons, *supra,* where recovery was allowed for injuries sustained when the plaintiff slipped on water and soap left on a tiled floor in defendant's store. The first class of cases has no application to the one before us.

The appellant contends first that, even if it can be said that defendant was negligent in permitting the wad of gum to be on the floor, there was no evidence that the negligence of the defendant was the proximate cause of the injury. It is true that appellee testified that she slipped on something which precipitated her fall. She does not testify that she saw any gum on the floor, although she saw it on the heel of her shoe after the accident. But there was evidence that there was gum on the floor, which had the appearance of someone having scuffed over it. The evidence as to proximate cause need not be supplied wholly by the person injured. We think that the evidence of gum on the shoe immediately following the accident, and the evidence of gum on the floor indicating that it had been scuffed over, together with the fact that appellee did fall, is sufficient evidence from which the jury could logically infer that the gum on the floor was the proximate cause of the accident. It is contended, however, that there is evidence in the record that there was no gum on the floor at the point where plaintiff slipped. It is true that the evidence on this point is in conflict, but the jury evidently resolved this question in favor of the plaintiff. We are bound by this finding by the jury on conflicting evidence on appeal.

We think the most important question raised by this appeal is whether or not the deposit of gum on the floor of defendant's store, under the circumstances shown by

the record, was sufficient to submit the question of defendant's negligence to the jury.

There is evidence in the record to the effect that the chewing gum in question was dark in color, flattened out on the floor as if it had been walked over, and bore indications that it had been mopped over in the application of the commercial floor preparation used on the floors of the store. The evidence shows that the floors had not been treated for at least two weeks, so it is conclusively established that the gum had been on the floor for at least that period of time. The oil preparation had not penetrated through to the floor, so it can be reasonably assumed that the surface of the gum deposit was not of the same texture as the bottom.

The habits of the public in dropping deposits of chewing gum in public places is well known. We do not think that the owner of a store is required to follow customers about his store to gather up gum and other debris cast away by invitees to his place of business. To place such a burden upon a store owner would make him an insurer of the safety of his customers. It is the general rule that a merchant who expressly or impliedly invites people to come into his store must use reasonable care to keep the premises in a safe condition. When the condition complained of results from the conduct of the public itself, a merchant can be held subject to liability only for a negligent omission on his part to remove the hazard created after he knows of it, or by the exercise of reasonable care should have known of its existence. We have not overlooked the rule that knowledge of the hazardous condition is not a necessary element of negligence where the condition was created by the owner of the premises as stated in Rogers v. J. C. Penney Co., *supra*. But such is not the rule where the hazardous condition is created by invitees themselves. We conclude, however, that the gum deposit had been on the floor a sufficient length of time to warrant the jury in finding that defendant was negligent, under all the circumstances

shown, in not discovering and removing the gum. Zanes v. Malden & Melrose Gas Light Co., 298 Mass. 569, 11 N. E. 2d 498; Connair v. J. H. Beattie Co., 298 Mass. 550, 11 N. E. 2d 499; Bavosi v. Interstate Theatres Corp., 307 Mass. 124, 29 N. E. 2d 688.

In Hudson v. F. W. Woolworth Co., 275 Mass. 469, 176 N. E. 188, the court in a case similar in principle said: "A finding that the plaintiff's injury was caused by a piece of candy on the floor of the store was warranted. The evidence of the appearance of the candy and its sticking to the floor, and of the appearance of the floor under and around it, warranted a finding that the candy had been on the floor such a period of time that in the exercise of reasonable, (sic) care to keep the premises in safe condition for use by customers, the defendant should have found and removed it. There was something on which to base a conclusion that the candy had not been dropped a moment before by a customer." See, also, Foley v. F. W. Woolworth Co., 293 Mass. 232, 199 N. E. 739.

We conclude that the evidence is sufficient to sustain a finding by the jury that plaintiff slipped on a wad of chewing gum on the floor which had been there for such a period of time that, in the exercise of reasonable care to keep the premises in safe condition for use by customers, defendant should have found and removed it.

AFFIRMED.

HARRY F. RATH, APPELLEE, V. SANITARY DISTRICT NUMBER ONE OF LANCASTER COUNTY, NEBRASKA, APPELLANT.
56 N. W. 2d 741

Filed January 16, 1953. No. 33211.

1. **Trial.** The party to an action upon whom rests the burden of the issues is entitled, on the trial of the cause, to open and close the evidence and arguments to the jury.
2. **Municipal Corporations.** One contiguous tract or unit is that

which in general belongs to the same proprietor as that taken, and is continuous with it and used together for a common purpose, whether or not the same is separated by platted or existing lines, lots, blocks, streets, alleys, or like divisions.

3. **Eminent Domain.** Ordinarily in a condemnation proceeding it is a question of law whether or not the property involved constitutes one contiguous unit or tract, but where the doubt is factual, depending on conflicting evidence or on different views of the evidence, the court should submit the question to the jury under proper instructions.
4. ———. Where the property involved is one contiguous tract or unit, in estimating the damages occasioned by the appropriation of a part thereof for public use, the injury to the property remaining as well as the market value of the property actually taken should be considered, although the petition filed by the condemner for the appointment of appraisers only describes the property taken.
5. ———. The measure of damages for land taken for public use in such cases is the fair and reasonable market value of the land actually appropriated and the difference in the fair and reasonable market value of the remainder of the land before and after the taking.
6. ———. The jury in fixing the damages sustained by a landowner in consequence of the appropriation, or injury, of his property for a public use may take into account every nonspeculative element of annoyance and disadvantage resulting from the improvement which would influence an intended purchaser's estimate of the market value of such property.
7. ———. A landowner cannot ordinarily recover, on account of a lawful public improvement, damages that he suffers in common with the public generally, though his loss may be greater in degree, but this rule does not prevent the recovery of special damages.

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

Max Kier and *Donald L. Brock*, for appellant.

Perry & Perry, for appellee.

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

CHAPPELL, J.

On April 7, 1951, Sanitary District Number One of

Lancaster County, Nebraska, a public corporation, commenced proceedings in the county court to condemn certain described lands for right-of-way necessary to straighten Salt Creek drainage channel, a part of their works, between 10th and 14th Streets in Lincoln. Appraisers were duly appointed and qualified, who, on April 30, 1951, after inspection and hearing, assessed "the damages which the owners of said land, and all persons interested therein have sustained by reason of the taking and appropriating of said lands for public improvements * * *." With regard to the land here involved, belonging to Harry F. Rath, they reported that: "For the taking and appropriating of Lots Seven (7) to Twelve (12), inclusive, Block Seven (7), Riverside Addition to Lincoln, Lancaster County, Nebraska, inclusing (sic) crops, we assess all damages in the sum of *$1200.00,* * * *." Thereafter, on May 9, 1951, such owner filed notice of appeal, to wit: "TO SANITARY DISTRICT NUMBER ONE (1) OF LANCASTER COUNTY, NEBRASKA:

"You are hereby notified that Harry F. Rath is not satisfied with the award of the County Court of Lancaster County, Nebraska, as to Lots Seven (7), to Twelve (12), inclusive, Block Seven (7), Riverside Addition to Lincoln, Lancaster County, Nebraska, and is appealing to the District Court of Lancaster County, Nebraska." On the same day he filed an appropriate appeal bond. Thereafter, by permission of the district court, he filed a petition on appeal wherein he appeared and was appropriately docketed as plaintiff, and Sanitary District Number One of Lancaster County, Nebraska, was appropriately docketed as defendant. They will be hereinafter so designated.

So far as important here, plaintiff's petition on appeal substantially alleged that he not only owned Lots 7 to 12, inclusive, in Block 7, the land actually taken, but also owned Lots 1 to 3, inclusive, in Block 7, together with Lot 12 and the north half of Lot 11 in Block 8, all

in Riverside Addition, which property was all owned and operated as one contiguous unit or tract, having great and productive value as such; that by reason of the taking of Lots 7 to 12, inclusive, and by reason of structures, ditch embankment, and other works erected or to be erected by defendant, together with the severance of said Lots 7 to 12, inclusive, from plaintiff's remaining lots or land, he had suffered substantial damages for which he prayed judgment.

The lawful right of defendant and legality of the proceedings to condemn and appropriate the land taken were never an issue. The sole issue was the amount of just compensation to be paid by defendant within Article I, section 21, Constitution of Nebraska, which provides: "The property of no person shall be taken or damaged for public use without just compensation therefor."

In that regard, defendant's answer denied generally; denied that plaintiff's property was contiguous or ever used as a single unit, but alleged that it consisted of three independent tracts, separated by streets and alleys; and also alleged that the lots taken were of small value. It prayed that plaintiff's recovery should be limited to the fair and reasonable value of the land taken as of April 7, 1951. Plaintiff's reply, insofar as important here, was a general denial.

The issues so made were submitted to a jury, whereupon plaintiff was awarded a verdict with judgment thereon for $3,000. Defendant's motion for new trial was overruled, and it appealed, assigning substantially: (1) That the verdict was not sustained by sufficient evidence and was contrary to law; (2) that the trial court erred in denying defendant the right to open and close and in failing to limit the issue to the fair and reasonable value of the land taken; and (3) that the trial court erred in giving and refusing to give certain instructions. We conclude that the assignments should not be sustained.

In that regard, defendant also assigned generally, without any particularity, that the trial court erred in receiving incompetent evidence over objections of defendant. However, that contention is not contained in the statement of questions involved, or supported by any authority, or argued in the brief, and it will not be further discussed.

At the outset we dispose of defendant's contention that plaintiff's notice of appeal of itself limited the issues to the fair and reasonable value of the land taken. The answer is twofold. First, concededly there was no statute requiring the filing of a notice of appeal in such cases until May 21, 1951, when section 76-716, R. S. Supp., 1951, became effective. Second, the notice, when considered in the light of defendant's original application and the appraisement, was all-inclusive and sufficient in any event. Atchison & N. R. R. Co. v. Boerner, 34 Neb. 240, 51 N. W. 842, 33 Am. S. R. 637.

We next dispose of defendant's contention that the trial court should have permitted it to open and close. Concededly plaintiff owned the land taken, and the only issue was just compensation. In such a situation, "* * * the general rule is that the burden of showing the damages which the landowner will suffer rests on him, while it is for the petitioner to show matters which tend to reduce or mitigate the damages." 29 C. J. S., Eminent Domain, § 271, p. 1257.

Section 25-1107, R. R. S. 1943, specifically provides in part: "(3) The party who would be defeated if no evidence were given on either side must first produce his evidence; the adverse party will then produce his evidence. * * * (6) The parties may then submit or argue the case to the jury. In argument, the party required first to produce his evidence shall have the opening and conclusion." In that connection it has long been the rule that: "The party to an action upon whom rests the burden of the issues is entitled, on the trial of the cause, to open and close the evidence; also the arguments

to the jury. Hickman v. Layne, 47 Neb. 177, followed." Brumback v. American Bank of Beatrice, 53 Neb. 714, 74 N. W. 264. Defendant's contention has no merit.

We turn then to the case on the merits. An examination of the record discloses that the following is without dispute or is supported by competent evidence which if believed was amply sufficient to sustain the verdict and judgment. The situation was illustrated by numerous photographs and plats. The jury also viewed the premises, as requested by defendant. The old, wide and deep Salt Creek channel, draining floodwaters through Lincoln from west and southwest to northeast, turned rather sharply to the right at 10th Street. It then turned gradually back left and crossed 14th Street, after which it turned left again rather sharply to the northeast. Floods had eroded the channel at the turns and elsewhere, damaging the county bridge over 14th Street, exposing a large city sewer, and threatening other structures east of the channel. In avoidance thereof, plans were worked out between defendant and the county to move and reconstruct the bridge about 550 feet north of its former location and straighten the channel in conformity therewith between 10th and 14th Streets and on east to the old channel again, thus shortening it about 270 feet. To do so, insofar as important here, defendant took all of Lots 1 to 6, inclusive, all of Lots 7 to 10 and the south half of Lot 11, inclusive, in Block 8, clear up to the south lot line of the north half of Lot 11 belonging to plaintiff. Defendant also took all of Lots 7 to 12, inclusive, in Block 7, clear up to the southeast corner of plaintiff's Lot 1 in said block.

A plat of Riverside Addition was filed on October 11, 1886. Such plat shows an alley running north and south across the center of Block 8; shows 13th Street running north and south between Blocks 7 and 8; and an alley running east and west across the center of Block 7. Although such alleys and street have never been vacated, they have never been either opened or used as such since

the plat was filed 66 years ago. As a matter of fact, there is a fence line down the center of the platted alley in Block 8, and the north half of platted 13th Street, although crossed by a power line, has been planted to a peach orchard for 10 or 12 years. In that connection, it appears that defendant has now occupied all of the alley in Block 8 up to plaintiff's south lot line; all the south half of 13th Street; and most of Emerson Street south of plaintiff's land actually taken by defendant.

Plaintiff's land was originally shaped somewhat like a closed hand with the fore and middle fingers pointing toward the east. Lot 12 and the south half of Lot 11 in Block 8 formed the fingers. Plaintiff's modern five-room house, chicken coop, and garage are located thereon. Lot 12 faces north lengthwise on Virginia Street, with access to it from 14th Street, about 160 feet east. West of Lot 12 and the south half of Lot 11 is platted 13th Street, upon which is the peach orchard heretofore mentioned. Lots 1, 2, and 3, Block 7, extending lengthwise north and south, lie directly west thereof. All face north on Virginia Street. Lots 12, 11, and 10 respectively lie directly south of them, west of which lie Lots 9, 8, and 7. All of such lots face Emerson Street on the south. The platted alley in Block 7 is between such lots and Lots 1, 2, and 3.

Plaintiff was a municipal contractor owning cars, special trucks, tractors, air compressors, bunk trucks, and related equipment used in such business. After investigation to determine that neither platted 13th Street nor the aforesaid alleys had ever been opened and used as such, a fact undisputed and readily observable, plaintiff, dealing through a named real estate operator, purchased all of the property as one transaction in January 1950, for a consideration of $3,900. He received three separate deeds from the same grantors respectively to Lot 12 and the south half of Lot 11, Block 8, Lots 1, 2, and 3, and Lots 7 to 12, inclusive, Block 7, all signed January 30, 1950. In addition, he received a quit-claim deed from

other grantors to Lots 1, 2, and 3, Block 7, which, under the circumstances, was necessarily executed at a later date.

Plaintiff purchased the property because it was accessible to 14th Street, was suitable for the storage of his equipment, and useful as an acreage, all in one unit or tract, and because it was located in a neighborhood where his operations would not be offensive to the public. He immediately went into possession of all the property, moved his equipment thereon, and established a business office in one room of the house, where he and his wife temporarily lived. He then modernized the five-room house, raised the ground level around the premises, and generally improved and modernized the property, expending about $2,000 therefor, not counting his own labor. He rented part of the house for a time, after which he, his wife, and step-daughter have continuously occupied all of the house and property as their home. When plaintiff moved on the property Lots 7 to 12 had been planted to corn and plowed. Thereafter plaintiff has not planted crops there, but has mowed and paid for mowing the weeds thereon. All of the land was low but level, with productive soil which had not been flooded for at least 25 or 30 years. Lots 12 and the south half of Lot 11 drain to the west and north toward Virginia Street.

Whereas the old, wide and deep Salt Creek channel was formerly about two blocks from plaintiff's property, now the north edge of the new channel is concededly but 80 feet from his south lot line, which is only 150 feet from the center line of the channel. Defendant's own engineer testified that the edge of the channel should properly be not less than 100 feet from plaintiff's property, and that if plaintiff's Lot 12 and the south half of Lot 11 had not had improvements upon them, necessitating the expenditure of more funds, they possibly would have purchased those also. A dike is constructed north of and along the channel to within 30 feet of plain-

tiff's lot line to prevent overflow from the channel going north over plaintiff's property. There is evidence that the banks of the channel will doubtless slough off some, that rains will wash the dirt from such dike across plaintiff's property, and that an overflow would inundate it. In such a situation it cannot be said as a matter of law that plaintiff's action was premature or that his injuries and damages were not permanent but merely prospective, temporary, recurring, or removable in character. In that respect, Uldrich v. Sanitary District No. 1, 114 Neb. 641, 209 N. W. 501, relied upon by defendant, is distinguishable upon the facts. In that connection, instruction No. 8 given by the trial court in the case at bar, about which no complaint is made, properly protected defendant's rights with regard to such matters.

Although conflicting, there is ample competent evidence in the record to sustain the verdict and judgment unless, as a matter of law, plaintiff was not entitled to recover consequential damages for depreciation in the value of his remaining land by severance and the construction of structures, embankment, and earthworks aforesaid, as argued by defendant. We conclude that such contention has no merit. In that event, the applicable rule is: "The measure of damages for land taken for public use is the fair and reasonable market value of the land actually appropriated and the difference in the fair and reasonable market value of the remainder of the land before and after the taking." Crawford v. Central Nebraska Public Power & Irr. Dist., 154 Neb. 832, 49 N. W. 2d 682.

In that connection, this court said in Schulz v. Central Nebraska Public Power & Irr. Dist., 138 Neb. 529, 293 N. W. 409, quoting from Chicago, R. I. & P. Ry. Co. v. O'Neill, 58 Neb. 239, 78 N. W. 521: " 'The jury in fixing the damages sustained by a landowner in consequence of the appropriation, or injury, of his property for a public use may take into account every element of annoyance and disadvantage resulting from the improve-

ment which would influence an intending purchaser's estimate of the market value of such property.' "

As stated in 29 C. J. S., Eminent Domain, § 111, p. 922, citing Nebraska cases and construing a constitutional provision like Article I, section 21, Constitution of Nebraska: "A compensable damaging or destruction, under these provisions, includes injury necessarily resulting from construction of works for public use and from subsequent maintenance and operation thereof, and has been held generally to include all damages or injuries arising from or determined to constitute an exercise of the right of eminent domain which cause a diminution in the value of private property, whether this results directly to the property or is but an interference with the right which the owner has to the legal and proper use of the same."

In Atchison & N. R. R. Co. v. Boerner, *supra,* this court held: "Where several contiguous town lots are used and treated by the owner as one property, in estimating his damages occasioned by the appropriation by a railroad company of one of such lots and parts of two others for its right of way, the injury to the entire property should be considered, although the petition filed by the railroad company for the appointment of commissioners only describes the lots across which the road is located."

In 18 Am. Jur., Eminent Domain, § 270, p. 910, it is said: "In determining what constitutes a separate and independent parcel of land, when the property is actually used and occupied, unity of use is the principal test, and if a tract of land, no part of which is taken, is used in connection with the same farm, or the same manufacturing establishment, or the same enterprise of any other character as the tract, part of which was taken, it is not considered a separate and independent parcel merely because it was bought at a different time, and separated by an imaginary line, or even if the two tracts are separated by a highway, railroad, or canal."

As stated in 2 Lewis, Eminent Domain (3d ed.), § 698, p. 1207: "Under the rule that, where part of a tract is taken, damages or benefits to the entire tract may be considered, it sometimes becomes a question of some difficulty to determine what is to be regarded as the entire tract. In general it is so much as belongs to the same proprietor as that taken, and is continuous with it and used together for a common purpose. Thus the whole of a farm is one tract, although it may consist of several government subdivisions, or lie partly in different counties, or have its parts separated by a highway or railroad or canal, and though the fee of the canal is in the state." See, also, McGinley v. Platte Valley Public Power & Irr. Dist., 133 Neb. 420, 275 N. W. 593.

In 29 C. J. S., Eminent Domain, § 140, p. 984, it is said: "The mere platting of a tract of land on a map into lots or blocks does not constitute such a division of it into separate lots that the owner's damage must be limited to the particular lot a portion of which, as shown on the map, is actually taken."

As stated in the annotation to 6 A. L. R. 2d at page 1207, citing Nebraska authorities among others: "Mere paper divisions are usually to be disregarded. Where the remaining land for which damages are claimed is divided from the land taken, or partly taken, only by a lot line, or where the land as a whole has been platted into lots, blocks, streets, and alleys, no corresponding change having been made in the physical condition or legal ownership of the property, the entire tract will be treated as a single parcel."

Defendant, in its argument and citation of authorities, contended that the property here involved was vacant, unoccupied, unused, and separated by streets and alleys; therefore it was composed of three separate tracts as a matter of law and there should have been no recovery for severance. The evidence in this record will not sustain such contention. Therefore, the authorities cited are distinguishable upon the facts. Under the evidence

here presented, it was a question for the jury to determine whether or not plaintiff's property was one contiguous tract entitling him to damages for severance therefrom.

In such situation the applicable rule is that ordinarily it is a question of law whether or not the property involved constitutes one contiguous unit or tract. "But where the doubt is factual, depending on conflicting evidence or on different views of the evidence, the court may submit the question to the jury under proper instructions." Annotation, 6 A. L. R. 2d 1207, which cites numerous cases supporting the aforesaid rule. The trial court appropriately submitted such issue to the jury in the case at bar.

We therefore conclude that the verdict and judgment were sustained by sufficient evidence, were not contrary to law, and that the trial court did not err in refusing to limit the issue to the fair and reasonable market value of the property taken. Such conclusion also disposes of defendant's objections that instructions Nos. 1, 2, 3, 4, and 5, given by the trial court, erroneously submitted issues of severance and consequential damages not supported by the law or any competent evidence. Such instructions properly submitted the issues presented by the pleadings and supported by competent evidence.

Defendant also complained that instruction No. 6 was prejudicially erroneous. Such instruction, after reciting plaintiff's claim that the property was one contiguous unit or tract, and defendant's contention that plaintiff's property consisted of three distinct tracts because separated by streets and alleys, said: "Relating to this matter, you are instructed that the question of whether the plaintiff has acquired a legal interest in, or whether the City of Lincoln has lost a legal interest in the streets and alleys, should not be considered by you in determining whether the property of the plaintiff was a contiguous tract and unit on April 7, 1951. The existence of streets and alleys in a tract does not conclusively

determine that it is not a unit or contiguous tract, nor does the non-use of the streets and alleys by the public determine that it is a unit or contiguous tract. A contiguous tract or unit is that which in general belongs to the same proprietor as that taken, and is continuous with it and used together for a common purpose." In the light of the evidence, other instructions, and authorities heretofore cited, we conclude that instruction No. 6 was not prejudicially erroneous. It simply stated the applicable rule, and in the light of that conclusion we find that the refusal of the trial court to give defendant's tendered instruction No. 4 was not prejudicial error.

Defendant's tendered instruction No. 1, taken from Lowell v. Buffalo County, 119 Neb. 776, 230 N. W. 842, read: "The court instructs the jury that a landowner cannot ordinarily recover on account of a lawful public improvement, damages that he suffers in common with the public generally, though his loss may be greater in degree." In that connection, defendant argued that such refusal was prejudicial error. We conclude otherwise. The statement as an abstract proposition of law is correct and ordinarily should be given. However, as held in Lowell v. Buffalo County, *supra*, as a part of the same syllabus: "but this rule does not prevent the recovery of special damages."

Viewed in that light, we have carefully examined all of the instructions given by the trial court which specifically limited and confined plaintiff's recovery, if any, entirely to prescribed special damages pleaded by him and supported by competent evidence. We therefore conclude that the failure to give defendant's requested instruction No. 1 was not prejudicially erroneous. Atchison & N. R. R. Co. v. Boerner, 45 Neb. 453, 63 N. W. 787.

For the reasons heretofore stated, we conclude that there was no error in the record prejudicial to de-

fendant, and that the judgment should be and hereby is affirmed.

AFFIRMED.

IN RE ESTATE OF JOSEPH A. MANN, DECEASED. THE COUNTY OF HOLT, STATE OF NEBRASKA, APPELLANT, V. EDWARD M. GALLAGHER, EXECUTOR OF THE ESTATE OF JOSEPH A. MANN, DECEASED, ET AL., APPELLEES.

56 N. W. 2d 621

Filed January 16, 1953. No. 33218.

1. **Taxation.** To authorize the imposition of an estate or succession tax the decedent must have, at the time of his death, an interest in the property the transfer of which can be taxed.
2. **Trusts: Wills.** General rules of construction of written instruments apply to the construction of trust instruments, whether they are contracts, deeds, or wills. The cardinal rule of construction is, of course, to determine the intention of the settlor, where the creation of the trust is a unilateral matter, and give effect thereto if it is not in conflict with law.

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

William W. Griffin, for appellant.

Lloyd Dort, for appellees.

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

WENKE, J.

This litigation had its inception when objections were made to including an interest in a trust created by John P. Mann as an asset of the estate of Joseph A. Mann, deceased, for the purpose of determining and assessing inheritance tax. This objection is based on the contention that Joseph A. Mann, at the time of his death, had no interest in the trust which could be included as part of his estate for inheritance tax purposes.

Section 77-2001, R. R. S. 1943, provides, insofar as here material, as follows: "All property which shall pass by will or by the intestate laws of this state from any person who, at the time of his death was a resident of this state, * * * shall be subject to tax * * *."

"To authorize the imposition of an estate or succession tax, it is clear that the decedent must have had, at the time of his death, an interest in the property the transfer of which is to be taxed." 28 Am. Jur., Inheritance, Estate, and Gift Taxes, § 63, p. 44.

On March 25, 1937, John P. Mann executed a written instrument whereby he created a trust. Therein he appointed the First National Bank of Chicago trustee. He conveyed to this trust certain personal property for the purpose of carrying out the provisions thereof but retained the power to revoke the trust at any time. However, he never exercised this power.

He died on April 12, 1940, a resident of Holt County, and left a will which has been allowed and admitted to probate by the county court of Holt County. Therein he recognized this trust by leaving additional of his personal property to it and stating, with reference thereto, that it was "to be added to and become part of the trust fund already established for her (Margaret Louise Murray's) benefit * * *."

Joseph A. Mann, a brother of John P. Mann, died on September 20, 1948, a resident of Holt County. He died testate and his will has been allowed and admitted to probate by the county court of Holt County. The executor of his estate listed an interest in this trust as one of the assets thereof.

The county judge of Holt County, acting as appraiser by authority of section 77-2021, R. R. S. 1943, included this asset as property of the deceased and appraised its value at $52,600.67 and determined and fixed the inheritance tax accordingly. The executor of the estate appealed therefrom to the county court. See § 77-2023, R. R. S. 1943.

The county court found that Joseph A. Mann did not, at the time of his death, have an interest in this trust which passed to his estate. It ordered that no interest in the trust should be included as part of the estate for inheritance tax purposes; modified the appraiser's report accordingly; and then determined and fixed the amount of inheritance tax. It also ordered the executor to accordingly correct the inventory he had filed in the estate.

On appeal to the district court for Holt County the action of the county court was sustained and the appeal dismissed. The County of Holt thereupon filed a motion for new trial and, from the overruling thereof, has perfected this appeal.

The first question presented by this appeal is, did Joseph A. Mann, at the time of his death, have such an interest in the trust established by his brother, John P. Mann, that it passed to his estate and became part of the assets thereof? If not, then he had no interest therein that was subject to inheritance tax.

It is often stated by courts that the intention is the polar star by which courts are to be guided in such cases. That intention should be gathered from the whole instrument, considering the language used together with the sense in which it is employed. Once determined it should be carried into effect if it is not in conflict with law.

"One fundamental rule is that the entire instrument, all its parts, and its general purpose and scope are to be considered, and no parts should be disregarded as meaningless if any meaning can be given to them consistent with the rest of the instrument." 54 Am. Jur., Trusts, § 17, p. 35.

"General rules of construction of written instruments apply to the construction of trust instruments, whether they are contracts, deeds, or wills. The cardinal rule of construction is, of course, to determine the intention of the settlor, where the creation of the trust is a unilateral

matter, and to determine the intention of the parties, where such creation is a bilateral matter." 54 Am. Jur., Trusts, § 17, p. 34.

By the trust instrument and his will the settlor transferred to the trust certain personal property for the purpose of carrying out the provisions thereof, including the final distribution of any remainder. The trustee, under the provisions of the trust instrument, held title thereto and had full power and authority to deal therewith.

During the settlor's lifetime the net income of the trust was payable to him. However, the real purpose of the trust was to provide for his adopted daughter, Margaret Louise Murray, after his death. This he did by the following language: "* * * thereafter (meaning his death) such net income shall be paid in monthly installments unto MARGARET LOUISE MURRAY, adopted daughter of the Settlor, during the remainder of her life." Margaret Louise Murray was about 32 years of age when the trust was created.

The trust provided that Margaret Louise Murray should be paid at least $200 per month, regardless of the amount of the net income, and authorized the trustee to use the principal of the trust for that purpose, if necessary. It further provided that if, in the judgment of the trustee, this amount should not be sufficient to provide her with proper care, maintenance, or necessities, the trustee was authorized to pay her whatever amount it considered necessary or proper for that purpose.

Although the trustee is authorized to exhaust the trust assets, if necessary, to carry out the foregoing provision the trust instrument provides what shall be done by the trustee with any assets remaining in the trust at the time of her death. It provides, in that respect, as follows: "* * * upon the death of the said MARGARET LOUISE MURRAY, after the death of the Settlor * * * the remainder of the trust estate and any

income that may be accrued thereon *shall be paid out, transferred, conveyed and assigned* by the TRUSTEE *to JOSEPH A. MANN,* brother of the Settlor, *or unto his heirs, legal representatives or assigns.* Upon the distribution of the remainder of the trust estate as herein provided, the trust hereby created shall terminate." (Emphasis ours.)

"Webster's New International Dictionary defines 'and' as, 'A particle expressing the general relation of connection,' and defines 'or' as 'A co-ordinating particle that marks an alternative.' Both words are conjunctions. 'And' is a copulative conjunction. 'Or' is a disjunctive conjunction. 'Or' signifies and the use of it indicates a substitution; it marks an alternative." Ford v. Jones, 223 Ky. 327, 3 S. W. 2d 781.

From the context of the entire trust instrument we come to the following conclusions: That the settlor's real purpose in creating the trust was to make secure his adopted daughter's future, after he was no longer on this earth to provide for her; that he caused a large amount of his personal property to become assets of the trust for that purpose; and that while he authorized the trustee to use all of the trust assets for that purpose, if necessary, he also made provision for the disposition of any balance which might remain. In this respect he provided, in the first instance, that: "* * * the remainder of the trust estate and any income that may be accrued thereon shall be paid out, transferred, conveyed and assigned by the TRUSTEE to JOSEPH A. MANN, * * * legal representatives or assigns." Recognizing that Joseph A. Mann might die before Margaret Louise Murray he further provided: "* * * the remainder of the trust estate and any income that may be accrued thereon shall be paid out, transferred, conveyed and assigned by the TRUSTEE * * * unto his (Joseph A. Mann's) heirs, legal representatives or assigns."

The effect of the language used by the settlor was to create an executory disposition of the balance of the

assets of the trust, if any, upon its termination, which was to occur upon the death of Margaret Louise Murray. The beneficiaries of this executory disposition were Joseph A. Mann, or his heirs, depending upon the contingency of whether or not Joseph A. Mann survived the termination of the trust. If not, then the trust instrument provided where it was to go; that is, to Joseph A. Mann's heirs. They, his heirs, will take by reason of the trust instrument and consequently Joseph A. Mann, at the time of his death, had no interest in the trust which passed to his estate. These provisions are not contrary to law. It is therefore our duty to see they are carried out and put into effect. See, 54 Am. Jur., Trusts, § 101, p. 93; Ebey v. Adams, 135 Ill. 80, 25 N. E. 1013, 10 L. R. A. 162; 33 Am. Jur., Life Estates, Remainders, etc., § 141, p. 602; In the Matter of Evans, 234 N. Y. 42, 136 N. E. 233; 33 Am. Jur., Life Estates, Remainders, etc., § 147, p. 610; Restatement, Property, § 252, p. 1270; Glover v. Condell, 163 Ill. 566, 45 N. E. 173, 35 L. R. A. 360.

Many rules of construction are cited by both parties as guides for the court to use in construing the provisions of the trust instrument. Rules of construction are intended for use in doubtful cases when the language used is not clear, but have no application when the language used clearly expresses the settlor's intent.

Section 30-401, R. S. Supp., 1951, requires that a true inventory be made of the assets of a deceased person whose estate is being probated. The county court ordered the executor to correct the inventory he had filed so as not to show any interest in this trust estate. We think the county court was correct in so doing. As stated in 21 Am. Jur., Executors and Administrators, § 178, p. 471: "An inventory may be corrected in the court of probate upon a proper application."

Having come to the conclusion that the county court was correct in what it did, we affirm the district court's action in sustaining the county court and dismissing the

appeal taken thereto by the County of Holt from the county court's decision.

AFFIRMED.

IN RE ESTATE OF FLORENCE HENDRICKSEN, DECEASED. WILLIAM F. ROHN, EXECUTOR, APPELLEE, V. ETHEL V. KELLEY, APPELLANT.
56 N. W. 2d 711

Filed January 16, 1953. No. 33224.

1. **Trial: Appeal and Error.** In a case tried to the court in equity the presumption obtains that the trial court, in arriving at decision, considered such evidence only as was competent and relevant, and this court will not reverse a case so tried because other evidence was admitted, if there is sufficient competent and relevant evidence in the record to sustain the judgment.
2. **Courts: Descent and Distribution.** The county court is by the Constitution and the statutes of the state given exclusive original jurisdiction of all matters relating to the settlement of estates of deceased persons.
3. **Descent and Distribution: Wills.** A proceeding in the probate court to settle the estate of a decedent is a proceeding in rem, and every one interested in such settlement is a party in the probate court whether he is named or not, and this is particularly true as to the distribution of an estate under a will.
4. **Courts: Descent and Distribution.** County Courts, in carrying out their exclusive original jurisdiction in matters relating to the administration of the estates of deceased persons, have jurisdiction to determine title to personal property claimed by representatives of decedents' estates.
5. **Courts.** County courts are courts of record, as provided by Article V, section 16, of the Constitution of this state.
6. **Judgments: Courts.** Within the contemplation of section 25-21,149, R. S. Supp., 1951, courts of record, within their respective jurisdictions, are vested with power to declare rights, status, and other legal relations whether or not further relief is or could be claimed.
7. **Judgments: Executors and Administrators.** Within the contemplation of section 25-21,152, R. R. S. 1943, an executor in the estate of a decedent may have a declaration of the rights or legal relation in respect thereto to determine any question arising in

the administration of the estate, including questions of construction of wills and other writings.

8. ———: ———. A petition for a declaratory judgment may be filed in probate proceedings by an executor to have a declaration of the rights or legal relation in respect to an estate of a decedent to determine whether proceeds of certain United States Savings Bonds should be declared to be assets of the estate.

9. **Courts: Equity.** County courts are without general equity jurisdiction but, in exercising exclusive original jurisdiction over estates, may apply equitable principles to matters within probate jurisdiction, and render to the parties interested in the assets of the estate such relief as their respective situations may justify.

APPEAL from the district court for Douglas County: JACKSON B. CHASE, JUDGE. *Affirmed.*

Ralph R. Bremers, for appellant.

John F. Rohn and *Leary & Leary,* for appellee.

Joseph T. Votava, Amicus Curiae.

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

MESSMORE, J.

The executor of the estate of Florence Hendricksen, deceased, filed an application in the probate proceedings in the county court of Douglas County for a declaratory judgment to have the proceeds of certain United States Saving Bonds, Series G, held by Ethel V. Kelley the daughter of the deceased and a residuary legatee under the will, to be declared assets of the estate. The county court entered an order finding generally in favor of the executor and against Ethel V. Kelley; that the proceeds of the bonds received by Ethel V. Kelley should be added to the residue of the estate; and that there be charged against the legacy of Ethel V. Kelley the sum of $5,918, with interest at 6 percent per annum from September 1, 1949, plus $4,000, with interest at 6 percent from December 31, 1949. From this judgment Ethel V. Kelley appealed to the district court for Douglas County.

The parties stipulated the case for trial on the equity docket. Trial was had. The trial court adjudged and decreed that the defendant Ethel V. Kelley held the sum of $9,794 with interest at 6 percent on $5,918 from September 10, 1949, and with interest at 6 percent on $3,876 from December 31, 1949, as a trustee under a resulting trust for the plaintiff William F. Rohn, executor of the estate of Florence Hendricksen, deceased, and that the plaintiff have and recover said amount from defendant; that said amount was properly a part of the assets of the estate of Florence Hendricksen; that the defendant pay said amount to the plaintiff within 20 days from the date of the decree; that in the event the defendant failed to pay as aforesaid, the plaintiff, in the estate of Florence Hendricksen, deceased, should set off from the 3/10 share of the residue of the estate which should be due to defendant upon closing, after adding to the other assets of the estate the sum of $9,794 with interest on the amounts heretofore set out and in the same manner, being the full amount found due to plaintiff; that in the event the defendant's 3/10 share of the residue of the estate due to the defendant at the time of closing and computed as set forth above was less than the amount found due plaintiff from defendant, the plaintiff was authorized to enter a partial satisfaction of the judgment awarded therein and to institute such proceedings as might be necessary to recover the balance due; and that plaintiff recover his costs therein expended from the defendant.

The defendant Ethel V. Kelley filed a motion for new trial which was overruled. Defendant appeals to this court.

For convenience we will refer to the parties as they are designated in the district court, and will make reference to the defendant on occasions as Ethel V. Kelley.

The pleadings in the district court are substantially the same as those filed by the respective parties in the county court. We summarize the pleadings and elim-

inate from the petition of the plaintiff in the district court certain facts which will more fully appear in the opinion.

That the plaintiff is the duly appointed, qualified, and acting executor of the estate of Florence Hendricksen, deceased, and that she left a last will and testament, is admitted. Further, the petition alleges the issuance of certain United States Savings Bonds, Series G, of the face value of $10,000, now in the possession of Ethel V. Kelley, one of the beneficiaries under the will, and the execution of certain written instruments by Florence Hendricksen and Ethel V. Kelley; and that by virtue of such instruments the United States Savings Bonds should be declared to be assets of the estate of Florence Hendricksen, deceased, for which the beneficiary Ethel V. Kelley should be required to account. The respective shares of the beneficiaries under the will are also set forth. The petition further alleges that the court should render a declaratory judgment as provided for by law, and more specifically as provided for in section 25-21,152, R. R. S. 1943; that the $10,000 savings bonds, Series G, or so much thereof as may be necessary, should be retained and charged against the share of Ethel V. Kelley as provided for by the will; and if her share is less than said amount, that the executor be instructed to sue for any balance due from her to the estate. The petition prayed that Ethel V. Kelley show cause why the $10,000 United States Savings Bonds, Series G, are not a part of the estate; that should the court determine the bonds are a part of the estate, then the court should enter a declaratory judgment to the effect that it is the executor's duty to see that the bonds as before mentioned or the proceeds from the same now held by Ethel V. Kelley are treated as assets of the estate of Florence Hendricksen; that the executor equalize the shares in said estate between and among the beneficiaries named in the residuary clause of the will under the doctrine of retainer insofar as possible; and that if the net estate

is not sufficiently large for the doctrine of retainer to so equalize said shares, that the executor then be directed to file suit against Ethel V. Kelley for any deficiency.

The answer of the defendant Ethel V. Kelley is a general denial, except the admission contained therein as set out above.

William F. Rohn testified that he was an attorney engaged in the practice of law with his father at Fremont. He was acquainted with Florence Hendricksen and knew that she possessed certain United States Savings Bonds. On March 30, 1948, Florence Hendricksen went to his office and on that date executed her last will and testament. By the terms of the will she bequeathed to a granddaughter the sum of $2,000. The rest, residue, and the remainder of the estate she divided among her children as follows: 4/10 to her son Glenn F. Peterson, 3/10 to her son Carl B. Peterson, and 3/10 to her daughter Ethel V. Kelley. She had possession of the United States Savings Bonds and left them with this witness the day she executed the will or a day or two subsequent thereto.

On the same day the will was executed Mrs. Hendricksen executed the following instrument written in longhand by this witness and signed by Mrs. Hendricksen: "Wm. Rohn: Today I signed my will in your office. I have $10,000 Series G United States Savings Bonds Nos. M6-266-759 G to and including M6-266-768 G. These were purchased with my money only and are to be entirely a part of my estate. My daughter Mrs. Ethel Kelley was in the Stephens Bank with me when they were issued and she requested the bank to issue them in this manner and I permitted it only to prevent an argument and to save embarrassment. Ethel Kelley is to have only the interest in these bonds that is given her in my will of this same date. (signed) Florence Hendricksen."

These bonds were 10 in number, and issued for $1,000

each. This witness retained possession of the bonds from March 30, 1948, to May 9, 1948. Five or six weeks after Mrs. Hendricksen executed the will this witness talked over the telephone to either Mr. or Mrs. Kelley, he did not remember which, about the bonds, and he did so at Mrs. Hendricksen's insistence. In the conversation he requested Ethel V. Kelley to come to Fremont. On or about May 9, 1948, this witness had another conversation with Ethel V. Kelley at her mother's home in Fremont where he and the Kelleys had been invited for dinner. In the presence of Mrs. Hendricksen and Ethel V. Kelley he mentioned to Ethel V. Kelley that her mother had requested him either to obtain an assignment of the bonds from her, or to redraft the will, and if it was necessary to redraft the will Mrs. Hendricksen would cancel the bonds because it would cost her some of the principal amount of the bonds to have them cashed and reissued in her name alone. He explained to Ethel V. Kelley that unless she wished to execute such an assignment the bonds would be immediately surrendered and the will would be redrawn. He read aloud the assignment and advised Ethel V. Kelley to sign it. Mrs. Kelley took the assignment. He assumed she read it, and she did sign it.

This assignment is as follows: "May 9, 1948 The undersigned Ethel Kelley for value received herewith sells, assigns and transfers to her mother, Florence Hendricksen, any interst she may have or purport to have in $10,000.00 Series G United States Savings Bonds, numbers M6-266-759 G to and including M6-266-768 G. Said Ethel Kelley further states that she had no interest in these bonds at the time her name was placed thereon and agrees that she shall have only such interest in the bonds as may be given her under the will of Florence Hendricksen. (signed) Ethel Kelley." William Rohn signed as witness.

On June 3, 1949, this witness received a letter from Ethel V. Kelley as follows: "6-3rd-1949 Please send all

of The Papers to Omaha (signed) Mrs Harry Kelley." After receiving this letter he prepared a letter for Mrs. Hendricksen to sign, wherein she directed Rohn to mail to her at 301 South 33rd Street in Omaha, certain papers, which included the 10 $1,000 Series G bonds. The letter was dated June 9, 1949, was signed by Mrs. Florence Hendricksen, and was witnessed by Mrs. Harry Kelley (Ethel V. Kelley).

On June 11, 1949, William F. Rohn wrote to Mrs. Hendricksen enumerating items constituting her property, which included the 10 $1,000 Series G bonds, and in which it is stated: "You will specifically remember that the $10,000 in bonds are made out to you and Mrs. Kelley jointly but that we have copies of papers showing you to be the sole owner." He testified that after that time he had no information as to the possession of the bonds, and that Mrs. Florence Hendricksen died on July 25, 1949. He further testified that he had a conversation with Mrs. Kelley the day of her mother's funeral and made arrangements for her to come to his office with regard to probating her mother's will. Within a day or two he had a meeting with Mrs. Kelley, her two brothers, and a Mr. Johnston, an undertaker who came with them. They asked him for the will, which he did not give to them. The other people were asked to leave and did so. He then asked Mrs. Kelley if she wanted to talk to him and his father alone, to which she agreed. In the presence of his father he told Mrs. Kelley he wanted to straighten out one thing. He did not want to embarrass her in front of her brothers who were from out of town. He asked her if she realized the 10 $1,000 bonds were part of the estate, and told her they would prefer to have this matter straightened out so she need not be embarrassed if her intention was to hold the bonds. Mrs. Kelley stated that she realized the bonds were part of the estate, and said she intended to turn them over. However, she turned neither the bonds nor the proceeds thereof over to the executor of the estate.

He further testified that the total estate, including the bonds amounted to $32,000 or $33,000; that Mrs. Kelley's share would be approximately $9,000, and the expenses would have to be deducted; and that the 10 $1,000 bonds were included in the inventory of the estate as assets of the estate.

Ethel V. Kelley testified that she was with her mother at the time the bonds were purchased. They were made out to Mrs. Florence Hendricksen or Mrs. Ethel Kelley. In other words, they were co-owners of the bonds which had a maturity value of $10,000. Her mother had spent the winters with her for the last three or four years when they lived in Omaha, and spent the springs and summers in Fremont. Her mother was desirous of buying a house in Grand Island where she formerly lived, and did purchase a home there and took possession of it in May 1949. She stayed about 10 days and then wrote to the Kelleys to come after her, which they did. She remained with them from the time of her return until her death.

It also appears from the evidence that a Mr. Johnston, a next-door neighbor of the Kelleys and a friend of theirs, was called by Mrs. Hendricksen to come to her apartment. When he arrived at the apartment Mrs. Hendricksen had a big brown envelope which contained bonds and stocks. She asked him to take the envelope and put it in his safe, which he agreed to do. In three or four days from that time she called and asked Mr. Johnston to return the envelope, which he did.

Ethel V. Kelley further testified that she procured possession of the bonds on June 12, 1949. She cashed six of the bonds between June 20 and June 23, 1949, in Omaha, and obtained a credit slip September 10, 1949, for $5,918. After her mother's death she cashed the remaining four bonds, presenting them to the Omaha National Bank, and on December 31, 1949, her account was credited with $3,876.

Johnston testified that after he returned the envelope

to Mrs. Hendricksen she opened it in the dining room and took the bonds and stocks from it. There were 10 government bonds. She handed them to Mrs. Kelley and said: "Ethel I want you to have these bonds." She put the rest back in the envelope, handed it to him, and asked him to take care of it and put it in the safe, which he did. While there is some discussion that this evidence is offered to prove a gift of the bonds by Florence Hendricksen to Ethel V. Kelley, it is clear from the record the issue as to whether or not there was a gift of the bonds to Ethel V. Kelley is not before this court.

Harry Kelley, the defendant's husband, testified that Mrs. Hendricksen had stayed in the Kelley home in Omaha in the winters from 1945 to 1949, and would go to Fremont in the spring. He further testified about the purchase of the home in Grand Island by Mrs. Hendricksen and that she wrote for the Kelleys to come after her, which they did. He further testified with reference to the savings bonds being given by Mrs. Hendricksen to Johnston for safekeeping, and the transactions with reference to getting the bonds back from Rohn and the letters with respect thereto; that when the bonds were returned by Johnston, Mrs. Hendricksen took them from the envelope and handed them to his wife who took them and put them in a box in the cabinet drawer; that he was with his wife when she signed the assignment; that there was no conference between Rohn and his wife or Mrs. Hendricksen regarding the assignment; that it was presented to his wife right after the dinner things were cleaned up and Mrs. Hendricksen was in the kitchen; that Rohn just gave the assignment to Mrs. Kelley and asked her to sign it; and that she glanced at it and did sign it.

Ethel V. Kelley testified with reference to the assignment as follows: "* * * my mother was in the kitchen, and he put this in front of me, and he said, 'Will you sign this?' I just walked over and just sort of glanced over it, and said, 'Yes,' like that, and signed my name."

She received no money from her mother, nor any other thing for signing the paper, and nothing was said to lead her to believe that she should sign the paper. It was a complete surprise to her, and was never mentioned to her by her mother. She did not know anything about her mother signing any paper that had to do with her not having any interest in the bonds except the interest in the share left to her by her mother's will. She further testified that it was a complete surprise that Rohn testified as he did concerning the statement signed by her mother with reference to the 10 $1,000 Series G, United States Savings Bonds, to the effect that she would only have an interest as provided for by the will, and that the bonds would be a part of her mother's estate.

The defendant in several assignments of error contends the trial court erred in admitting into evidence certain testimony and exhibits, and denying admissibility of certain testimony into evidence.

This case is before this court on a trial de novo as provided for in section 25-1925, R. R. S. 1943, and with respect to the admissibility of evidence, the following becomes pertinent: In a case tried to the court in equity the presumption obtains that the trial court, in arriving at decision, considered such evidence only as was competent and relevant, and this court will not reverse a case so tried because other evidence was admitted, if there is sufficient competent and relevant evidence in the record to sustain the judgment. See, Pierce v. Fontenelle, *ante* p. 235, 55 N. W. 2d 658; Western Smelting & Refining Co. v. First Nat. Bank, 150 Neb. 477, 35 N. W. 2d 116; Coffin v. Maitland, 146 Neb. 477, 20 N. W. 2d 310; Kemmerling v. State, 89 Neb. 98, 130 N. W. 988; Smith v. Garbe, 86 Neb. 91, 124 N. W. 921, 136 Am. S. R. 674; Smith Bros. v. Woodward, 94 Neb. 298, 143 N. W. 196.

This brings us to the proposition as to whether or not the executor may, under the Declaratory Judgments Act, file a petition in the probate proceedings, such as

was done in this case, to require the defendant to show cause why the government savings bonds heretofore described or the proceeds thereof in her possession should not be declared assets of the estate of Florence Hendricksen, deceased. In this connection we deem the following pertinent to a determination of this proposition.

Section 25-21,149, R. S. Supp., 1951, provides: "Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree."

County courts are courts of record. See Art. V, § 16, Constitution of the State of Nebraska.

The county court is by the Constitution and the statutes of the state given exclusive original jurisdiction of all matters relating to the settlement of estates of deceased persons. See, Starr v. Fidelity & Deposit Co., 134 Neb. 240, 278 N. W. 478; In re Estate of Donlen, 145 Neb. 370, 16 N. W. 2d 731; In re Estate of Wiley, 150 Neb. 898, 36 N. W. 2d 483.

A proceeding in the probate court to settle the estate of a decedent is a proceeding in rem, and every one interested in such settlement is a party in the probate court whether he is named or not, and this is particularly true as to the distribution of an estate under a will. See, In re Estate of Sweeney, 94 Neb. 834, 144 N. W. 902; Nilson v. Tekamah Investment Co., 133 Neb. 180, 274 N. W. 465; In re Estate of Statz, 144 Neb. 154, 12 N. W. 2d 829.

County courts, in carrying out their exclusive original jurisdiction in matters relating to the administration of the estates of deceased persons, have jurisdiction to determine title to personal property claimed by representatives of decedents' estates. See In re Estate of

Wiley, *supra*. See, also, Egan v. Bunner, 155 Neb. 611, 52 N. W. 2d 820.

It will be observed by the foregoing that the county court is a court of record, has exclusive original jurisdiction over the probate and administration of estates, and has jurisdiction over personal property of estates to determine the title claimed by the representatives of decedents' estates.

Section 25-21,152, R. R. S. 1943, provides: "Any person interested as or through an executor, * * * in the * * * estate of a decedent * * * may have a declaration of rights or legal relation in respect thereto: * * * (c) To determine any question arising in the administration of the estate * * * including questions of construction of wills and other writings."

The defendant contends the Declaratory Judgments Act ordinarily contemplates distinct proceedings by petition and not by the filing of an application for a declaratory judgment in a pending action. From an examination of the Declaratory Judgments Act we find nothing that prevents the filing of a petition for a declaratory judgment in probate proceedings. Sections 25-21,149, R. S. Supp., 1951, and 25-21,152, R. R. S. 1943, vest the county court with the power and authority to declare the rights, status, and other legal relations of the parties. We are satisfied that the facts appearing in this case bring it clearly within both the letter and spirit of our Declaratory Judgments Act.

The defendant relies on the case of Graham v. Beauchamp, 154 Neb. 889, 50 N. W. 2d 104, wherein the following language is found: "In an action for declaratory judgment the matter of entering a declaratory judgment has been held to be one of practice and procedure rather than one of jurisdiction. An action for such a judgment or relief is a special proceeding and is equitable in its nature, but it is not an exercise of general equity jurisdiction in which the court may grant consequential relief under a general prayer or upon general equitable

considerations." 1 C. J. S., Actions, § 18, p. 1046, and Washington-Detroit Theatre Co. v. Moore, 249 Mich. 673, 299 N. W. 618, 68 A. L. R. 105, are cited.

Defendant argues that by the decree granted by the trial court consequential relief was actually given to the plaintiff based upon the exercise of general equity jurisdiction in impressing a resulting trust upon the proceeds held by the defendant.

In the instant case the executor prayed for specific relief, and set forth in his petition in the county court and in the district court all the facts concerning the issuance of the bonds, the instruments upon which is based the action for declaratory judgment, and prayed as previously set out. In this connection the following authorities become applicable.

County courts are without general equity jurisdiction but, in exercising exclusive original jurisdiction over estates, may apply equitable principles to matters within probate jurisdiction, and render to the parties interested in the assets of the estate such relief as their respective situations may justify. In re Estate of Statz, *supra*.

As stated in In re Estate of Jurgensmeier, 142 Neb. 188, 5 N. W. 2d 233: "* * * it is to be remembered that county courts are without general equity jurisdiction, but, in exercising exclusive original jurisdiction over estates, may apply equitable principles to matters within probate jurisdiction." See, also, In re Estate of Frerichs, 120 Neb. 462, 233 N. W. 456; In re Estate of Wilson, 97 Neb. 780, 151 N. W. 316; In re Estate of Wiley, *supra*.

We believe the foregoing pertinent to the application of the equitable principles to matters within probate jurisdiction.

The defendant predicates error on the part of the trial court in holding that the laws and regulations of the federal government and the regulations of the Treasury Department have no applicability to the facts in this case respecting the ownership of the bonds and the proceeds thereof.

The defendant contends that Ethel V. Kelley, having possession of the United States Savings Bonds here involved and as co-owner of the same, had the right to cash said bonds at any time, and upon the death of her mother became the sole owner of the bonds as if they were registered in her name, and was entitled to the proceeds thereof.

There appear in the record certain United States Treasury Department regulations governing United States Savings Bonds of the class involved in this case. The defendant cites subsection (a) of section 22 of the Second Liberty Loan Act as amended, which constitutes a new section to the Second Liberty Loan Act, 31 U. S. C. A., § 757 c (a); and in addition Article I, section 8, clause 2, of the Constitution of the United States; Article I, section 8, clause 18, of the Constitution of the United States; and Article VI, clause 2, of the Constitution of the United States. In the light of the foregoing citations, there is no doubt but that there is a valid exercise by Congress of its constitutional power to borrow money on the credit of the United States; that the borrowing power necessarily includes the power to fix the terms of the obligation of the United States; that the regulations of the Treasury Department under which the bonds are issued have the force and effect of federal law; and that the law of the United States is the supreme law of the land and takes precedence over state law.

The primary purpose of the Treasury Department regulations is to prevent the government from being involved in suits between claimants to government bonds. These Treasury Department regulations refer to the bonds themselves, providing protection to the government if its agents pay the named owner or co-owner. In addition, the government's power to borrow money at a fixed rate of interest should not be burdened by defending litigation.

From an examination of the cases cited by the defendant we are unable to find any case in which a con-

veyance by one co-owner of savings bonds to another was involved. For the most part the cases cited by the defendant refer to a situation where no positive act of the parties themselves, those who are co-owners of the bonds, intervenes between the time the bonds are issued and the time the dispute arises. The government would have no interest as to how the assets of Florence Hendricksen's estate would be distributed, or that by the last will of Florence Hendricksen Ethel V. Kelley had no further rights in the estate so long as she retained the proceeds of the bonds. It seems clear that the federal laws and regulations are not intended to interfere with the positive act of two co-owners of bonds by which one conveys her interest in them to the other. In the instant case, as shown by the evidence, Ethel V. Kelley assigned all her right, title, and interest in the bonds to her mother during her mother's lifetime, and for a valuable consideration. The evidence also shows that she acknowledged that the proceeds of the bonds constituted part of the assets of her mother's estate, and her assignment of the bonds clearly indicates such to be true.

The government's interest is a contractual one. Its obligation was to pay either of the co-owners the amount agreed upon as shown by the bonds upon their proper presentation, in compliance with the federal law. When the Treasurer of the United States satisfied the government's obligation by paying the proceeds of the bonds to Ethel V. Kelley, the government's interest in the matter ended. The government is in no sense a party to this litigation, and under the facts and circumstances could in no event have any interest in the result of this litigation.

The court decreed that Ethel V. Kelley deliver the proceeds which she obtained from cashing the bonds to the executor in accordance with her assignment of the bonds for a consideration to her mother, whereby she agreed to take her share of the estate as provided for by

her mother's will. There is nothing in this phase of the decree contrary to the laws of the United States or the regulations of the United States Treasury Department. Those laws and regulations do not prevent the declaration of a resulting trust in the proceeds of the bonds as shown under the facts in this case.

The 1951 Revised Rules of this court, rule 8 a 2 (4), provides in part: "Assignments of error relied upon for reversal and intended to be urged in the brief shall be separately numbered and paragraphed, bearing in mind that consideration of the cause will be limited to errors assigned and discussed."

The defendant has assigned errors in her brief which are not discussed, and therefore are not considered. See Kuhlman v. Farmers Union Co-Operative Assn., 152 Neb. 597, 42 N. W. 2d 182.

We conclude, under the pleadings, the evidence, and the authorities cited herein, the judgment of the trial court is correct.

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

AFFIRMED.

RUTH MARCELLA MASON, APPELLEE, V. AVERY J. MASON, APPELLANT.
56 N. W. 2d 614

Filed January 16, 1953. No. 33234.

Contracts. A written contract which is couched in clear and unambiguous language is not subject to a construction other and different from that which flows from the language used.

APPEAL from the district court for Saline County: STANLEY BARTOS, JUDGE. *Affirmed.*

John E. Mekota, for appellant.

Gerald J. Hallstead and *Davis, Stubbs & Healey,* for appellee.

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

YEAGER, J.

On October 16, 1946, in an action for divorce wherein Ruth Marcella Mason was plaintiff and Avery J. Mason was defendant, a decree of divorce was entered in favor of the plaintiff. Prior to the entry of the decree a written agreement was entered into containing a settlement of property rights and all matters as to future rights and obligations as between the parties, and as to duties and obligations in relation to the then minor children of the parties. There were two children and they were then of the age of 16 years. They attained the age of 21 years May 13, 1951. This agreement was made a part of the decree and the terms approved by the decree.

On or about December 31, 1951, the defendant filed in that action what has been termed an application for order to satisfy the decree. In the application he sets forth that he has complied with all of the requirements of the agreement and the decree, and he asks that the plaintiff be ordered to enter satisfaction thereof or in the alternative that an order be entered by the court satisfying the decree. The relief prayed was denied, whereupon a motion for new trial was overruled. From the order denying relief and the order overruling the motion for a new trial the defendant has appealed. Hereinafter the defendant will be referred to as appellant and the plaintiff as appellee.

The agreement is of great length but all of its provisions do not require consideration. The meaning and effect of the first provision to be considered is that of paragraph 5e, the pertinent part of which is as follows:

"The Husband shall retain ownership of the real property described as the south 33 feet of Lot 5, and all of Lot 6, in Block 109, in the City of Crete, Saline County, Nebraska, now held in his name. The Wife shall have the right to occupy said premises, without any obligation

to pay rent or other remuneration to the Husband therefor, so long as said Children, or either of them, shall remain unmarried and the Wife shall maintain a home for said Children, or either of them, in said premises. * * * If, while maintaining such home for said Children, or either of them, and thus entitled to the rent-free occupancy of said premises according to the terms hereof, the Wife shall prefer to vacate said premises and occupy other premises or living quarters, the Husband shall, in lieu of the free occupancy of said premises, pay to the Wife, in addition to the payments otherwise provided for herein, the following sums: (a) The sum of $30.00 per month while said home shall be maintained at Crete, Nebraska; (b) The sum of $40.00 per month while said home shall be maintained elsewhere than at Crete, Nebraska. The rent-free occupancy of said premises, or the alternative provisions herein made for maintaining said home elsewhere shall cease and terminate in the event of the remarriage of said Wife; * * *."

The substantial contention of the appellant in relation to this provision is that he became released from the entire obligation of this provision when the children became self-supporting or attained the age of 21.

Paragraph 10 imposes a lien upon the real estate described in paragraph 5e for the enforcement of the obligations of the paragraph and other obligations of the agreement.

The appellant further contends that with the release of the obligations the lien became extinguished. The appellee contends that she is entitled to the benefit of the provision so long as she remains unmarried and so long as one or both of the children, regardless of age, remains unmarried and she shall maintain a home for such child or children.

Factually, at the time of the trial appellee had not remarried and one of the children was unmarried. Appellee had left the described property but was maintaining a home for the daughter in Crete, Nebraska.

The daughter at the time was a graduate nurse and gainfully employed but she was living in the home maintained by the appellee for the two of them.

This provision of the agreement as to its obligation is full, complete, and unambiguous, and contains conditions for its discontinuance. This being true the court may not look further for the meaning of the provision. The rule is well stated in Hompes v. B. F. Goodrich Co., 137 Neb. 84, 288 N. W. 367, as follows: "A written contract, if couched in clear, unambiguous language, is not subject to construction. The intent of the parties to such a contract must be deduced from the language used." See, also, Smith v. United States Fidelity & Guaranty Co., 142 Neb. 321, 6 N. W. 2d 81; Mutual Benefit Health & Accident Assn. v. Milder, 152 Neb. 519, 41 N. W. 2d 780.

The conditions which would bring relief from paragraph 5e and the related paragraph 10 have not come to pass, therefore the application as to them must be denied.

It is to be observed that the appellant in nowise seeks anything in the nature of reformation or modification as to these or any other provisions of the agreement as is disclosed by the following from the bill of exceptions: "The Court: You are not asking for modification? Mr. Mekota: I am not asking for modification. May I state that my theory is that the decree has been complied with?"

Another provision which is brought into question is paragraph 7 of the agreement. Paragraph 10 is designed in part to guarantee enforcement of the obligations of paragraph 7. Paragraph 7 is as follows:

"In addition to the payments otherwise provided for herein, the Husband shall, at his own expense, pay all medical, surgical, dental, optometrical, nursing, and hospital expenses for the Wife and Children, reasonably incurred or reasonably necessary to protect and preserve the health, welfare, and well-being of the Wife and Children, said obligation to continue until the Wife re-

marries or dies, and until the Children attain the age of 21 years, or die, marry, or become wholly self-supporting prior to attaining the age of 21 years; * * *."

It is to be observed that in this paragraph two obligations are involved, one to the wife and another to the children. The one to the wife extends until the wife shall remarry or die. Neither of these eventualities has come about. The one to the children extends until they attain the age of 21 years, die, marry, or become wholly self-supporting. At the time of trial both were 21 years of age, one had married, and the other on the basis of evidence of employment and income must be said to have become wholly self-supporting.

No obligation therefore remained at the time of trial as to the children. The obligation as to the wife on the other hand has remained as it was from the date of entry of the decree. However, by the specific terms of paragraph 10, the lien upon the property described in paragraph 5e does not attach or apply to the obligations accruing under paragraph 7 after August 1951. Therefore the obligation of paragraph 7 remained, but the security of paragraph 10 did not apply to any part of the obligation accruing under paragraph 7 after August 1951.

The next provision to which attention is directed is 6e of the agreement, as follows:

"In addition to the foregoing, the Husband shall defray all expenditures in connection with the support, maintenance, and education of said Children, or either of them, beyond high school, and upon the Husband assuming and discharging this obligation the payments provided for in subdivision b hereof shall cease and terminate as to such Child, or both of them, during the period or periods such Children, or either of them, are so being supported, maintained, and further educated by the Husband. The amount of such expenditures for support, maintenance, and further education to be defrayed and paid by the Husband shall depend upon the financial resources of the Husband at the time, and

shall be mutually agreed upon by the parties, it being the intention and desire of the Husband to provide the Children, or either of them, with such further education as his financial resources will permit; * * *."

This provision relates to support, maintenance, and education of the children after completion of high school. The expenditures contemplated depend upon two conditions, namely, the financial resources of the appellant, and mutual agreement of appellant and appellee.

The record makes no disclosure as to the financial resources of appellant and likewise it fails to disclose any mutual agreement of the parties.

The record does disclose that appellant paid all expenses which were or could be contemplated by this provision except an item of $45 for eye-glasses and $96.09 for clothes for the unmarried daughter. These items were purchased by her after she attained the age of 21 years.

It is contended that this paragraph embraces educational expense after high school whether before or after attaining the age of 21 years and that on that account the provision requires payment by appellant. This question does not call for determination here since the provision as already pointed out imposes no obligation in the absence of mutual agreement on the part of appellant and appellee.

The four provisions referred to and considered form the basis of the defense to appellant's application to have the decree satisfied. There is no contention here that the remaining provisions have not been fully complied with.

It follows therefore from what has been said herein that the appellant is not entitled to have his application sustained and the district court correctly denied the application.

There are, however, in the journal entry or decree of the district court findings and conclusions inconsistent and in conflict with the findings and conclusions of this

opinion, therefore, the denial of the application of appellant to have satisfied the divorce decree is affirmed in accordance with the findings and conclusions herein.

An attorney's fee is allowed to appellee for her attorneys in the amount of $250.

AFFIRMED.

LYDIA SCHUSTER, APPELLANT, V. WILLIAM H. DOUGLAS ET AL., APPELLEES.
56 N. W. 2d 618

Filed January 16, 1953. No. 33280.

1. **Pleading: Appeal and Error.** An order of the district court requiring a petition to be made more definite and certain will be sustained on appeal unless it clearly appears that the court abused its discretion to the prejudice of the plaintiff.
2. **Judgments: Pleading.** If a defendant relies upon the rule of res judicata as a defense the burden is upon him to bring such facts into the record as will affirmatively show that the plaintiff's relation to the former action was such as to make the judgment therein conclusive of the matter in controversy.

APPEAL from the district court for Saline County: STANLEY BARTOS, JUDGE. *Affirmed.*

L. R. Doyle, for appellant.

Lloyd E. Chapman, for appellees.

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

YEAGER, J.

On June 13, 1949, the plaintiff, Lydia Schuster, filed the petition herein in the district court for Saline County, Nebraska. William H. Douglas and Elizabeth D. Douglas were named defendants. The purpose of the action was to have title to Lot 10, Block 1, First Addition to Crete, Nebraska, quieted in the plaintiff and to have a building removed from the described lot.

On June 18, 1949, the defendants filed a motion for an order requiring the plaintiff to make her petition more definite and certain in particulars not necessary to be set out herein. This motion was sustained on May 5, 1950, and plaintiff was allowed 30 days within which to comply with the order.

On June 2, 1950, plaintiff filed an amended petition but in it there was a failure of compliance with the order requiring plaintiff to make her original petition more definite and certain.

On November 15, 1951, the district court apparently on its own motion entered an order allowing the parties 10 days within which to show cause why the case should not be stricken from the docket. What the effect of the proposed order striking the case from the docket would have been had it been entered does not appear. However no such order was entered.

Thereafter on December 22, 1951, the defendants filed a motion to dismiss the action with prejudice. The motion contained two claimed grounds for dismissal.

The first of these was that the plaintiff had failed to comply with the order to make the petition more definite and certain.

The second was that the issues tendered by plaintiff had been previously adjudicated, which adjudication was binding upon the plaintiff, in an action wherein Elizabeth D. Schuster, now Elizabeth D. Douglas and one of the defendants herein, was plaintiff, and George Schuster, a brother of plaintiff, was defendant.

The second ground of the motion was in substance a plea in bar though denominated a motion to dismiss since it was a plea which if sustained would have the effect of defeating and barring absolutely and entirely the action of the plaintiff. Black's Law Dictionary (3d ed.), p. 1366; 1 C. J. S., Abatement and Revival, § 5, p. 32.

The first is in the nature of a plea in abatement since it does not go to the right to maintain an action at any time but only to the right at the present time under

existing conditions to maintain the action. 1 C. J. S., Abatement and Revival, § 5, p. 32.

Whether or not the two may properly be joined, or whether or not, as at common law, the filing of a plea in bar waives a plea in abatement, we are not called upon to consider since that question, though properly pertinent, has not been raised.

On July 15, 1952, the plaintiff filed an answer to the defendants' motion to dismiss. This answer, as to the first ground of the motion, contains an allegation that plaintiff requested permission to amend the petition by attachment. The content of the proposed amendment nowhere appears. There is nothing in the transcript to disclose whether or not the requested amendment would have conformed to the requirement of the order to make more definite and certain.

The answer contained a denial of that portion of the motion which tendered the question of res judicata or former adjudication.

With the record in this condition a trial was had to the court at the conclusion of which an order was entered dismissing the action. The order fails to state whether it was dismissed with or without prejudice. A motion for new trial was duly filed by plaintiff which was overruled. From the orders of dismissal and overruling the motion for new trial the plaintiff has appealed.

One of the grounds of error is that the court refused to allow an amendment to the petition. This contention is untenable. As already pointed out insofar as the record is concerned no amendment was ever tendered. There was a request for leave to amend but nothing was offered from which it could be ascertained that if amendment were allowed it would conform with the requirements of the order to make more definite and certain.

As to the right of the district court to require that a petition shall be made more definite and certain there can be no question. In Northport Irrigation Dist. v. Farmers Irrigation Dist., 125 Neb. 607, 251 N. W. 174,

it was said: "An order of the district court requiring a petition to be made more definite and certain will be sustained, unless it clearly appears that the court abused its discretion to plaintiff's prejudice." See, also, Bushnell v. Thompson, 133 Neb. 115, 274 N. W. 453.

In the light of the chronology of events as they have been outlined herein it cannot well be said that the dismissal, if based upon the failure to make the petition more definite and certain, involved any abuse of discretion by the district court. This is especially true in view of the fact that the plaintiff does not complain of the legal propriety of the exaction that her petition be made more definite and certain. It however is not ascertainable from the record whether or not the dismissal was based upon this phase of the motion.

As to that portion of the motion which seeks dismissal on the ground of res judicata the allegations in relation thereto were traversed. The answer contains no admission of any fact in support of the defendants' contention in this respect.

On the trial no witness was called for any purpose by either party. The following is all that appears to sustain the portion of the motion seeking dismissal on the ground of res judicata: The defendants offered in evidence the decree entered on December 5, 1946, in the case of Paul H. Schuster v. Elizabeth D. Schuster, case No. 6655, appearance docket 18, page 176; the petition, the answer, and the journal entry entered January 21, 1948, in the case of Elizabeth D. Schuster v. George Schuster, case No. 6759, appearance docket 18, page 280; and the petition filed December 16, 1947, and the decree entered February 27, 1948, in the case of Elizabeth D. Douglas, formerly Elizabeth D. Schuster, and William H. Douglas, wife and husband, v. The heirs, devisees, legatees, personal representatives and all other persons interested in the estate of Jesse C. Bickle, deceased, real names unknown, et al., case No. 6791, appearance docket 19, page 25.

To this offer the plaintiff objected for the reason that the evidence was incompetent, irrelevant, immaterial, and outside the issues of the case.

Over the objection the offered evidence was received.

There is nothing whatever in the evidence to identify the parties to the cases wherefrom the pleadings and orders came which were received in evidence, or their relationships, or the issues in those cases in any such manner as to permit the district court or this court to say whether or not the issues determined in those cases amounted to determinations binding upon the plaintiff herein. There was no foundation for its introduction, and without foundation it had no probative value on the question of res judicata.

The controlling rule as to burden of proof in such an instance as it has been stated by this court is the following: "If a defendant rely upon the rule of res adjudicata as a defense, he should bring such facts into the record as will show affirmatively that the plaintiffs' relation to the former action was such as to make the judgment therein conclusive of the matter in controversy." Hartley v. Gregory, 9 Neb. 279, 2 N. W. 878. See, also, Western Public Service Co. v. Wheeler County, 126 Neb. 120, 252 N. W. 609.

No evidence was adduced the effect of which was to show that the plaintiff's relation to the former actions or any of them was such as to make the determinations therein conclusive of the matters involved in this action. If therefore the dismissal was on the theory of former adjudication or res judicata it cannot on that ground be sustained.

In the light of the record the only proper basis upon which the motion to dismiss could have been sustained was that the plaintiff failed timely to comply with the order of the court to make the petition more definite and certain. Assuming therefore that the order was so based the order of dismissal is on that ground affirmed.

AFFIRMED.